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INSCRIBED
TO
THE BENCH AND BAR
OF THE STATES AND TERRITORIES ENUMERATED ON THE TITLE PAGE
OF THIS VOLUME AS A TRIBUTE TO THEIR LEARNING, RESEARCH,
AND ARDUOUS LABORS IN EVOLVING A SYSTEMATIC METHOD
OF PROCEDURE UNDER THE STATUTORY SYSTEM
GOVERNING COURTS IN THE EXERCISE OF
THEIR JURISDICTION OVER THE
ESTATES OF DECEASED
PERSONS.

NEW
PROBATE LAW AND PRACTICE

WITH
ANNOTATIONS AND FORMS

FOR USE IN
ALASKA, ARIZONA, CALIFORNIA, COLORADO, IDAHO, KANSAS,
MONTANA, NEVADA, NEW MEXICO, NORTH DAKOTA,
OKLAHOMA, OREGON, SOUTH DAKOTA, UTAH,
WASHINGTON, AND WYOMING

BY
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AUTHOR OF CHURCH ON HABEAS CORPUS, ANNOTATED SAN FRANCISCO
CHARTER, ETC.

IN TWO VOLUMES
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PREFACE.

The plan of this work speaks for itself. It embraces the full and correct text of all sections of the California codes, bearing on probate law and practice. Probate law is a creature of the statute. Each point thereof is governed by the statute in force in the particular state, and, as little aid can be gained from text-writers, or from the decisions of other states where the statutes are not identical, or at least analogous, tables of "Analogous and Identical Statutes," so far as such statutes could be conveniently found, have been strewn throughout the volume to facilitate reference to the laws of other states than those of California.

Forms have been given for the various steps in probate proceedings, with "Explanatory Notes," suggesting what is necessary to fill the blanks left therein. Many of these forms are quite brief, but it is believed that each one contains all the requirements of the statute involved. Some of them have been in use, in California, for fifty years, long before the codes were adopted; but many of them are, in substance, the same as those promulgated by the Honorable Lucien Shaw, Presiding Justice of Department One of the Supreme Court of California, while he was a Superior Judge of Los Angeles. We have made free use of the forms approved by the learned justice, with the hope that they will simplify probate proceedings, decrease the volume of papers on file, make the record less cumbersome, and save the time and patience of judges on the bench,—a desideratum which seems to have been earnestly wished by the learned justice. There should not, however, be a "slavish adherence" to any of the forms given, but it will be convenient to follow the phraseology with such omissions and additions as the particular estate may require. Yet, at all times, and under all circumstances, the practitioner, before drawing a form, should inform himself of all requirements of the latest statute on the subject, and see that such requirements are incorporated therein. It has not been deemed necessary to give the form of affidavit, citation, order that notice be given, and the notice itself, in every proceeding, as the forms of such matters are very much alike, and to give them in each instance would lead to much useless repetition. The form of the order, in any particular case, is suggestive of what the affidavit, petition, notice, and citation should contain. It is thought that the forms given in the following pages are full and complete enough for general purposes, and that they can be used, with slight modifications,

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in all the Pacific group of states. In particular or unusual cases, the additions or omissions suggested by the statute can easily be made. Courts have been named in the forms as "the court of the county of —, state of —," as being a designation likely to create the least confusion, and which can easily be changed where such is not the exact title. It will be noticed, too, that the words, "Dated," etc., fall below the judge's signature in some instances where neither the judge's signature nor a date is necessary to the validity of the paper. The words have simply been so placed to meet the exigences of the type-set page. Nor does the law require the addresses of attorneys to be stated, in giving notices, etc., or that the file numbers of papers should be given, yet these matters should appear on the papers as a matter of convenience to all persons interested therein.

Many extended notes on various topics of probate law and practice have been interspersed throughout the volume, and include much of what the courts have said respecting the matters under consideration. A note follows each chapter, with few exceptions, discussing the law of the subject of the chapter. Cases on the construction and interpretation of wills, undue influence in the execution of wills, etc., are as numerous as the sands of the sea-shore. Hence, as "every will furnishes its own law," and, as the proof sufficient to establish undue influence must necessarily depend on the facts and circumstances of each particular case, no attempt has been made to give anything more than a mere general statement of the principles governing such matters. Their discussion, in detail, would of itself fill a large volume, and it may be found in almost any work on Wills. To avoid all misconception, it may be stated here, that when reference has been made, in the notes, to a "probate court," it is understood to be that branch or department of various courts, wherein probate proceedings are conducted. The power of a superior, district, or county court, exercising probate jurisdiction, is the same as it would be if such court were, in fact, a separate court. An effort has been made to give a key to the whole field of probate law in the states named on the title page of this work. Most of the law devoted to a chapter will be found within its confines, and the index will afford a means of finding any incidental treatment of it elsewhere. Matters of like kind are brought together as closely as possible, and all of the material has been so arranged as to give one the best grip on probate law and practice that the author knows how to give.

The Hawaiian Islands have not been neglected. The common law of England was adopted there in 1893, and the Islands were a part of the United States on August 16, 1898. There is some good probate law in the former little kingdom, and Hawaiian reports have been cited as authority on a number of points.

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The practitioner is cautioned to see that all notices required by statute or order of court have been served, posted, or published for the required length of time; and that affidavit of service, or of posting, or of publication of such notices is made and filed. Give notice of application, when necessary, for all orders of court, and see that everything is recorded which the law requires to be recorded.

It is hoped that this volume will fill a long-felt professional want, and that it will be as favorably received as the former works of the author.

San Francisco, February, 1909.

WM. S. CHURCH.

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PARTITION, DISTRIBUTION, AND FINAL SETTLEMENT OF ESTATES. ABSENT INTERESTED PARTIES. ACCOUNTS OF TRUSTEES.

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For synopsis of note on execution, revocation, and classes of wills,
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For synopsis of note on the probate of nuncupative wills, see pp. 1724, 1728.

PART XVII.

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COMMUNITY PROPERTY AND SEPARATE PROPERTY.

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- § 1038. Community property. Conveyances to or by married women.
Time limit for bringing action.
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ESTATES OF MISSING PERSONS.

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- § 1052. Form. Order fixing tax.
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- § 1055. Form. Petition for citation to show cause why tax should
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PART I.

ADOPTION, SUCCESSION, AND ESCHEAT.

CHAPTER I.

ADOPTION.

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- § 2. Who may adopt.
- § 3. Consent to adoption. [By wife.]
- § 4. Same. Orphans and abandoned children.
- § 5. Consent of child.
- § 6. Proceedings on adoption.
- § 7. Form. Petition for leave to adopt a minor.
- § 8. Form. Consent to adoption.
- § 9. Form. Agreement to adopt.
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- § 11. Form. Order of adoption.
- § 12. Effect of adoption.
- § 13. Same. On parents.
- § 14. Of illegitimate child.

LAW OF ADOPTION.

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| 2. Essentials of adoption. | 12. Attacking the order. |
| 3. Who may adopt. | 13. What will not invalidate proceedings. |
| 4. Consent to adoption. | 14. Adoption in another state. |
| 5. Examination of parties. | 15. Inheritance. |
| 6. Order of adoption. | 16. Specific performance. |
| 7. Abandoned child. | 17. Hawaii. |
| 8. Indian children. | |
| 9. Illegitimate children. | |
| 10. Evidence of adoption. | |

§ 1. **Of child.** Any minor child may be adopted by any adult person, in the cases and subject to the rules prescribed in this chapter. **Kerr's Cyc. Civ. Code, § 221.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 21, p. 360.

Arizona.* Rev. Stats. 1901, par. 2036.

Probate — 1

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Colorado. 1 Mills's Ann. Stats., sec. 396.
Idaho.* Civ. Code 1901, sec. 2075.
Kansas. Gen. Stats. 1905, § 4379.
Montana.* Civ. Code, sec. 310.
Nevada. Comp. Laws, sec. 608.
New Mexico. Comp. Law 1897, sec. 1496.
North Dakota.* Rev. Codes 1905, § 4109.
Oklahoma.* Rev. Stats. 1903, sec. 3781.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5316.
South Dakota.* Civ. Code 1904, § 128.
Utah.* Rev. Stats. 1898, sec. 1.
Washington. Pierce's Code, § 2801.
Wyoming. Rev. Stats. 1899, sec. 3016.

§ 2. Who may adopt. The person adopting a child must be at least ten years older than the person adopted. **Kerr's Cyc. Civ. Code, § 222.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 21, p. 360.
Arizona.* Rev. Stats. 1901, par. 2037.
Colorado. 1 Mills's Ann. Stats., sec. 396.
Idaho. Civ. Code 1901, sec. 2076.
Kansas. Gen. Stats. 1905, § 4379.
Montana.* Civ. Code, sec. 311.
Nevada. Comp. Laws, sec. 608.
New Mexico. Comp. Laws 1897, sec. 1496.
North Dakota.* Rev. Codes 1905, § 4110.
Oklahoma.* Rev. Stats. 1903, sec. 3782.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5316.
South Dakota.* Civ. Code 1904, § 129.
Utah.* Rev. Stats. 1898, sec. 2.
Washington. Pierce's Code, § 2801.
Wyoming. Rev. Stats. 1899, sec. 3016.

§ 3. Consent to adoption. [By wife.] A married man, not lawfully separated from his wife, cannot adopt a child without the consent of his wife, nor can a married woman, not thus separated from her husband, without his consent, provided the husband or wife, not consenting, is capable of giving such consent. **Kerr's Cyc. Civ. Code, § 223.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 21, p. 360.
Arizona.* Rev. Stats. 1901, par. 2038.

Colorado. 1 Mills's Ann. Stats., secs. 396, 397.
Idaho.* Civ. Code 1901, sec. 2077.
Kansas. Gen. Stats. 1905, § 4379.
Montana.* Civ. Code, sec. 312.
Nevada.* Comp. Laws, sec. 610.
New Mexico. Comp. Laws 1897, sec. 1498.
North Dakota.* Rev. Codes 1905, § 4111.
Oklahoma.* Rev. Stats. 1903, sec. 3783.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5316.
South Dakota.* Civ. Code 1904, § 130.
Utah.* Rev. Stats. 1898, sec. 3.
Washington. Pierce's Code, §§ 2801, 2802.
Wyoming. Rev. Stats. 1899, sec. 3016.

§ 4. **Same. Orphans and abandoned children.** A legitimate child cannot be adopted without the consent of its parents, if living; nor an illegitimate child without the consent of its mother, if living; except, that consent is not necessary from a father or mother deprived of civil rights or adjudged guilty of adultery or cruelty, and for either cause divorced, or adjudged to be habitually intemperate in the use of intoxicants, or who has been judicially deprived of the custody of the child on account of cruelty or neglect.

[Abandoned children, consent not necessary.] Neither is consent of any parent necessary in case of any abandoned child; provided, however, that any such child, being a half-orphan, and kept and maintained in any orphan asylum in this state for more than two years, may be adopted, with the consent of the manager of such orphan's home without the consent of the parent unless such parent has paid toward the expenses of maintenance of such half-orphan at least a reasonable sum during the said time, if able to do so.

[Deserted child.] Any child deserted by both parents or left in the care and custody of another by its parent or parents, without any agreement or provision for its support, for the period of one year, is deemed to be an abandoned child within the meaning of this section and where the parent is a non-resident of this state such child may be adopted with the consent of the managers of such home wherever it has been left in such home for more than one year; or any abandoned child, within the meaning of this section, if left

in the care and custody of another person for one year or more, may, with the consent of the district attorney of the county wherein the person applying to adopt such child is a resident, be adopted by such person. **Kerr's Cyc. Civ. Code** (**Kerr's Stats. and Amdts.**, p. 400), § 224.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, secs. 22, 23, p. 360.

Arizona. Rev. Stats. 1901, par. 2039.

Colorado. 1 Mills's Ann. Stats., sec. 396.

Idaho. Civ. Code 1901, sec. 2078.

Kansas. Gen. Stats. 1905, § 4379.

Montana. Civ. Code, secs. 313, 320.

Nevada. Comp. Laws, secs. 611, 614.

New Mexico. Comp. Laws 1897, secs. 1499, 1500, 1504.

North Dakota. Rev. Codes 1905, § 4112.

Oklahoma. Rev. Stats. 1903, secs. 3784, 3790.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 5317, 5318.

South Dakota. Civ. Code 1904, § 131.

Utah. Rev. Stats. 1898, secs. 4, 11.

Washington. Pierce's Code, § 2801.

Wyoming. Rev. Stats. 1899, secs. 3016, 3023.

§ 5. **Consent of child.** The consent of a child, if over the age of twelve years, is necessary to its adoption. **Kerr's Cyc. Civ. Code**, § 225.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 25, p. 361.

Arizona. Rev. Stats. 1901, par. 2040.

Colorado. 1 Mills's Ann. Stats., sec. 396.

Idaho.* Civ. Code 1901, sec. 2079.

Kansas. Gen. Stats. 1905, § 4379.

Montana.* Civ. Code, sec. 314.

Nevada. Comp. Laws, sec. 611.

New Mexico.* Comp. Laws 1897, sec. 1501.

North Dakota. Rev. Codes 1905, § 4113.

Oklahoma. Rev. Stats. 1903, sec. 3785.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5320.

South Dakota.* Civ. Code 1904, § 132.

Utah.* Rev. Stats. 1898, sec. 5.

Washington. Pierce's Code, § 2801.

Wyoming. Rev. Stats. 1899, sec. 3016.

§ 6. Proceedings on adoption. Any person desiring to adopt a child may, for that purpose, petition the superior court of the county in which the petitioner resides. The person adopting a child, and the child adopted, and the other persons, if within or residents of said county, whose consent is necessary, must appear before the court, and the necessary consent must thereupon be signed and an agreement executed by the person adopting, to the effect that the child shall be adopted and treated in all respects as his own lawful child should be treated. If the persons whose consent is necessary are not within or are not residents of said county, then their written consent, duly proved or acknowledged, according to sections eleven hundred and eighty-two and eleven hundred and eighty-three, must be filed in said superior court at the time of the application for adoption. **Kerr's Cyc. Civ. Code (Kerr's Stats. and Amdts., p. 401), § 226.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 21, p. 360.

Arizona. Rev. Stats. 1901, par. 2041.

Colorado. 1 Mills's Ann. Stats., sec. 396.

Idaho. Civ. Code 1901, sec. 2080.

Kansas. Gen. Stats. 1905, § 4379.

Montana. Civ. Code, sec. 315.

Nevada. Comp. Laws, sec. 609.

New Mexico. Comp. Laws 1897, sec. 1502.

North Dakota. Rev. Codes 1905, § 4114.

Oklahoma. Rev. Stats. 1903, secs. 3786, 3788.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5316.

South Dakota. Civ. Code 1904, §§ 133, 134.

Utah. Rev. Stats. 1898, sec. 6.

Washington. Pierce's Code, § 2801.

Wyoming. Rev. Stats. 1899, secs. 3016, 302

§ 7. Form. Petition for leave to adopt a minor.

[Title of court.]

[Title of matter.]

{ Department No. —.

{ [Title of form.]

To the Honorable the ———¹ Court of the County² of ———, State of ———.

Your petitioners, ——— and ———, respectfully represent as follows:

That they desire to adopt a minor child, namely, —, as their own child; and that said child is — (—) years of age; ³

That your petitioners are married, and are husband and wife; and that they are both residents of —; ⁴

That the parents of said minor child are — and —, ⁵ who consent that such adoption be made by petitioners;

That consent to such adoption is in writing, signed by all parties whose consent is required by law, and is on file herein;

That the welfare of such child will be subserved, and its best interests promoted, by such adoption.

Your petitioners therefore pray for an order of this court that said petitioners have adopted said minor child, and that henceforth such child shall be regarded and treated in all respects as the child of petitioners, including the right of support, protection, and inheritance. —, Petitioner.

Dated —, 19—.

—, Petitioner.

Explanatory notes. 1. Title of court. 2. Or, City and County. 3. If over a certain age prescribed by statute, when consent of the child is necessary, say here, "and consents to such adoption by petitioners." 4. County in which order of adoption is made. 5. In cases where consent is not necessary, or cannot be given, say that —, the father, or —, the mother, of said child, according to the fact, is dead, or insane, etc.

§ 8. Form. Consent to adoption.

[Title of court.]

[Title of matter.]

{ Department No. —
[Title of form.]

A petition having been filed in the above-entitled court for leave to adopt —, a minor child of — and —, the undersigned hereby consent to the said adoption in accordance with such petition.

____ 1
____ 2
____ 3
____ 4
____ 5

Explanatory notes. 1. Name of father. 2. Name of mother. 3. Name of guardian. 4. Name of said minor child, if over twelve

years of age. 5. Name of husband or wife adopting. When the consent of the husband or wife of the person adopting is required by statute, as in California, the consent should also be signed by such husband or wife.

§ 9. Form. Agreement to adopt.

[Title of court.]

[Title of matter.]

{ Department No. ____
[Title of form.]

A petition having been filed in the above-entitled court for leave to adopt ____, a minor child of ____ and ____, and ____,¹ ____,² ____,³ ____,⁴ and ____,⁵ having filed in the said court their consent in writing to such adoption, —

Now, therefore, In consideration of the filing of such consent as required by law, and of the entry of an order of said court permitting said adoption to be made as prayed for in said petition, the undersigned, the petitioners,⁶ who are residents of the county⁷ in which such order of adoption is made, hereby agree with said minor, and with said other persons, whose consent has been filed as aforesaid, that the said ____ shall be adopted, and is now adopted, as our own child, and that such minor child shall be treated in all respects as our own lawful child should be treated, including the right of support, protection, and inheritance.

In witness whereof, We have hereunto set our hands and seals this ____ day of ____, 19__.

____ [Seal]

____ [Seal]

Explanatory notes. 1. Father. 2. Mother. 3. Guardian. 4. Minor child. 5. Husband or wife of person adopting. 6. If there is but one petitioner, make the appropriate change in nouns and pronouns. 7. Or, city and county.

§ 10. Judge's order of adoption. The court must examine all persons appearing before it pursuant to the last section, each separately, and if satisfied that the interests of the child will be promoted by the adoption, it must make an order declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting. The petition, agreement, consent, and order must be filed and registered in the office of the county clerk in the same

manner as papers in other special proceedings. **Kerr's Cyc. Civ. Code, § 227.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 26, p. 361.

Arizona. Rev. Stats. 1901, par. 2042.

Colorado. 1 Mills's Ann. Stats., sec. 398.

Idaho. Civ. Code 1901, sec. 2081.

Kansas. Gen. Stats. 1905, § 4379.

Montana. Civ. Code, sec. 316.

Nevada. Comp. Laws, secs. 612, 615.

New Mexico. Comp. Laws 1897, sec. 1505.

North Dakota. Rev. Codes 1905, § 4115.

Oklahoma. Rev. Stats. 1903, secs. 3789, 3790.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5321.

South Dakota. Civ. Code 1904, § 135.

Utah. Rev. Stats. 1898, sec. 7.

Washington. Pierce's Code, §§ 2802, 2803.

Wyoming. Rev. Stats. 1899, sec. 3017.

§ 11. Form. Order of adoption.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

It being shown to this court, in the above-entitled matter, that ____ and ____, on the ____ day of ____, 19____, filed a petition in said court for leave to adopt ____, a minor child of ____ and ____; that said minor child, ____, is over the age of ____² years, and that his consent, in writing, to his adoption by said petitioners, has been signed before me and filed herein; that the said ____ is the father of said minor child; that the said ____ is the mother of said minor child; that ____ is the guardian of said minor child; that the consent of the said father, mother, and guardian of said minor child, to its adoption by said petitioners, has been signed before me and filed herein; and that said petitioners have filed herein an agreement properly signed, before me, with said minor child, and with each person whose consent has been filed herein, that the said minor child shall be adopted by the said petitioner, and treated in all respects as their own lawful child should be treated, including the right of inheritance; and the said matter now coming regularly

on for hearing,³ the court proceeds to an examination of the case, and finds that said petitioners, and the said minor child, and all persons whose consent is necessary, have each appeared herein, and were examined as provided by law; that each of said petitioners resides in this county;⁴ and that the interests of —, the said minor child, will be promoted by such adoption;—

It is therefore ordered, adjudged, and decreed, That the said petitioners, — and —, adopt the said minor child; that henceforth the said minor child shall be treated by them in all respects as their own lawful child should be treated, including the right of inheritance; and that said petitioners and the said minor child shall hereafter bear towards each other the relation of parent and child.

Dated —, 19—, —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Twelve years, or other age prescribed by statute. 3. If the matter has been continued, say, "and the said matter having been by the court regularly postponed to the present time." 4. County in which order of adoption is made.

§ 12. Effect of adoption. A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subjected to all the duties of that relation. **Kerr's Cyc. Civ. Code, § 228.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 27, p. 361; sec. 31, p. 362.

Arizona.* Rev. Stats. 1901, par. 2043.

Colorado. 1 Mills's Ann. Stats., sec. 399.

Idaho. Civ. Code 1901, sec. 2082.

Kansas. Gen. Stats. 1905, § 4380.

Montana.* Civ. Code, sec. 317.

Nevada. Comp. Laws, sec. 613.

New Mexico. Comp. Laws 1897, sec. 1507.

North Dakota. Rev. Codes 1905, §§ 4115, 4116.

Oklahoma. Rev. Stats. 1903, secs. 3791, 3792, 3793.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 5322, 5328.

South Dakota.* Civ. Code 1904, § 136.

Utah. Rev. Stats. 1898, sec. 8.

Washington. Pierce's Code, § 2804.

Wyoming. Rev. Stats. 1899, secs. 3018, 3027, 3028.

§ 13. Same. On parents. The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it. **Kerr's Cyc. Civ. Code, § 229.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 28, p. 361.
- Arizona.*** Rev. Stats. 1901, par. 2044.
- Colorado.** 1 Mills's Ann. Stats., sec. 399.
- Idaho.*** Civ. Code 1901, sec. 2083.
- Montana.*** Civ. Code, sec. 318.
- Nevada.** Comp. Laws, sec. 613.
- New Mexico.** Comp. Laws 1897, sec. 1508.
- North Dakota.** Rev. Codes 1905, § 4117.
- Oklahoma.** Rev. Stats. 1903, sec. 3794.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5323.
- South Dakota.*** Civ. Code 1904, § 137.
- Utah.*** Rev. Stats. 1898, sec. 9.
- Washington.** Pierce's Code, § 2804.
- Wyoming.** Rev. Stats. 1899, sec. 3018.

§ 14. Of illegitimate child. The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption. **Kerr's Cyc. Civ. Code, § 230.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 2045.
- Colorado.** 1 Mills's Ann. Stats., sec. 1530.
- Idaho.*** Civ. Code 1901, sec. 2084.
- Montana.*** Civ. Code, sec. 319.
- Nevada.** Comp. Laws, sec. 616.
- New Mexico.** Comp. Laws 1897, secs. 1489-1493.
- North Dakota.*** Rev. Codes 1905, § 4118.
- Oklahoma.*** Rev. Stats. 1903, sec. 3795.
- South Dakota.*** Civ. Code 1904, § 138.
- Utah.*** Rev. Stats. 1898, sec. 10.

LAW OF ADOPTION.

- | | |
|----------------------------|--|
| 1. Nature of proceeding. | 11. Effect of adoption. Divorce proceedings. |
| 2. Essentials of adoption. | 12. Attacking the order. |
| 3. Who may adopt. | 13. What will not invalidate proceedings. |
| 4. Consent to adoption. | 14. Adoption in another state. |
| 5. Examination of parties. | 15. Inheritance. |
| 6. Order of adoption. | 16. Specific performance. |
| 7. Abandoned child. | 17. Hawaii. |
| 8. Indian children. | |
| 9. Illegitimate children. | |
| 10. Evidence of adoption. | |

1. **Nature of proceeding.** Adoption was unknown to the common law, and, independently of statute, there is no such thing as the adoption of an heir. Such a proceeding is purely statutory. It is a special power, to be strictly construed: *Henry v. Taylor* (S. D.), 93 N. W. Rep. 641, 642; *Ex parte Clark*, 87 Cal. 638; 25 Pac. Rep. 967; *Furgeson v. Jones*, 17 Or. 204; 20 Pac. Rep. 842; *Nugent v. Powell*, 4 Wyo. 173; 33 Pac. Rep. 23. The adoption of children is purely a matter of statute, pertaining to the legislature, with which a judge or a court has nothing to do, unless the power is conferred upon them by statute. The matter of adoption belongs to the legislative, and not to the judicial, department of the government: *In re Stevens*, 83 Cal. 322, 331; 17 Am. St. Rep. 252; 23 Pac. Rep. 379. As the legislature has full power over this matter, it may invest any person, or officer, or court, with the power of receiving, witnessing, and declaring the adoption. It may prescribe what that ceremony shall be, and before whom it shall be celebrated. It may make the ceremony so simple that its celebration requires only the consent in writing of the parents of the child, and the acceptance of such consent by the person desiring to adopt, and the filing of such paper with a public officer. The legislative power over the subject of adoption is not an interference with judicial power: *In re Stevens*, 83 Cal. 322, 331; 17 Am. St. Rep. 252; 23 Pac. Rep. 379. An adoption proceeding is one of contract between both parties whose consent is required: *In re Johnson*, 98 Cal. 531, 552; 33 Pac. Rep. 460; 21 L. R. A. 380.

REFERENCES.

Proceedings on adoption: See *Kerr's Cal. Civ. Code*, § 226, and notes. Conflict of laws as to adoption: See note 65 L. R. A. 177-187.

2. **Essentials of adoption.** It is necessary for the record to show that the person adopting a child is a resident of the county in which the order of adoption is made: *Ex parte Clark*, 87 Cal. 638, 640; 25 Pac. Rep. 967. The jurisdiction, both as to subject-matter and the person, must affirmatively appear: *Ex parte Clark*, 87 Cal. 638, 640;

25 Pac. Rep. 967. A petition for adoption cannot be maintained by a non-resident of the state: *Knight v. Gallaway*, 42 Wash. 413; 85 Pac. Rep. 21.

REFERENCES.

Adoption of adult under statute providing for adoption of child: See note 12 L. R. A. (N. S.) 884, 885.

3. Who may adopt. Adoption may be made by persons other than the parent: *In re Jessup*, 81 Cal. 408, 446; 21 Pac. Rep. 976; 22 Pac. Rep. 742, 1028; 6 L. R. A. 594. A wife has precisely the same right to adopt a child as the husband, and there seems to be no reason why both may not unite in an application for the adoption of a child as the child of both, or why, in such a case, the order of adoption should not declare that the child shall henceforth be treated and regarded as the child of both spouses: *In re Williams*, 102 Cal. 70; 41 Am. St. Rep. 163; 36 Pac. Rep. 407.

4. Consent to adoption. Consent lies at the foundation of statutes of adoption, and, when it is required to be given and submitted, the court cannot take jurisdiction of the subject-matter without it. Hence if the parents are living, and do not belong to the excepted classes, their consent must be given, and is a prerequisite to jurisdiction: *Furgeson v. Jones*, 17 Or. 204; 20 Pac. Rep. 842. In adoption proceedings, where no guardian is appointed, it becomes necessary for the parents to consent to such adoption: *State v. Wheeler*, 43 Wash. 183; 86 Pac. Rep. 394, 396. An orphan child, who has been in an orphan asylum for a year, and supported at its expense, cannot be legally adopted by a husband and wife, under the decree of a superior court, without the consent of the managers of the asylum, given in the same manner as parents are authorized to consent to the adoption of their children: *Ex parte Chambers*, 80 Cal. 216, 219; 22 Pac. Rep. 138; but where there is no adoption, because of a failure to adopt according to law, the objection may be obviated by proceeding at once to have the child adopted in the mode prescribed by statute: *Ex parte Chambers*, 80 Cal. 216, 219; 22 Pac. Rep. 138. Where a father has been divorced from the mother on the ground of his adultery, his consent to the order of adoption is rendered unnecessary by the express provisions of the code: *In re Williams*, 102 Cal. 70; 36 Pac. Rep. 407. A mother's consent is not necessary, where the adoption is by the father, and especially where such adoption is the result of his conduct toward the child, and such consent does not depend on any formal proceeding: *In re Jessup*, 81 Cal. 408, 446; 21 Pac. Rep. 976; 22 Pac. Rep. 742, 1028; 6 L. R. A. 594. When a parent makes application to the probate judge to relinquish all right to his or her child, it is, among other things, the duty of the probate judge to make inquiry as to the right of the parent making the application to make such relinquish-

ment; and if, upon such inquiry, it should be ascertained that the other parent is still living, and still possesses a right to its care, custody, or control, it would be the duty of the judge to refuse to approve such adoption, unless the written consent of such absent parent is obtained and filed. On the other hand, if the judge should find that the child had another parent living, and also that that parent had relinquished his or her right to the care, custody, or control of the child, it would not be necessary to have his or her consent. "The parent" referred to in such a proceeding is a parent who still possesses some right in or to the custody over and control of the child which he or she can relinquish: *Nugent v. Powell*, 4 Wyo. 173; 33 Pac. Rep. 23, 26.

REFERENCES.

Consent in case of abandoned children: See subd. 7, *infra*.

5. **Examination of parties.** The only object of a statute in directing the judge of a court to examine the parties who are required to appear before him in adoption proceedings is, that he may satisfy himself that the parties whose consent is required do consent, fully and freely, to the making of such contract, and that the adoption contemplated by the contract will be for the best interests of the child adopted: *In re Johnson*, 98 Cal. 531, 538; 33 Pac. Rep. 460; 21 L. R. A. 380. In determining whether leave to adopt a child should be granted by the court, the welfare of the child is the primary, if not the sole, consideration: *Knight v. Gallaway*, 42 Wash. 413; 85 Pac. Rep. 21. In order that the judge may thus satisfy himself that a child over the age of twelve years, or a wife whose consent is necessary, does freely consent to the adoption, the judge is required to examine the parties separately; but the examination of a child whose consent to the contract is unnecessary, and who is of such tender years that it is incapable of exercising any judgment as to the effect of such contract upon its interests, would certainly be an idle thing. The provision in relation to the separate examination of the parties to such contract, in so far as it is applicable to a child under the age of consent, is simply directory, and is to be complied with, or not, in the discretion of the court; and this doctrine leads to the conclusion that the examination of the other parties to the contract by the judge making the order is not absolutely necessary in order to effect the adoption of a minor. If this is so, it necessarily results that a statute, in so far as it requires that the parties shall be separately examined, is merely directory: *In re Williams*, 102 Cal. 70, 80; 41 Am. St. Rep. 163; 36 Pac. Rep. 407. If a court has jurisdiction of adoption proceedings, the failure of the judge to examine the father of the child is a mere error of procedure which does not affect the validity of the adoption: *Estate of McKeag*, 141 Cal. 403, 410; 74 Pac. Rep. 1039.

6. Order of adoption. To give the decree of a county court adopting a child any validity, such court must have acquired jurisdiction: 1. Over the parties seeking to adopt such child; 2. Over the child to be adopted; 3. Over the parents of such child: *Furgeson v. Jones*, 17 Or. 204; 20 Pac. Rep. 842. An order of adoption is not a judgment of the court: *Estate of Camp*, 131 Cal. 469, 470; 82 Am. St. Rep. 371; 63 Pac. Rep. 736. An order of adoption is void, if the person adopting the child is not a resident of the county in which the order of adoption was made: *Ex parte Clark*, 87 Cal. 638, 640; 25 Pac. Rep. 967. But an order for the adoption of a child is not invalidated because such order is made by the court, and signed by an acting judge, and not made and signed by the regular judge in chambers: *In re Newman's Estate*, 75 Cal. 213; 16 Pac. Rep. 887. So where an order of adoption is made by a probate court at the request of the adopting parent, and such order is acted upon by all parties as valid, and the adopting parent takes and keeps the custody and control of the adopted infant, and treats it as his own child for several years, and then dies, the surviving heirs and legal representatives of such deceased adoptive parent cannot avoid the legal effect of the adoption proceedings for any mere irregularities or clerical mistakes: *Cubitt v. Cubitt*, 74 Kan. 353; 86 Pac. Rep. 475. An order of the probate court permitting the adoption of an infant child is conclusive, so far as that court is concerned. Such court has no further jurisdiction in the matter: *In re Bush*, 47 Kan. 264; 27 Pac. Rep. 1003. An order indorsed on an agreement of adoption, which order recites that the agreement of adoption is approved by the judge, and which order is filed with the county clerk, constitutes a sufficient order of adoption entitling the child to share in the estate of its adoptive parent: *Estate of Evans*, 106 Cal. 562; 39 Pac. Rep. 860. An order of adoption may declare that the child shall henceforth be treated and regarded as the child of both spouses: *In re Williams*, 102 Cal. 70, 78; 36 Pac. Rep. 407.

REFERENCES.

Legal status of adopted child: See note 17 L. R. A. 435-439.

7. Abandoned child. The voluntary acts of a mother in making an application to a court for an order, by virtue of which she would be legally relieved of any responsibilities as to the care and maintenance of her child, and the relinquishment by her of its custody, with the express desire that its new custodians assume the relation and stand in the place of its father and mother, are, in contemplation of law, entirely consistent with the view that she had, prior to that time, with intent to surrender the superior claim of a mother, abandoned the child. That being true, her consent to its adoption is unnecessary, and her objections thereto will be unavailing: *Richards v. Matteson*, 8 S. D. 77; 65 N. W. Rep. 428. Whether children have been abandoned by

their parents is a jurisdictional fact, to be determined by the judge on the evidence presented to him before he is authorized to entertain the petition for their adoption; and a recital in his order that it appeared to his satisfaction that they had been abandoned by their parents is a determination of this fact which cannot be questioned in a collateral attack upon the order: *Estate of Camp*, 131 Cal. 469, 471; 82 Am. St. Rep. 371; 63 Pac. Rep. 736. In a petition by heirs for the distribution of the estate of an intestate, where the petitioners are contesting the right of an adopted heir to such estate, and where it is alleged that an order was entered by the probate court consenting to and approving of the adoption by the deceased of such child, such allegation is conclusive upon the petitioners, although the evidence and findings of the court show the contrary. Though the adoption proceedings might not constitute a bar to the father's action for the recovery of the possession or custody of a child, and not be conclusive upon him, it does not follow, because the adoption proceedings were not conclusive upon the father, that they are not conclusive upon the parties to the proceedings and their privies: *Nugent v. Powell*, 4 Wyo. 173; 33 Pac. Rep. 23. In proceedings to adopt a child, which has been abandoned by its father, no notice of the proceedings on application of the mother need be served on the father: *Nugent v. Powell*, 4 Wyo. 173; 33 Pac. Rep. 23. A statute which authorizes the adoption of a child on the application of its mother, and without its father's consent, where its father has relinquished his claim to such child by abandonment, is constitutional: *Nugent v. Powell*, 4 Wyo. 173; 33 Pac. Rep. 23, 31.

8. Indian children. In the matter of marriage between Indians, tribal customs have been recognized by the courts because they are in conformity with natural rights. But the right of adoption is contrary to natural law, and it seems that adoption by custom cannot be sanctioned nor maintained: *Non-She-Po v. Wa-Win-Ta*, 37 Or. 213; 62 Pac. Rep. 15. Adoption was unknown to the common law, but was a feature of the Roman law. Yet, according to that system, some special authority of law was necessary to constitute an adoption. It never was in the power of an individual, either by the common law of England or the Roman law, to adopt the child of another at his own volition, or by the consent of its parents. There must be some special authority for such a proceeding. In this state it requires the decree of a competent court, made in conformity with the provisions of the statute, to confer on a child the capacity or quality of heir to a stranger. Hence, although an infant Indian has been abandoned by its mother, the fact that it has been cared for until then by another person does not constitute a legal adoption of the infant: *Non-She-Po v. Wa-Win-Ta*, 37 Or. 213; 62 Pac. Rep. 15. Although an Indian probably resided during a portion of his childhood in the family of another Indian, that fact justifies no presumption that he was an adopted son: *Henry v. Taylor*, 16 S. D. 424; 93 N. W. Rep. 641.

9. Illegitimate children. Where the legal relation of parent and child has been established by an adoption proceeding, an illegitimate child so adopted is clothed with the full rights of inheritance of a legal child: *Eddie v. Eddie*, 8 N. D. 376; 79 N. W. Rep. 856. But an instrument signed in the presence of witnesses, declaring the one who executed it to be the father of a certain illegitimate child, naming the child's mother, and stating that the child is living as a foster son, with a physician named, is not an adoption, though it is a good acknowledgment of an illegitimate child, so as to make him the heir of the person acknowledging him: *Estate of De Laveaga*, 142 Cal. 158, 168; 75 Pac. Rep. 790. The father of an illegitimate child, in order to adopt him as legitimate, must not only publicly acknowledge him as his own, but must receive him into his family, and if he has a wife, with her consent. If the father of such child has no family except the child, and pays for his support in another family, but the child never lived with the father at his home, there is no adoption: *Estate of De Laveaga*, 142 Cal. 158, 169; 75 Pac. Rep. 790. The mere acknowledgment of an illegitimate child by its father, without receiving it into his family, does not constitute an adoption of such child, and does not confer upon it any right to administer its father's estate: *Garner v. Judd*, 64 Pac. Rep. 1076. When a man has a home, where he lives with a woman whom he holds out to the world as his wife, he has a family, within the meaning of the statute, and to which he must receive an illegitimate child in order to make it legitimate: *Garner v. Judd*, 136 Cal. 394, 396; 68 Pac. Rep. 1026. Where the father of an illegitimate child never received it into his family, or into the home in which he lived, or into or among his kindred, and did not treat the child as if he were a legitimate child, but, on the contrary, treated him and referred to him as an illegitimate child, there is no legitimation by adoption under the statute: *Estate of De Laveaga*, 142 Cal. 158, 168; 75 Pac. Rep. 790. Statutes authorizing the adoption of illegitimate children are to be liberally construed, but a liberal construction does not require nor authorize the frittering away of the written law: *In re Jessup*, 81 Cal. 408, 423; 21 Pac. Rep. 976; 22 Pac. Rep. 742, 1028; 6 L. R. A. 594. A section of the code which provides that every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child, and in all cases is an heir of his mother, and inherits his or her estate in whole or in part, as the case may be, in the same manner as if born in lawful wedlock, forms no limitation or qualification of another section of the code which relates only to the legitimizing of minor illegitimate children, and which confers a right of inheritance as the result of adoption: *In re Jessup*, 81 Cal. 408, 421; 21 Pac. Rep. 976; 22 Pac. Rep. 742, 1028; 6 L. R. A. 594. Where the father, mother, and their illegitimate children were domiciled in a foreign kingdom, whose laws made no provision for the adoption of illegitimate children by the father, such as exists in North Dakota, the conduct of the father towards them, in recognizing them as his own children, treating them

as such, and contributing to their support, all occurring in the foreign state, but entirely discontinued after leaving the foreign country and coming into this jurisdiction, does not constitute an adoption under the laws of that state: *Eddie v. Eddie*, 8 N. D. 376; 79 N. W. Rep. 856. A decree of distribution to an illegitimate child of a deceased brother of decedent, of part of the estate, in the right of his deceased father, must be reversed where such child has not been legitimated by adoption: *Estate of De Laveaga*, 142 Cal. 158, 171; 75 Pac. Rep. 790.

REFERENCES.

For an instructive case on the legitimation of an illegitimate child, see *Blythe v. Ayres*, 96 Cal. 532; 31 Pac. Rep. 915; 19 L. R. A. 40. A statute concerning the adoption of illegitimate children, enacted before the adoption of the codes, is to be strictly construed, as being in derogation of the common law, but the code provisions on that subject are to be liberally construed: *Estate of Jessup*, 81 Cal. 408, 421; 21 Pac. Rep. 976; 22 Pac. Rep. 742, 1028; 6 L. R. A. 594.

10. Evidence of adoption. The best evidence of adoption is the order of the court made in the proceeding therefor pursuant to statute; and in the absence of anything to show that any of the required legal steps were ever taken, or the record thereof has been lost or destroyed, the unexplained statement of a witness that he was adopted is but a conclusion without probative force. A matter of such importance as the adoption of an heir, which can be accomplished only by strict compliance with the statute, can never be presumed in the absence of competent testimony: *Henry v. Taylor* (S. D.), 93 N. W. Rep. 641, 642.

11. Effect of adoption. Divorce proceedings. After the adoption of a child, it ceases to sustain any relation to its actual parent: *Younger v. Younger*, 106 Cal. 377, 380; 39 Pac. Rep. 779. The residence of an adopted child is that of its foster parent: *Estate of Taylor*, 131 Cal. 180, 182; 63 Pac. Rep. 345. The adoption in law which results from an adoption in fact is the same, in legal effect, as that resulting from an adoption by decree of court: *Eddie v. Eddie*, 8 N. D. 376; 79 N. W. Rep. 856. A natural parent, by her voluntary act in consenting to the adoption of her child by another, becomes divested of all legal rights and obligations in respect to such child, and the situation is not changed by the death of the adoptive parent. Hence a decree of adoption divests the mother and grandmother of any right to be appointed as guardian of the child after its father's death: *In re Masterson's Estate* (Wash.), 87 Pac. Rep. 1047. Although a child may be under the jurisdiction of a court, in divorce proceedings between its parents, that does not prevent another court from taking jurisdiction of the same child in proceedings for its adoption, where the parent to whose custody it has been given consents to the adoption proceedings: *Younger v. Younger*, 106 Cal. 377; 39 Pac. Rep. 779. In divorce proceedings, the jurisdiction of the court over the children of divorced

parents is lost by valid adoption proceedings. Although the court, in the divorce proceedings, may have jurisdiction of the child because of the fact that it is the child of the parties to the action, and may have power to award its custody as it may deem for its best interests, and to direct provision for its maintenance and support, the adoption proceeding wholly changes the status of the child. It becomes ipso facto the child of another, and ceases to sustain that relation, in a legal sense, to its natural parents. The adoption proceedings extinguish the jurisdiction of the court as absolutely as though death had intervened: *Younger v. Younger*, 106 Cal. 377, 379; 39 Pac. Rep. 779.

12. Attacking the order. A parent is not entitled to the custody of a child who is old enough to work and care for himself, after consenting to his emancipation; but there is no basis for such a claim, if the minor is a young child incapable of caring for himself, although the parent consented to another's custody of such child under an illegal order of adoption: *Ex parte Clark*, 87 Cal. 638, 642; 25 Pac. Rep. 967. Although the natural parents of a child have acquiesced in the claim of its adopting parents for several years, they are not estopped from asserting their right to the custody of such child as against an illegal order of adoption. If the right to a transfer of a child from the custody of the adopting parents to the custody of its natural parents is brought up on a writ of habeas corpus, the court must take the record as it finds it, and determine the rights of the parties accordingly, irrespective of proceedings taken to amend the record of adoption so as to make it conform with the law: *Ex parte Clark*, 87 Cal. 638, 641; 25 Pac. Rep. 967. The validity of adoption proceedings cannot be questioned by one who claims as the distributee of one who adopted a child and received the benefit of the relation: *Estate of McKeag*, 141 Cal. 403, 411; 74 Pac. Rep. 1039. On a collateral attack on an order of adoption, in proceedings to revoke letters of administration, a recital in the order of adoption that "the petitioner and said minor child, and all persons whose consent is necessary, have appeared herein as provided by law," is sufficient to show that the father of the child was present at the hearing on the petition of adoption: *Estate of McKeag*, 141 Cal. 403, 408; 74 Pac. Rep. 1039. An order of adoption may be collaterally attacked on a writ of habeas corpus for want of notice to those who are entitled to notice: *Beatty v. Davenport* (Wash.), 88 Pac. Rep. 1109.

13. What will not invalidate proceedings. That the father of a boy, at the time of its adoption, made false statements concerning the death of its mother, or that the adopting parent would not have adopted the boy had he known that the mother was living, or that the boy afterwards became incorrigible, and was sent to the reform school, and was subsequently taken therefrom by his natural mother, or that the plaintiff did not subsequently, in one state, take steps to adopt the boy, does not appear to render the adoption had in another state

illegal: *James v. James*, 35 Wash. 650; 77 Pac. Rep. 1082, 1084. Where adoption proceedings in another state are alleged to be void under the laws of that state, and the laws of that state, showing wherein the adoption is void and of no effect, are not set forth, a court, in determining the question, will apply the *lex fori*: *James v. James*, 35 Wash. 650; 77 Pac. Rep. 1082, 1084. In the absence of any statute prescribing the manner in which a probate judge's records shall be kept, or of evidence that he kept them in any other way than by writing them out upon sheets of paper, the record of his office, showing his consent and approval of the adoption of a child, is sufficient, though such record is on a detached piece of paper retained among the papers of his office: *Nugent v. Powell*, 4 Wyo. 173; 33 Pac. Rep. 23, 25. Even the failure of a probate judge to do his duty does not work the destruction of the rights of others who have done all that they were required to do in the matter: *Nugent v. Powell*, 4 Wyo. 173; 33 Pac. Rep. 23, 25. The surviving heirs and legal representatives of an adoptive parent, who died after the adoption of an infant, cannot avoid the legal effect of the adoption proceedings for any mere irregularities or clerical mistakes, where the order of adoption was made by the probate court at the request of the adoptive parent, and such order was acted upon by all parties as valid, and the adoptive parent took and kept the custody and control of the adopted infant, and treated it as his own child for several years, until the death of the adoptive parent: *Cubitt v. Cubitt*, 74 Kan. 353; 86 Pac. Rep. 475. If it clearly appears from the record in proceedings had in the probate court for the adoption of an infant that all interested parties were present in court, and that the court made an order that such infant be adopted, the mere fact that the name of the infant's mother appears in the order of adoption where the name of the adopting parent should have been written is immaterial, and will be disregarded, when it is clearly apparent from such record that the name was there written by an oversight and mistake, and that the name of the adopting parent was intended: *Cubitt v. Cubitt*, 74 Kan. 353; 86 Pac. Rep. 475.

REFERENCES.

See order of adoption, subd. 6, ante.

14. **Adoption in another state.** If a child has been adopted in another state, whose laws require the act of adoption to be evidenced by an instrument in writing signed by the parties consenting to the adoption, which instrument must be acknowledged and recorded in the county where the person adopting the child resides, proof of the adoption cannot be made in another state, without a compliance with such requirements. The failure to record the instrument of adoption would, of itself, be fatal to the legality of the proceeding: *James v. James*, 35 Wash. 650; 77 Pac. Rep. 1080. If a claim is made that proceedings in another state for the adoption of a child are void under its laws, but such laws, showing wherein the adoption is void, are not set out,

the court, in determining the question, will apply the law of the forum: *James v. James*, 35 Wash. 655; 77 Pac. Rep. 1082.

15. Inheritance. An adopted child is entitled to succeed by inheritance to the estate of the adopting parents: *In re Newman*, 75 Cal. 213, 219; 7 Am. St. Rep. 146; 16 Pac. Rep. 887; *Estate of Wardell*, 57 Cal. 484, 491. Where a child has been adopted by legal proceedings, with the agreement that he shall have the right to inherit property of the adopting parents, the heirship of the child is established by the order of the court: *Quinn v. Quinn*, 5 S. D. 328; 58 N. W. Rep. 808. A child adopted in a sister state, in substantial compliance with her statutes, may inherit lands of the deceased adopting parents in this state, on equal terms with a child of such parents born in wedlock; and the heirs of an adopted daughter may inherit, through her, a share of the estate of the deceased adopting parent as if it were his own child born in wedlock; and it may inherit property in other states than that in which the adoption was had from its adopting parent: *Gray v. Holmes*, 57 Kan. 217; 45 Pac. Rep. 596. Where adoption proceedings are regulated by statute, the right of children to inherit can only be acquired through adoption by a substantial compliance with the provisions of the statute: *Ex parte Clark*, 87 Cal. 638; 25 Pac. Rep. 967. If a testator dies, leaving a will in which no reference is made to an adopted child, and such omission is not expressed on the face of the will to have been intentional, such child is entitled to a share in the testator's estate, the same as if he had died intestate: *Estate of Wardell*, 57 Cal. 484, 491. If a mother's consent to the adoption of her child is gained under an agreement that such child shall have a share of the property of the adopting parent, it cannot be deprived of its right to such property by will, or by any subsequent fraudulent disposition thereof: *Quinn v. Quinn*, 5 S. D. 328; 58 N. W. Rep. 808. The law has established cognatic relations between illegitimate children acknowledged or adopted by their father and legitimate children, and either is as capable of inheriting as the other: *Estate of Wardell*, 57 Cal. 484, 491. One of the objects of adoption, and of legitimizing by adoption, is to give the capacity of inheritance: *In re Jessup*, 81 Cal. 408, 422; 21 Pac. Rep. 976; 22 Pac. Rep. 742, 1028; 6 L. R. A. 594. A pretermitted adopted child is entitled to a share in the testator's estate, the same as if he had died intestate: *Van Brocklin v. Wood*, 38 Wash. 384; 80 Pac. Rep. 530, 532. To establish heirship under acts providing for the adoption of children, the enactments must be looked to to ascertain the rights of the plaintiff. A child may be adopted by one parent and not by another, and the rights thus acquired would be simply rights in the estate of the adopting parent, and would leave the right of inheritance as to the non-adopting parent wholly unaffected by the act of adoption. Hence where an act of the legislature gives one certain rights as the adopted child of a husband, but does not make such child the natural heir of the wife, or give the child any inheritable rights as the daughter of such wife, the act

cannot be extended, and the child, though adopted by one of its parents, does not thereby become entitled to inherit from the other: *Webb v. Jackson*, 6 Col. 211; 40 Pac. Rep. 467.

REFERENCES.

Inheritance by adopted children: See note on "Succession," subd. 6, post. Inheritance by illegitimate children: See subd. 9, ante. Right of adopted children to inherit: See note 118 Am. St. Rep. 684-688. Right of adopted child to inherit property from a relative of its adoptive parent: See note 8 L. R. A. (N. S.) 117-123. Inheritance from adopted child: See note 17 L. R. A. 437.

16. Specific performance. Where a man and his wife, who have no children, orally agree that, in consideration of a young girl becoming a member of their family, and giving to them love, obedience, and service, they would rear and treat her as their own child, and at their death leave her all of their property, and there is full and faithful performance of the agreement by the girl, such agreement will be enforced by a court of equity, providing there are no circumstances or conditions which would render enforcement inequitable: *Bichel v. Oliver* (Kan.), 95 Pac. Rep. 396, 397.

REFERENCES.

Adoption by one person of the children of another: See note 39 Am. St. Rep. 210-231; *Kerr's Cal. Civ. Code*, §§ 221-230, and notes.

17. Hawaii. In the Hawaiian Islands there have been two classes of adoption; one oral, by ancient custom before the existence of written law, and the other under the written law, which requires the execution and recording of an agreement in writing. But a right of inheritance in the adopted child is not a necessary result of adoption by either method, unless such right is clearly defined and proved, or expressed in the written agreement: *Mellish v. Bal*, 3 Haw. 123, 127; *Estate of Maughan*, 3 Haw. 262, 270; *Estate of Nakuapa*, 3 Haw. 410, 415; *Wei See v. Young Sheong*, 3 Haw. 489, 495; *Estate of Wilhelm*, 13 Haw. 206, 211; citing former cases. An oral adoption, however, where it is clearly proved to have been an adoption as heir, may include a right of inheritance in the adopted child: *Estate of Nakuapa*, 3 Haw. 342, 347; *Kiaiaina v. Kahanu*, 3 Haw. 368, 369. Where the law requires agreements of adoption to be in writing and recorded, proof of a compliance with these requirements is necessary to a valid adoption: *Abenela v. Kailikole*, 2 Haw. 660, 662. A written agreement of adoption, executed but not recorded until after the death of the adopting parent, is invalid: *Black v. Castle*, 7 Haw. 273, 275. An adoptive father does not inherit the property of an adopted child: *Estate of Namaau*, 3 Haw. 484, 486. A decree of adoption, by a court of competent jurisdiction, cannot be impeached collaterally on account of informality of the record: *Paris v. Kialoha*, 11 Haw. 450, 452.

CHAPTER II.

SUCCESSION.

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- § 40. Successor is liable for decedent's obligations.
- § 41. Convicted murderer of decedent not to succeed.

LAW OF SUCCESSION.

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| 1. Taking by descent. | (3) Under agreements. |
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| (1) In general. | (2) Heirs of half blood. |
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| 12. Inheritance by Indians. | (5) Illegitimacy, how inferred. |
| 13. Taking by contract, and not by succession. | (6) Construction of Utah statute. |
| 14. Inheritance by or through illegitimate children. | (7) Right of non-resident alien. |
| (1) Right of. Acknowledgment. | (8) Pretermitted illegitimate child. |
| (2) Succession to estate of illegitimate not acknowledged or adopted. | |
15. What law governs.

§ 15. **Definition of.** Succession is the coming in of another to take the property of one who dies without disposing of it by will. **Kerr's Cyc. Civ. Code, § 1383.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Idaho.*** Civ. Code 1901, sec. 2537.
Montana.* Civ. Code, sec. 1850.
North Dakota.* Rev. Codes 1905, § 5185.
Oklahoma.* Rev. Stats. 1903, sec. 6893.
South Dakota.* Civ. Code 1904, § 1092.
Utah.* Rev. Stats. 1898, sec. 2824.

§ 16. **Estate passes to whom.** The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court, for the purposes of administration. **Kerr's Cyc. Civ. Code, § 1384.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Idaho.*** Civ. Code 1901, sec. 2538.
Montana.* Civ. Code, sec. 1851.
North Dakota.* Rev. Codes 1905, § 5186.
Oklahoma.* Rev. Stats. 1903, sec. 6894.
South Dakota.* Civ. Code 1904, § 1093.
Utah.* Rev. Stats. 1898, sec. 2825.
Washington. Pierce's Code, § 2718.

§ 17. **Succession to and distribution of property.** When any person having title to any estate not otherwise limited by marriage contract, dies without disposing thereof by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this code and the Code of Civil Proce-

dure, subject to the payment of his debts, in the following manner :

1. If the decedent leaves a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leaves a surviving husband or wife, and more than one child living, or one child living and the lawful issue of one or more deceased children, one third to the surviving husband or wife, and the remainder in equal shares to his children and to the lawful issue of any deceased child, by right of representation; but if there is no child of decedent living at his death, the remainder goes to all of his lineal descendants; and if all of the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take according to the right of representation. If the decedent leaves no surviving husband or wife, but leaves issue, the whole estate goes to such issue; and if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living and the issue of the deceased child or children by right of representation;

2. If the decedent leaves no issue, the estate goes one half to the surviving husband or wife, and the other half to the decedent's father and mother in equal shares, and if either is dead the whole of said half goes to the other. If there is no father or mother, then one half goes in equal shares to the brothers and sisters of decedent and to the children or grandchildren of any deceased brother or sister by right of representation. If the decedent leaves no issue, nor husband nor wife, the estate must go to his father and mother in equal shares, or if either is dead then to the other;

3. If there is neither issue, husband, wife, father, nor mother then in equal shares to the brothers and sisters of decedent and to the children or grandchildren of any deceased brother or sister, by right of representation;

4. If the decedent leaves a surviving husband or wife, and neither issue, father, mother, brother, sister, nor the children or grandchildren of a deceased brother or sister, the whole estate goes to the surviving husband or wife;

5. If the decedent leaves neither issue, husband, wife, father, mother, brother, nor sister, the estate must go to the next of kin, in equal degree, excepting that, when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote;

6. If the decedent leaves several children, or one child and the issue of one or more children, and any such surviving child dies under age and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent and to the issue of any such other children who are dead, by right of representation;

7. If, at the death of such child, who dies under age, not having been married, all the other children of his parents are also dead, and any of them has left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation;

8. If the deceased is a widow, or widower, and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and his or her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse and to the descendants of such children by right of representation, and if none, then one half of such common property goes to the father and mother of such decedent in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation, and the other half goes to the father and mother of such deceased spouse in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation.

If the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise, or bequest, such property goes in equal shares to the children of such spouse and to the descendants of any deceased child by right of representation, and if none, then to the father and mother of such spouse, in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such spouse and to the descendants of any deceased brother or sister by right of representation.

9. If the decedent leaves no husband, wife, or kindred, and there are no heirs to take his estate or any portion thereof, under subdivision eight of this section, the same escheats to the state for the support of the common schools. **Kerr's Cyc. Civ. Code (Kerr's Stats. and Amdts., p. 424), § 1386.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 168, p. 384; sec. 169, p. 386. See sec. 168, subd. 7, sec. 169, subd. 6, and sec. 182, p. 389 (escheat).

Arizona. Rev. Stats. 1901, pars. 2116, 2117, 2123. See pars. 2470, 2485 (escheat).

Colorado. 3 Mills's Ann. Stats., sec. 4652.

Idaho. Civ. Code 1901, sec. 2539.

Kansas. Gen. Stats. 1905, §§ 2528, 2538, 2539, 2540, 2550.

Montana. Civ. Code, § 1852. See § 1852, subd. 8 (escheat).

Nevada. Comp. Laws, sec. 3045. See sec. 3045, subd. 6, and sec. 3059 (escheat).

New Mexico. Comp. Laws 1897, secs. 2032, 2033, 2034, 2035; Laws 1907, sec. 28, p. 50. See Comp. Laws 1897, sec. 2036 (escheat).

North Dakota. Rev. Codes 1905, § 5187. See § 5187, subd. 7, and § 5204 (escheat).

Oklahoma. Rev. Stats. 1903, sec. 6895. See sec. 6895, subd. 9, and sec. 6912 (escheat).

Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 5577, 5578. See § 5577, subd. 7, § 5578, subd. 5, and § 5614 (escheat).

South Dakota. Civ. Code 1904, § 1094. See § 1094, subd. 9, and § 1111 (escheat).

Utah. Rev. Stats. 1898, secs. 2826, 2828. See sec. 2828, subd. 9, and sec. 3976 (escheat).

Washington. Pierce's Code, §§ 2702, 2716. See § 2702, subd. 8, and § 2716, subd. 8 (escheat).

Wyoming. Rev. Stats. 1899, sec. 4858. See sec. 2306 (escheat).

§ 18. Illegitimate children to inherit in certain events.

Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child and all the legitimate children are considered brothers and sisters, and on the death of either of them, intestate, and without issue, the others inherit his estate, and are heirs, as hereinbefore provided, in like manner as if all the children had been legitimate; saving to the father and mother, respectively, their rights in the estates of all the children in like manner as if all had been legitimate. The issue of all marriages null in law, or dissolved by divorce, are legitimate. **Kerr's Cyc. Civ. Code, § 1387.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 171, p. 387.
- Arizona.** Rev. Stats. 1901, pars. 2127, 2128.
- Colorado.** 3 Mills's Ann. Stats., secs. 4658, 4659.
- Idaho.*** Civ. Code 1901, sec. 2540.
- Kansas.** Gen. Stats. 1905, §§ 2541, 2542.
- Montana.*** Civ. Code, sec. 1853.
- Nevada.** Comp. Laws, sec. 3046.
- New Mexico.** Comp. Laws 1897, secs. 2038, 2039, 2040.
- North Dakota.*** Rev. Codes 1905, § 5189.
- Oklahoma.** Rev. Stats. 1903, sec. 6897.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5580.
- South Dakota.*** Civ. Code 1904, § 1096.
- Utah.** Rev. Stats. 1898, sec. 2833.
- Washington.** Pierce's Code, § 2705.
- Wyoming.** Rev. Stats. 1899, secs. 4862, 4863.

§ 19. Succession to property of illegitimate child. The estate of an illegitimate child, who has been legitimated by the subsequent marriage of its parents, or adopted by the

father as provided by section two hundred and thirty, and who dies intestate, is succeeded to as if he were born in lawful wedlock. If such child has not been so legitimated or adopted, his estate goes to his lawful issue, or, if he leaves no issue, to his mother, or in case of her decease, to her heirs at law. **Kerr's Cyc. Civ. Code, § 1388.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 172, p. 387.
- Arizona.** Rev. Stats. 1901, par. 2128.
- Colorado.** 3 Mills's Ann. Stats., sec. 4661.
- Idaho.** Civ. Code 1901, sec. 2541.
- Kansas.** Gen. Stats. 1905, §§ 2543, 2544.
- Montana.** Civ. Code, sec. 1854.
- Nevada.** Comp. Laws, sec. 3047.
- North Dakota.** Rev. Codes 1905, § 5190.
- Oklahoma.** Rev. Stats. 1903, sec. 6898.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5581.
- South Dakota.** Civ. Code 1904, § 1097.
- Utah.** Rev. Stats. 1898, sec. 2834.
- Washington.** Pierce's Code, § 2706.
- Wyoming.** Rev. Stats. 1899, sec. 4864.

§ 20. **Degree of kindred, how computed.** The degree of kindred is established by the number of generations, and each generation is called a degree. **Kerr's Cyc. Civ. Code, § 1389.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 173, p. 387.
- Idaho.** Civ. Code 1901, sec. 2542.
- Montana.*** Civ. Code, sec. 1855.
- Nevada.** Comp. Laws, sec. 3048.
- North Dakota.*** Rev. Codes 1905, § 5191.
- Oklahoma.*** Rev. Stats. 1903, sec. 6899.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5582.
- South Dakota.*** Civ. Code 1904, § 1098.
- Utah.*** Rev. Stats. 1898, sec. 2835.
- Washington.** Pierce's Code, § 2707.

§ 21. **Same. [Collateral line.]** The series of degrees forms the line; the series of degrees between persons who descend from one another is called direct or lineal consan-

guinity; and the series of degrees between persons who do not descend from one another, but spring from a common ancestor, is called the collateral line or collateral consanguinity. **Kerr's Cyc. Civ. Code, § 1390.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 173, p. 387.
- Idaho.** Civ. Code 1901, sec. 2542.
- Montana.*** Civ. Code, sec. 1856.
- Nevada.** Comp. Laws, sec. 3048.
- North Dakota.*** Rev. Codes 1905, § 5192.
- Oklahoma.*** Rev. Stats. 1903, sec. 6900.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5582.
- South Dakota.*** Civ. Code 1904, § 1099.
- Utah.*** Rev. Stats. 1898, sec. 2836.
- Washington.** Pierce's Code, § 2707.

§ 22. **Same. [Ascending and descending direct line.]** The direct line is divided into a direct line descending and a direct line ascending. The first is that which connects the ancestors with those who descend from him. The second is that which connects a person with those from whom he descends. **Kerr's Cyc. Civ. Code, § 1391.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 173, p. 387.
- Idaho.** Civ. Code 1901, sec. 2542.
- Montana.*** Civ. Code, sec. 1857.
- Nevada.** Comp. Laws, sec. 3048.
- North Dakota.*** Rev. Codes 1905, § 5193.
- Oklahoma.*** Rev. Stats. 1903, sec. 6901.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5582.
- South Dakota.*** Civ. Code 1904, § 1100.
- Utah.*** Rev. Stats. 1898, sec. 2837.
- Washington.** Pierce's Code, § 2707.

§ 23. **Same. [Degrees in direct line.]** In the direct line there are as many degrees as there are generations. Thus, the son is, with regard to the father, in the first degree; the grandson in the second; and vice versa with regard to the father and grandfather toward the sons and grandsons. **Kerr's Cyc. Civ. Code, § 1392.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 173, p. 387.
Idaho. Civ. Code 1901, sec. 2542.
Montana.* Civ. Code, sec. 1858.
Nevada. Comp. Laws, sec. 3048.
North Dakota.* Rev. Codes 1905, § 5194.
Oklahoma.* Rev. Stats. 1903, sec. 6902.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5582.
South Dakota.* Civ. Code 1904, § 1101.
Utah.* Rev. Stats. 1898, sec. 2838.
Washington. Pierce's Code, § 2707.

§ 24. **Same. [Degrees in collateral line.]** In the collateral line the degrees are counted by generations, from one of the relations up to the common ancestor, and from the common ancestor to the other relations. In such computation the decedent is excluded, the relative included, and the ancestor counted but once. Thus, brothers are related in the second degree; uncle and nephew in the third degree; cousins german in the fourth, and so on. **Kerr's Cyc. Civ. Code, § 1393.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 173, p. 387.
Idaho. Civ. Code 1901, sec. 2542.
Montana.* Civ. Code, sec. 1859.
Nevada. Comp. Laws, sec. 3048.
North Dakota.* Rev. Codes 1905, § 5195.
Oklahoma.* Rev. Stats. 1903, sec. 6903.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5582.
South Dakota.* Civ. Code 1904, § 1102.
Utah.* Rev. Stats. 1898, sec. 2839.
Washington. Pierce's Code, § 2707.

§ 25. **Relatives of the half blood.** Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance. **Kerr's Cyc. Civ. Code, § 1394.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 173, p. 387.
Arizona. Rev. Stats. 1901, par. 2119.
Colorado. 3 Mills's Ann. Stats., sec. 4654.
Idaho. Civ. Code 1901, sec. 2542.
Kansas. Gen. Stats. 1905, § 2548.
Montana.* Civ. Code, sec. 1860.
Nevada. Comp. Laws, sec. 3048.
North Dakota.* Rev. Codes 1905, § 5196.
Oklahoma.* Rev. Stats. 1903, sec. 6904.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5582.
South Dakota.* Civ. Code 1904, § 1103.
Utah.* Rev. Stats. 1898, sec. 2840.
Washington. Pierce's Code, § 2707.
Wyoming. Rev. Stats. 1899, sec. 4860.

§ 26. **Advancements are part of distributive share.** Any estate, real or personal, given by the decedent in his lifetime as an advancement to any child, or other heir, is a part of the estate of the decedent for the purposes of division and distribution thereof among his heirs, and must be taken by such child, or other heir, toward his share of the estate of the decedent. **Kerr's Cyc. Civ. Code, § 1395.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 174, p. 387.
Arizona. Rev. Stats. 1901, par. 2122.
Colorado. 3 Mills's Ann. Stats., sec. 4655.
Idaho. Civ. Code 1901, sec. 2543.
Kansas. Gen. Stats. 1905, § 2545.
Montana. Civ. Code, sec. 1861.
Nevada. Comp. Laws, sec. 3049.
North Dakota. Rev. Codes 1905, § 5197.
Oklahoma. Rev. Stats. 1903, sec. 6905.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5583.
South Dakota. Civ. Code 1904, § 1104.
Utah. Rev. Stats. 1898, sec. 2841.
Washington. Pierce's Code, § 2708.

§ 27. **Advancements, when too much, or not enough.** If the amount of such advancement exceeds the share of the heir receiving the same, he must be excluded from any further portion in the division and distribution of the estate, but he must not be required to refund any part of such ad-

vancement; and if the amount so received is less than his share, he is entitled to so much more as will give him his full share of the estate of the decedent. **Kerr's Cyc. Civ. Code**, § 1396.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.*** Carter's Code, sec. 175, p. 387.
- Arizona.** Rev. Stats. 1901, par. 2122.
- Colorado.** 3 Mills's Ann. Stats., sec. 4655.
- Idaho.*** Civ. Code 1901, sec. 2544.
- Kansas.** Gen. Stats. 1905, § 2546.
- Montana.*** Civ. Code, sec. 1862.
- Nevada.*** Comp. Laws, sec. 3050.
- North Dakota.*** Rev. Codes 1905, § 5198.
- Oklahoma.*** Rev. Stats. 1903, sec. 6906.
- Oregon.*** Bellinger and Cotton's Ann. Codes and Stats., § 5584.
- South Dakota.*** Civ. Code 1904, § 1105.
- Utah.*** Rev. Stats. 1898, sec. 2842.
- Washington.*** Pierce's Code, § 2709.

§ 28. **What are advancements.** All gifts and grants are made as advancements, if expressed in the gift or grant to be so made; or if charged in writing by the decedent as an advancement, or acknowledged in writing as such, by the child or other successor or heir. **Kerr's Cyc. Civ. Code**, § 1397.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 177, p. 388.
- Arizona.** Rev. Stats. 1901, par. 2122.
- Colorado.** 3 Mills's Ann. Stats., sec. 4656.
- Idaho.*** Civ. Code 1901, sec. 2545.
- Montana.*** Civ. Code, sec. 1863.
- Nevada.** Comp. Laws, sec. 3051.
- North Dakota.*** Rev. Codes 1905, § 5199.
- Oklahoma.*** Rev. Stats. 1903, sec. 6907.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5586.
- South Dakota.*** Civ. Code 1904, § 1106.
- Utah.*** Rev. Stats. 1898, sec. 2843.
- Washington.** Pierce's Code, § 2711.

§ 29. **Value of advancements. How determined.** If the value of the estate so advanced is expressed in the conveyance, or in the charge thereof made by the decedent, or in the acknowledgment of the party receiving it, it must be held as of that value in the division and distribution of the

estate; otherwise, it must be estimated according to its value when given, as nearly as the same can be ascertained. **Kerr's Cyc. Civ. Code, § 1398.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 178, p. 388.
- Arizona.** Rev. Stats. 1901, par. 2122.
- Colorado.** 3 Mills's Ann. Stats., sec. 4655.
- Idaho.*** Civ. Code 1901, sec. 2546.
- Montana.*** Civ. Code, sec. 1864.
- Nevada.*** Comp. Laws, sec. 3052.
- North Dakota.*** Rev. Codes 1905, § 5200.
- Oklahoma.*** Rev. Stats. 1903, sec. 6908.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5587.
- South Dakota.*** Civ. Code 1904, § 1107.
- Utah.*** Rev. Stats. 1898, sec. 2844.
- Washington.** Pierce's Code, § 2712.

§ 30. When heir advanced to dies before decedent. If any child, or other heir receiving advancement, dies before the decedent, leaving heirs, the advancement must be taken into consideration in the division and distribution of the estate, and the amount thereof must be allowed accordingly by the representatives of the heirs receiving the advancement, in like manner as if the advancement had been made directly to them. **Kerr's Cyc. Civ. Code, § 1399.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 179, p. 388.
- Arizona.** Rev. Stats. 1901, par. 2122.
- Colorado.** 3 Mills's Ann. Stats., sec. 4655.
- Idaho.** Civ. Code 1901, sec. 2547.
- Montana.** Civ. Code, sec. 1865.
- Nevada.** Comp. Laws, sec. 3053.
- North Dakota.** Rev. Codes 1905, § 5201.
- Oklahoma.** Rev. Stats. 1903, sec. 6909.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5588.
- South Dakota.*** Civ. Code 1904, § 1108.
- Utah.** Rev. Stats. 1898, sec. 2845.
- Washington.** Pierce's Code, § 2713.

§ 31. Inheritance of husband and wife from each other. The provisions of the preceding sections of this title, as to the inheritance of the husband and wife from each other,

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apply only to the separate property of the decedents. **Kerr's Cyc. Civ. Code, § 1400.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 2118.

Idaho.* Civ. Code 1901, sec. 2548.

Nevada.* Comp. Laws, sec. 3054.

· **§ 32. Distribution of common property on death of wife.** Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband. **Kerr's Cyc. Civ. Code, § 1401.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 2124.

Idaho.* Civ. Code 1901, sec. 2549.

New Mexico.* Laws 1907, p. 49, sec. 26.

Washington. Pierce's Code, § 2703.

§ 33. Distribution of common property on death of husband. Upon the death of the husband, one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and in the absence of both such disposition and such descendants, is subject to distribution in the same manner as the separate property of the husband. In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration. **Kerr's Cyc. Civ. Code, § 1402.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 2124.

Idaho.* Civ. Code 1901, sec. 2550.

Kansas. Gen. Stats. 1905, § 2537.

New Mexico. Laws 1907, sec. 27, p. 50.

Washington. Pierce's Code, § 2703.

§ 34. Inheritance by representation. Inheritance or succession "by right of representation" takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parents would have taken if living. Posthumous children are considered as living at the death of their parents. **Kerr's Cyc. Civ. Code, § 1403.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 181, p. 388.

Colorado. 3 Mills's Ann. Stats., sec. 4653.

Idaho.* Civ. Code 1901, sec. 2551.

Kansas. Gen. Stats. 1905, § 2549.

Montana.* Civ. Code, sec. 1866.

Nevada.* Comp. Laws, sec. 3058.

North Dakota.* Rev. Codes 1905, § 5202.

Oklahoma.* Rev. Stats. 1903, sec. 6910.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5590.

South Dakota.* Civ. Code 1904, § 1109.

Utah.* Rev. Stats. 1898, sec. 2846.

Washington. Pierce's Code, § 2715.

Wyoming. Rev. Stats. 1899, sec. 4859.

§ 35. Inheritance by aliens. Resident aliens may take in all cases by succession as citizens; and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relative; but no non-resident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession. **Kerr's Cyc. Civ. Code, § 1404.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 2129.

Colorado. 3 Mills's Ann. Stats., sec. 4657.

Idaho.* Civ. Code 1901, sec. 2552.

Montana.* Civ. Code, sec. 1867.

North Dakota. Rev. Codes 1905, § 5203.

Oklahoma. Rev. Stats. 1903, sec. 6911.

South Dakota. Civ. Code 1904, § 1110.

Utah. Rev. Stats. 1898, sec. 2847.

Wyoming. Rev. Stats. 1899, sec. 4861.

§ 36. Effect of not claiming succession. When succession is not claimed as provided in the preceding section, the superior court, on information, must direct the attorney-general to reduce the property to his possession or that of the state, or to cause it to be sold, and it or its proceeds to be deposited in the state treasury for the benefit of the person entitled thereto, to be paid to him, if, within five years after such deposit, he appears in the court in which such information was filed and asks for a judgment or order entitling him thereto. **Kerr's Cyc. Civ. Code, § 1405.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Idaho. Civ. Code 1901, sec. 2553.

Montana. Civ. Code, sec. 1868.

North Dakota. Rev. Codes 1905, § 5204.

Oklahoma. Rev. Stats. 1903, sec. 6912.

§ 37. Aliens inheriting must claim within five years. If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property in such case is disposed of as provided in title eight, part three, Code of Civil Procedure. **Kerr's Cyc. Civ. Code, § 672.**

§ 38. Property escheats to state when. When such judgment or order is obtained, a certified copy thereof must be filed with the state treasurer as his voucher. Thereupon the property must be delivered, or the proceeds paid, to the claimant, on filing his receipt therefor. If no one succeeds to the estate or the proceeds, as herein provided, the property of the decedent devolves and escheats to the people of the state, and must be placed by the state treasurer to the credit of the school fund. **Kerr's Cyc. Civ. Code, § 1406.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 168, subd. 7, p. 385; sec. 169, subd. 6, p. 386; sec. 182, p. 389.

Idaho. Civ. Code 1901, sec. 2554 (succession by aliens).

Montana. Civ. Code, sec. 1869 (succession by aliens).

North Dakota. Rev. Codes 1905, § 5204.

Oklahoma. Rev. Stats. 1903, sec. 6912.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5614.

South Dakota. Civ. Code 1904, § 1111.

Utah. Rev. Stats. 1898, sec. 3974.

§ 39. Escheated property is subject to what charges. Real property passing to the state under the last section, whether held by the state or its officers, is subject to the same charges and trusts to which it would have been subject if it had passed by succession, and is also subject to all the provisions of title eight, part three, of the Code of Civil Procedure. **Kerr's Cyc. Civ. Code, § 1407.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1870.

North Dakota. Rev. Codes 1905, § 5205.

Oklahoma. Rev. Stats. 1903, sec. 6913.

South Dakota. Civ. Code 1904, § 1112.

§ 40. Successor is liable for decedent's obligations. Those who succeed to the property of a decedent are liable for his obligations in the cases and to the extent prescribed by the Code of Civil Procedure. **Kerr's Cyc. Civ. Code, § 1408.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1871.

North Dakota. Rev. Codes 1905, § 5206.

Oklahoma. Rev. Stats. 1903, sec. 6914.

South Dakota. Civ. Code 1904, § 1113.

§ 41. Convicted murderer of decedent not to succeed. No person who has been convicted of the murder of the decedent shall be entitled to succeed to any portion of his estate; but the portion thereof to which he would otherwise be entitled to succeed descends to the other persons entitled thereto under the provisions of this title. **Kerr's Cyc. Civ. Code, § 1409.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 2120.

North Dakota. Rev. Codes 1905, § 5127.

Utah. Rev. Stats. 1898, sec. 2823.

LAW OF SUCCESSION.

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|---|---|
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1. Taking by descent.

(1) *In general.* The term "succession" is used in place of the words "descent and distribution," in some of the codes, to denote the transmission of the property of a decedent by operation of law: Estate of Headen, 52 Cal. 294, 298. The word "succeed" refers to persons who take property by operation of law; that is, by descent, by succession: Estate of Wakefield, 136 Cal. 110, 112; 68 Pac. Rep. 499. The heirs of decedent, whether lineal or collateral, take their distributive share of the estate subject to all existing equities in favor of the estate against them personally, and against any of those through whom they inherit: *Head v. Spier*, 66 Kan. 386; 71 Pac. Rep. 833. While it is true that the descent is cast and the property of the decedent vested in the devisees and legatees, or in the heirs, at the moment of the death of the deceased, it is also true that they take the property subject to the payment of the expenses of administration, and subject to the charges which the law fixes upon it for the support, maintenance, and comfort of the widow and family of the deceased, and subject to the liability to have these charges enforced by orders of the court made without notice in pursuance of the statute; and the enforcement of these charges in the authorized mode is not a violation of any constitutional right of the heir, devisee, or legatee: Estate of Bump (Cal.), 92 Pac. Rep. 643, 644. Under the statutes of Washington, which provide

that if the decedent leaves no issue, or husband or wife, and no father or mother, or brother or sister, the estate must go to the next of kin in equal degree, first cousins are preferred to second cousins: *In re Sullivan's Estate* (Wash.), 94 Pac. Rep. 483, 486. Where the intestate leaves no wife and no issue, and his parents are both dead, one half of the estate goes to the heirs of the deceased father, and the other half to the heirs of the deceased mother: *Russell v. Hallett*, 23 Kan. 276, 280; *Sparks v. Bodensick*, 72 Kan. 5; 82 Pac. Rep. 463. If a wife, being the owner of certain land, dies intestate, and leaves as her only heirs her husband and several grandchildren, the offspring of her daughter by a former marriage, the surviving husband inherits a one-half interest in said land and the grandchildren the other half-interest: *Oliver v. Sample*, 72 Kan. 582; 84 Pac. Rep. 138. The intent of a statute which provides that an intestate's property shall descend to the surviving husband or wife, and to the intestate's descendants in specified proportions, and, in case of no issue, to the surviving husband or wife and father in equal shares, and, if no issue, or husband, or wife, or father, then in equal shares to the brothers and sisters of the intestate, is, that one half of the property shall descend and be distributed, subject to the payment of debts, to the surviving husband or wife, and the other half to the intestate's brothers and sisters, and to the children of any deceased brother or sister by right of representation, provided, if the intestate shall leave a mother, she shall share equally with the brothers and sisters: *In re Foley's Estate*, 24 Nev. 197; 51 Pac. Rep. 834, 837. The Kansas statute excluding strangers to the blood from the line of descent is not unconstitutional with respect to the forms of its enactment: *Andrews v. Harron*, 59 Kan. 771; 51 Pac. Rep. 885, 886. In Colorado the lands of an intestate descend to the heirs, and not to the administrator. The title vests immediately in the heirs, and the administrator has no control over, or right, title, or interest in, the lands, except the power to harvest growing crops, and lease, mortgage, or sell in certain contingencies, and under proper order of the court having probate jurisdiction: *Rupp v. Rupp*, 11 Col. App. 36; 52 Pac. Rep. 290, 291. If the testator leaves no wife surviving him, nor any issue, except a pretermitted child, and there is nothing to show that the failure to mention the child was unintentional, such child takes the whole estate, in the same manner as though the testator had died intestate. In such a case there is no need for any apportionment, and the question of advancement becomes immaterial: *Pearson v. Pearson*, 46 Cal. 609, 624. A native-born American citizen may claim property to which he has succeeded, at any time before a judgment or decree in a proper proceeding to escheat has been entered: *Estate of Miner*, 143 Cal. 194; 76 Pac. Rep. 968, 970.

REFERENCES.

Degrees of consanguinity and affinity, how computed: See note 56 *Am. Dec.* 293, 294; *Kerr's Cal. Cyc. Civ. Code*, §§ 1389-1393, and notes.

Law governing descent and distribution: See note 10 L. R. A. 766, 767. Succession to estate of intestates: See note 12 Am. St. Rep. 81-113. Descent of title to personal property: See note 112 Am. St. Rep. 727-729. Procedure where succession is not claimed: See note **Kerr's Cal. Cyc. Civ. Code**, § 1405. Who are "next of kin": See note 15 L. R. A. 300-304. Right to take property by inheritance or will as natural right protected by constitution: See note 9 Am. & Eng. Ann. Cas. 726.

(2) **Title passes how.** The equitable title to the personal estate of an intestate descends at once to his heirs at law, subject only to the debts of the decedent. The legal title to the estate passes to the administrator, when appointed, for the purpose of enabling him to pay the debts due from the estate: *Brown v. Baxter* (Kan.), 94 Pac. Rep. 155. The title to real property vests in the heir at the time of the decedent's death: *In re Sullivan's Estate*, 36 Wash. 217; 78 Pac. Rep. 945, 948. Real estate descends directly to the heirs of the deceased, subject to the payment of his debts: *Adams v. Slattery* (Col.), 85 Pac. Rep. 87, 88. The title to both real and personal property of one who dies without disposing of it by will passes to the heirs of the intestate, subject to the control of the probate court and to the possession of any administrator appointed by that court for the purpose of administration: *Reed v. Stewart* (Ida.), 87 Pac. Rep. 1002, 1003. The title to a decedent's land vests in the heirs at his death, subject only to such powers to order a sale in course of administration as are then possessed by the court; and these vested rights cannot be impaired nor affected by subsequent legislation giving it a power of sale for new purposes different from and greater than those conferred by the law in force at the time of the death of the deceased: *Estate of Newlove*, 142 Cal. 377; 75 Pac. Rep. 1083, 1084.

(3) **Deflection of descent.** If a decedent dies intestate as to certain land, without widow or issue, or father, but does leave surviving him a mother, she becomes his sole heir, and the descent thus cast cannot be deflected along any other line, except by will containing other terms of disposition. The mother, in such a case, cannot be deprived of the estate by a provision in the testator's will leaving her a legacy, if the will contains no disposition of the testator's property to any one else: *Andrews v. Harron*, 59 Kan. 771; 51 Pac. Rep. 885.

2. What property descends.

(1) **In general.** An intestate's undisputed possession of real estate, with claim of ownership, up to the time of his death, gives him such a title as descends to his heirs: *Janes v. Holanden*, 7 Kan. App. 811; 52 Pac. Rep. 913. So personal property of one who dies intestate passes to the heirs of such intestate, subject to the control of the probate court and to the possession of any administrator appointed

by the court for the purposes of administration: *Litz v. Exchange Bank*, 15 Okl. 564; 83 Pac. Rep. 790. A settler upon the public lands of the United States may appropriate water and acquire a right to the use thereof upon such lands, and such right may be sold by him, or, in case of his death, the right descends to his heirs: *Hall v. Blackman*, 8 Ida. 272; 68 Pac. Rep. 19. A water right for irrigation purposes is an easement and an incorporeal hereditament descendible by inheritance, and a freehold estate. It therefore comes within the meaning of the term "real property": *Gutheil Park Inv. Co. v. Town of Montclair*, 32 Col. 420; 76 Pac. Rep. 1050, 1051. The right of enjoyment of possession of public land may descend among the effects of a deceased person to the executor or administrator, and the right of the deceased be conveyed by regular sale to another: *Grover v. Hawley*, 5 Cal. 485, 486. A claim of preference right of purchase of tide-lands from the state is a right which will descend to the purchaser's heirs and legal representatives as other property rights descend; and the heirs and legal representatives to whom the right descends may convey that right to another: *Hotchkin v. Bussell* (Wash.), 89 Pac. Rep. 183, 185. A cause of action for a trespass or injury to land, occurring after the death of decedent, does not pass to the administrator or executor, but to the heir or devisee: *Adams v. Slaterry* (Col.), 85 Pac. Rep. 87, 89. Upon the death of defendant, in an action brought by the state for maintaining an alleged nuisance, by keeping a place where intoxicating liquors are unlawfully sold, the property used by him in the maintenance of the nuisance passes to his heirs, subject to the control of the county court and the possession of the administrator: *State v. McMaster*, 13 N. D. 58; 99 N. W. Rep. 58. If a life estate in certain real property is devised to the widow, and, without making any devise of the remainder after the widow's death, a direction is made in the will that the proceeds be divided equally between four children, the entire interest therein is vested in the children by reason of their being the sole beneficiaries thereof. The effect of such direction is to convert the land into personalty, to take effect when the executor has power to make the sale. The rule of equitable conversion merely amounts to this: that, where it is mandatory to sell at a future time, equity, upon the principle of regarding that done which ought to be done, will, for certain purposes, and in aid of justice, consider the conversion as effected at the time when the sale ought to take place, whether the land be then really sold or not. But, wherever the direction is for a future sale, up to the time fixed the land is governed by the law of real estate: *Bank of Ukiah v. Rice*, 143 Cal. 265; 76 Pac. Rep. 1020, 1021. Statutes which regulate the descent and distribution of real property are applicable to quartz-lodes: *Carrhart v. Montana Min. etc. Co.*, 1 Mont. 245, 249.

REFERENCES.

Descent of unpatented mining claim: See note 4 L. R. A. (N. S.) 919, 920.

(2) **Community property.** Under a statute which provides that, upon the husband's death, one half of the community property goes to the surviving wife, and that the other half is subject to the testamentary disposal of the husband, and in the absence of such disposition, goes to his descendants, and in the absence of both such disposition and descendants, is subject to distribution in the same manner as the separate property of the husband, the widow is not entitled to any portion of such other half, which must be distributed according to the common law: *In re Clark's Estate*, 17 Nev. 124; 28 Pac. Rep. 238, 239. Under a statute which provides that, upon the death of the husband, one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants, a widow is not entitled to one half by virtue of the statute, nor to any part of the other half which is otherwise disposed of by will, especially where she has, by virtue of the will, more than one half of the whole estate: *Chadwick v. Tatem*, 9 Mont. 354; 23 Pac. Rep. 729, 733. It is a rule of property in the state of Washington that one half of all the property purchased by a husband and wife with community funds descends to the heirs of the wife on her death: *Warburton v. White*, 18 Wash. 511; 52 Pac. Rep. 233. Mining property acquired under the laws of the United States during coverture is community property; and all property acquired by the husband during coverture, except such as is acquired by gift, bequest, devise, or descent, is community property, although the wife may never have been a resident of the state: *Jacobson v. Bunker Hill etc. Co.*, 3 Ida. 126; 28 Pac. Rep. 396. A statute which provides that a testator shall be deemed intestate as to such of his children as are not provided for in his will applies to community property, as well as to his separate estate; and, where he is deemed intestate as to such children, parol evidence is not admissible to show that he had provided for such children otherwise than by his will: *Hill v. Hill*, 7 Wash. 409; 35 Pac. Rep. 360. When the husband dies, his wife takes one half of the community property as his heir: *Estate of Moffitt*, 35 Cal. Dec. 377, 378 (April 20, 1908). Upon the husband's death, one half of the community property goes to the surviving wife, and the other half is subject to his testamentary disposition, and in the absence of such disposition, goes to his descendants. It cannot be contended, with respect to such property, where there is a surviving wife and children, that the wife takes one half absolutely and one third of the remaining half as her own. It follows that her judgment creditor can enforce his judgment only against her interest in the estate: *Estate of Angle*, 148 Cal. 102; 82 Pac. Rep. 668.

REFERENCES.

Distribution of common property on death of husband: See note *Kerr's Cal. Cyc. Civ. Code*, § 1402. Distribution of common property on death of wife: See note *Kerr's Cal. Cyc. Civ. Code*, § 1401.

(3) **Homesteads.** The title to a homestead does not descend to the widow and children of a deceased owner, who may occupy the land at the time of his death, to the exclusion of other heirs, who may reside elsewhere, but it descends in the same manner as the title to other real estate, subject only to the right of occupancy of the widow and children residing there, until the widow remarries, or the children all become of age: *Mitchell v. Mitchell*, 69 Kan. 441; 77 Pac. Rep. 98. Where the estate is solvent and out of debt, the value of such part of the homestead as may be set aside to the widow should be deducted from her distributive share provided for by statute. She cannot have both, unless such design on the part of the testator clearly appears from the will: *In re Little*, 22 Utah, 204; 61 Pac. Rep. 899. If a married man makes a homestead entry on a certain quarter-section of land while his wife is living, but she dies before final proofs are made and the patent issued, and the husband afterwards acquires the legal title, the children take as heirs of their mother: *Cox v. Tompkinson*, 39 Wash. 70; 80 Pac. Rep. 1005, 1006. The descent of a homestead, on the father's death, to his children, subject to a life estate in the widow, is not unconstitutional as class legislation, as it operates upon persons uniformly throughout the state: *Holmes v. Mason* (Neb.), 114 N. W. Rep. 606, 608. It seems to be the policy of the law to guard homestead rights for the benefit of the entryman himself, and in case of his death before patent, for the benefit of his heirs. Whatever rights survive the death of the homesteader belong to the heirs, and not to the estate of the deceased. The heirs do not succeed to such rights by inheritance, but by virtue of the law, which merely grants to them preference rights. If they fail to exercise those rights, or if there are no heirs capable, as citizens of the United States, of succeeding to such rights, then there is no one else to whom any preference right survives, and the land is open, as a part of the public domain, for occupancy by any qualified homesteader. The administrator, as such, succeeds to no rights in the homestead, for the reason that these are reserved for the heirs, and the law does not invest the administrator with any rights therein, simply because there are no heirs: *Towner v. Rodegeb*, 33 Wash. 153; 99 Am. St. Rep. 936; 74 Pac. Rep. 50. Before a homesteader has earned a right to a patent, he has no such interest in the land as will make it a part of his estate on his death. The patent thereafter issued to the persons specified in the Federal statute is issued to them, not as heirs of the decedent, who have inherited his title, but as original parties, who are preferred by the Federal statute, after the rights of the original homesteader have been destroyed by death; they being allowed the benefit of his residence upon the land: *Gjerstadenjen v. Van Duzen*, 7 N. D. 612; 76 N. W. Rep. 233. If a homestead has not been selected from community property, but from the property of the wife, it descends, upon her death, to her heirs, and if there be more than one child, as where

there are two children and a surviving husband, one third of it is succeeded to by the husband, and the remaining two thirds in equal shares by the children, as provided in the statute governing succession: *Beck v. Soward*, 76 Cal. 527, 531; 18 Pac. Rep. 650.

(4) **Timber-culture claims.** It is settled beyond dispute that the heirs of a timber-culture entryman upon public lands of the United States, who dies before completing the period of occupancy and receiving the patent, succeed to all his rights, and, upon making the required proof, take title as direct grantees and purchasers from the government, and not by inheritance: *Gould v. Tucker* (S. D.), 105 N. W. Rep. 624, 625. Even though the administrator of the estate of a deceased entryman uses money belonging to the estate to commute the entry by payment of the required amount to the United States, all rights under the patent inure to the heirs as if their names had been specially mentioned therein, and neither the administrator nor the probate court has authority to sell the land to satisfy debts previously created, or to burden the same with any part of the expense incurred in securing the patent: *Gould v. Tucker* (S. D.), 105 N. W. Rep. 624, 625. Upon the death of a timber-culture claimant, before performance by him of the conditions precedent to obtaining title from the government, his heirs succeed to the claim, and may obtain a patent therefor in their own name by proof of full performance by them and their ancestor of the required conditions. But, in such case, they take directly as donees of the government, and not by inheritance. Upon the death of the claimant, his interest in the timber-culture claim absolutely terminates and is at an end, and his rights pass by direct grant to his heirs and substituted beneficiaries of the government. He has, at the time of his death, no interest which can be devised, or which will descend or pass to his heirs or personal representatives. Hence proceedings assuming jurisdiction over the claim, and authorizing its sale, are absolutely void for want of jurisdiction of the subject-matter. The claim at that time belongs to the heirs, in their own right, and such proceedings could have no more force and effect than if the court should assume to order a sale by the administrator of any other property belonging to the heirs: *Haun v. Martin* (Or.), 86 Pac. Rep. 371, 372.

3. Rights of widow.

(1) **In general.** A wife is not a "relative" of her husband, so that, under a will containing a devise to her, she dying first, her heirs succeed to the estate as she would have done had she lived. Upon her death preceding that of her husband, the devise would lapse: *In re Renton's Estate*, 10 Wash. 533; 39 Pac. Rep. 145, 146. The Colorado statute expressly provides that a widow or surviving wife of a husband dying intestate is heir to one half of his real estate, if there be a child or children living, and is also entitled to one half

of the personalty, but if there are no children, or descendants of any child, she becomes the sole heir at law. She is therefore entitled to share in the proceeds of a policy of insurance payable to her husband's "legal heirs": *Anderson v. Groseback*, 26 Col. 3; 55 Pac. Rep. 1086, 1090. A widow has no interest in, and is not entitled to, a distributive share of land owned by the deceased husband during marriage, and which is not a homestead, where the same was sold before his death upon a special execution or order of sale issued in pursuance of a judgment in an action to recover upon a note executed by the husband, and to foreclose a mortgage given to secure its payment, notwithstanding that she did not join in executing the note or mortgage, and was not a party to the foreclosure action: *Mosteller v. Gorrell*, 41 Kan. 392; 21 Pac. Rep. 232. If a woman claims property as the wife of a decedent, and she makes affidavit that the decedent had deserted her after marriage, in a foreign country, some sixteen years prior to the time of his death, and that she believed that after he had deserted her he came to this country, she cannot recover, where there is no evidence of that fact, and evidence of the identity of the deceased as her husband is wholly lacking: *Goldwater v. Burnside*, 22 Wash. 215; 60 Pac. Rep. 409, 410. A widow is an "heir": *Thurston v. Allen*, 8 Haw. 392, 404.

(2) **As a survivor.** A deed which conveys an estate to a husband and wife conveys it in entirety, and upon the death of one, the other is entitled, as a survivor of the two, to the entire estate: *Baker v. Stewart*, 40 Kan. 442; 19 Pac. Rep. 904, 906.

REFERENCES.

Inheritance by wife: See *Kerr's Cal. Cyc. Civ. Code*, § 1386, note 57.

(3) **Under agreements.** Agreements between husband and wife, which are calculated to facilitate the securing of a divorce, are contrary to public policy, and void. Hence if a husband, by unfair means, secures his wife's signature to such a contract, in which she consents to take, as her share, a fractional part of the property of her husband on his death, she is not barred from her right of inheritance: *Palmer v. Palmer*, 26 Utah, 31; 72 Pac. Rep. 3, 9. An antenuptial agreement providing that the property owned by either party shall, after marriage, remain the separate and distinct property of such owner; that neither shall have or exercise any right, title, or estate in the property of the other; and that each may, at his or her option, dispose of such property by will or otherwise, except that the husband shall not, during the lifetime of the wife, so dispose of his property as to jeopardize or render nugatory a subsequent provision for her benefit, by which he agrees to furnish her proper and comfortable support so long as they live together as husband and wife, or in case she survives him, so long as she remains his

widow,— does not exclude the widow from her right of inheritance in the husband's property, where they have lived together for thirty years, and the husband dies intestate: *Rouse v. Rouse* (Kan.), 91 Pac. Rep. 45.

(4) **Election to take under will.** Where a will is deposited in the office of the probate judge by the testator, and, after his death, the will is produced in open court, opened, and read in the presence of the devisees of the real property described therein (one of the witnesses to the will, and another), and an entry is made upon the will, by the probate judge, of the election of the widow to take under the will, and that the will is admitted to probate, the property passes under the will, and does not descend to the heirs of the testator: *Chandler v. Richardson*, 65 Kan. 152; 69 Pac. Rep. 168.

(5) **Construction of statutes.** Although the act of Congress endows the widow, in Utah, with a one-third part of all land whereof the husband was seised, and she has therefore a dower interest, a life estate, to the extent of one third of all the real estate whereof the husband died seised, she is also entitled, under the law of succession, to one third of all the real estate remaining after the dower is set off to her, and also to the undivided one third of all the personal property after the debts, costs, and expenses attending the settlement of the estate are paid; and minor heirs are each entitled, by succession, to the undivided one third of the remaining two thirds of the real estate and personal property, subject to the widow's right of dower, as above stated: *Knudsen v. Hannberg*, 8 Utah, 203; 30 Pac. Rep. 749, 752. A proviso in a statute, limiting the general right of a wife to inherit the real estate of her husband, and which is, that she shall not be entitled to any interest in any land of which the husband has made a conveyance, when the wife, at the time of the conveyance, "is not or never has been a resident of this state," does not prevent her from taking the benefit of the acts relative to descents and distributions, if she has ever been a resident of the state. The word "or," in the last clause, should be read "and," as this will not limit the right of inheritance, and will give some meaning to all of the words of the statute: *Kennedy v. Haskell*, 67 Kan. 612; 73 Pac. Rep. 913, 914.

4. Children's right of inheritance.

(1) **In general.** In New Mexico, a child can be disinherited without being mentioned in a will, though it appears that the omission of its name occurred through inadvertence or mistake: *In re McMillen's Estate*, 12 N. M. 31; 71 Pac. Rep. 1083. Under the statute of Washington, where a testator is deemed intestate as to such of his children as are not provided for by his will, parol evidence is not admissible to show that the testator had provided for his children otherwise than by his will: *Hill v. Hill*, 7 Wash. 409; 35 Pac. Rep.

360. In 1868, the statute of New Mexico did not determine the rights of a child in the estate of its mother, where the father was living. Such rights were determined by the Spanish law: *Crary v. Field*, 9 N. M. 222; 50 Pac. Rep. 342, 344. The surviving husband is authorized by the civil law of Spain and Mexico to sell as much of the community property as may be necessary to pay the community debts, and, in the exercise of this right and discharge of this duty, any transfer of property made by him, be it personal or real, conveys a good title to his vendee, and the heirs are without authority to interfere with or restrain him in his action, as survivor, unless it shall appear that he is prostituting his power, and committing waste to their detriment: *Crary v. Field*, 9 N. M. 222; 50 Pac. Rep. 342, 344. A deceased person, in his lifetime, was married three times. By his first wife he had one child. By his second wife he had one child. By his third wife, surviving him, he had five children. He died intestate in Kansas. It was held that, at his death, one half in value of his real estate, not necessary for the payment of his debts, descended in fee-simple to his widow; that the other half of his real estate descended to his seven children equally, being all of his children by his three wives; and that, upon the death of his widow, her estate descended to her own children: *Colgon v. Burleigh*, 52 Kan. 392; 34 Pac. Rep. 1050. Where a deceased father had been ordered by decree of court to pay a certain sum of money, from and after the date of the decree, for the support and maintenance of his child, it cannot be contended, in the face of such monthly payments, that the omission to mention the child in his will was caused by, or was due to, inadvertence or mistake: *In re McMillen's Estate*, 12 N. M. 31; 71 Pac. Rep. 1083, 1084. A clause of the testator's will, empowering the executrix to sell land to pay the testator's debts, does not operate to devest a child born after the making of the will of its title in the land devised, where the statute provides that every testator leaving a child born after the making of the will, not named nor provided for therein, shall be deemed to have died intestate as to such child: *Worley v. Taylor*, 21 Or. 589; 28 Pac. Rep. 903.

(2) **Heirs of half blood.** Where an intestate leaves, as his sole heirs, four brothers (or sisters), half-brothers (or sisters) who are children of his father, and half-brothers (or sisters) who are children of his mother, each full brother (or sister) inherits an equal share with each child of his father in the half of the estate descending through the father, and also, in addition thereto, an equal share with each child of his mother in the half of the estate descending through her; the provision of the statute that children of the half blood shall inherit equally with children of the full blood not having the effect to require that in the case stated all the children of either or both of intestate's parents shall receive equal parts of his estate: *Tays v. Robinson*, 68 Kan. 53; 74 Pac. Rep. 623. The statute casting the descent of property uses the word "children," and the relation of

parent and child determines inheritance. The divorce of parents does not affect this relation. No matter who may have a daughter's custody for the purposes of nurture, she is still the child of her father, and, by statute, children of the half blood inherit equally with those of the whole blood: *McIntyre v. Gelvin* (Kan.), 95 Pac. Rep. 389. Resident citizen half-sisters of a resident citizen who died intestate, leaving neither widow nor children, and whose parents both died before him, non-resident aliens, inherit immediately and directly the lands of the deceased in Kansas: *State v. Ellis*, 72 Kan. 285; 83 Pac. Rep. 1045.

REFERENCES.

Relatives of the half blood: See note *Kerr's Cal. Cyc. Civ. Code*, §§ 1386, 1394. Inheritance by half blood: See note 61 Am. Dec. 655-667. Descent and distribution among kindred of half blood: See note 29 L. R. A. 541-567.

5. **Descent on death of unmarried minor.** If a minor daughter has inherited the proceeds of community property of her father and mother upon the death of her father, and dies without issue, and, not having been married, leaving surviving her a mother and her brothers, all of such property, personal as well as real, of the deceased child goes to her surviving brothers, and the mother takes no interest therein; but regard must be had to the source from which the property was derived in its distribution, and a separate personal estate must be distributed among the same persons as would be entitled to the real property: *Fort v. West*, 14 Wash. 10; 44 Pac. Rep. 104, 106.

6. **Inheritance by adopted children.** In a state having a statute regulating the adoption of children, the provisions thereof must be substantially followed, in order to clothe the adopted children with the right of inheritance: *Renz v. Jury*, 57 Kan. 84; 45 Pac. Rep. 71, 72. The word "issue," in a statute prescribing a rule of inheritance, is used in the same sense as the word "child" and "children." So if an adopted child is, by virtue of its status, to be "regarded and treated in all respects as the child of the person adopting," and is to "have all the rights and be subject to all the duties of the legal relation of parent and child," the right to succeed to the estate of the deceased parent must be included: *Estate of Newman*, 75 Cal. 213; 16 Pac. Rep. 887, 888. The right of inheritance in such cases is fixed solely by the act itself. If a child is adopted by one parent, and not by another, the rights acquired by an adopted child would be simply rights in the estate of the adopting parent, and would leave the right of inheritance as to the non-adopting parent wholly unaffected by the act of adoption. Some cases hold that the right of inheritance extends only to the property of the parents who may die leaving property, and gives to the blood of the adopted child no such inheritable quality as to make the child a sister or brother of the children of the deceased parents with the ordinary right of inheri-

tance which would proceed from that relationship: *Webb v. Jackson*, 6 Col. App. 211; 40 Pac. Rep. 467, 468. Where the adoption is under the statute of one state, and the parents ultimately remove to another, whose statutes of descent and distribution are dissimilar, the child can acquire no right in property which descends, and is to be distributed according to the law in force in place of the newly acquired residence: *Webb v. Jackson*, 6 Col. App. 211; 40 Pac. Rep. 467, 468. If a testator dies, leaving a will in which no reference is made to an adopted child, such child is entitled to share in the estate as if the testator had died intestate. But the failure to refer in the will to such child does not invalidate the will. The whole estate is subject to the debts and expenses of administration. When these are paid, the adopted child is entitled to have its proportionate share of the estate set over to it, and the remainder of the estate descends according to the terms of the will. The remedy of a child not provided for in a will is, simply to move the court to proceed with the administration of the estate of the mother, and, as a part of such administration, to decree and set over to such child the proportion to which it would be entitled if the testator had died intestate. If the administration of the estate has been properly set on foot by the probating of the will, it should continue until the estate is finally closed. The only effect that the failure to name the child in the will could have upon the proceedings would be to compel a determination thereof without regard to any extension provided for by the terms of the will, and a distribution that, as to such child, should be uninfluenced by any of the provisions thereof: *Van Brocklin v. Wood*; 38 Wash. 384; 80 Pac. Rep. 530, 532. Where the adoption of children is regulated by statute, as in Iowa and Kansas, rights of inheritance can only be acquired through adoption by a substantial compliance with the provisions of the statute: *Renz v. Jury*, 57 Kan. 84; 45 Pac. Rep. 71. A child adopted in a sister state, in substantial compliance with her statutes, will inherit lands of the deceased adopting parent in Kansas, on equal terms with a child of such parent born in wedlock: *Gray v. Holmes*, 57 Kan. 217; 45 Pac. Rep. 596. The heirs of an adopted daughter will inherit, through her, a share of the estate of the deceased adopting parent, just as if she were a daughter of such parent by blood: *Gray v. Holmes*, 57 Kan. 217; 45 Pac. Rep. 596. A child by adoption cannot inherit from its adoptive parent unless the act of adoption is in strict accordance with the statute: *Furgeson v. Jones*, 17 Or. 204; 20 Pac. Rep. 842. To establish heirship under acts providing for the adoption of children, the enactments must be looked to, to ascertain the rights of the claimants: *Webb v. Jackson*, 6 Col. App. 211; 40 Pac. Rep. 467, 468.

REFERENCES.

Inheritance by adopted children: See note on "Adoption," subd. 15, ante, and *Kerr's Cal. Cyc. Civ. Code*, § 1386, note 2. Right of adopted children to inherit: See note 118 *Am. St. Rep.* 684-688.

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Adopted child, right of, to inherit from persons other than adopting parents: See notes 4 Am. & Eng. Ann. Cas. 881; 9 Am. & Eng. Ann. Cas. 780.

7. Descent to father. Under the Kansas statute, when a child dies intestate, leaving no wife or issue, the whole of his estate goes to his father: *Gray v. Holmes*, 57 Kan. 217; 45 Pac. Rep. 596. Where a husband and wife had a family of six children, three of whom died early, unmarried, and without issue, and where the mother, who was the owner of a tract of land, subsequently died intestate, and left surviving her the father and three children, it was held, in an action to determine the respective interests of the parties in the estate of the mother, that the surviving father was the sole heir of the children who died prior to the death of the mother, and that the shares which they would have taken, had they outlived the mother, descended to him, and therefore that the three living children were each entitled only to a one-twelfth portion of the estate: *De Lashmutt v. Parrent*, 40 Kan. 641; 20 Pac. Rep. 504. If a woman dies, leaving surviving her husband and four minor children, and two of the children die under age, and unmarried, their interest in their mother's estate descends to their father. This is so under a statute which provides that if any person shall die seised of any real property, not having lawfully devised the same, if he leave no issue or wife, such real property shall descend to his father, and a statute which applies only in cases where the intestate has left one or more minor children, and the issue of one or more deceased children, is inapplicable to the case: *Stitt v. Bush*, 22 Or. 239; 29 Pac. Rep. 737, 738. In statutes of descent, the word "ancestor" means one from whom an estate is immediately inherited. So, if an estate comes to a father from his infant son, the son is the ancestor of his father: *Estate of Ehu*, 9 Haw. 393, 394.

REFERENCES.

Inheritance by father: See *Kerr's Cal. Cyc. Civ. Code*, § 1386, note 44.

8. Descent to grandparents. The grandfather is one degree nearer of kin than the uncle, as computed by the civil law; and where an intestate has no issue, or wife, father, mother, brother, or sister, his grandfather takes the estate in preference to his uncle, as next of kin: *Smallman v. Powell*, 18 Or. 367; 23 Pac. Rep. 248. A son having died, leaving no child, wife, father, mother, sister, or brother, or issue of any brother or sister, it was held that the estate descended to his grandmother on his father's side, and his grandfather and grandmother on his mother's side, in equal shares to each: *Shadden v. Hembree*, 17 Or. 14; 18 Pac. Rep. 572. Under the Colorado statute, the estate vests in the grandparents, if there are any, as one class, and if there are none, then in the uncles and aunts, collectively: *Thatcher v. Thatcher*, 17 Col. 404; 29 Pac. Rep. 800, 801.

9. Who cannot inherit. When a woman consents to become a plural wife, she does so at her peril, in so far as the law of inheritance is concerned. She is without the pale of the law of inheritance as to any property which her husband has acquired or may subsequently acquire; and if he sees fit to bequeath all of his property to another, she has no lawful right to complain: *Raleigh v. Wells*, 29 Utah, 217; 81 Pac. Rep. 908, 910. In a jurisdiction where marriage between a white man and an Indian woman, either by ceremony, cohabitation, customs of the Indian tribe, or any other method, is null and void, a child of such persons, born during their relationship of pretended husband and wife, has no right of inheritance from the father: *In re Walker's Estate*, 5 Ariz. 70; 46 Pac. Rep. 67. Where the statute provides that if a decedent leave a husband or wife, and neither issue, father, mother, brother, nor sister, the whole estate shall go to the surviving husband or wife, it is a rule of property that the nieces and nephews of the decedent, who dies intestate, and who leaves surviving him a widow, but neither father, mother, brother, nor sister, do not succeed to any portion of the estate of the deceased, and this rule will be adhered to: *Estate of Nigro (Cal.)*, 87 Pac. Rep. 384. Succession to estates is purely a matter of statutory regulation, which cannot be changed by courts: *Ingram's Estate v. Clough*, 78 Cal. 586; 21 Pac. Rep. 435. If a widow dies, leaving an estate acquired by descent, the children of her deceased husband, by a former wife, cannot inherit under a statute which provides that "kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance": *Amy v. Amy*, 12 Utah, 278; 42 Pac. Rep. 1121, 1132.

10. Inheritance by convict. The right of inheritance is a civil right, existing only by virtue of the law, and the legislature may make the deprivation of this right a portion of the penalty to be imposed for the commission of a crime. Hence if the statute declares that a person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead, and he has been so sentenced, he cannot inherit the estate of his father, where such person was serving a life sentence at the time of his father's death: *Estate of Donnelly*, 125 Cal. 417; 58 Pac. Rep. 61. There is no doubt of the power of the legislature, by express language, to cast the descent of a convict's property, in the event of his civil death, on such persons as will be heirs at law in case of natural death; but a statute which provides that when a person shall be imprisoned under a sentence of imprisonment for life, his estate, property, and effects shall be administered and disposed of in all respects as if he were naturally dead, does not cast the descent of his property upon his heirs by the fact of such

sentence and imprisonment: *Smith v. Becker*, 62 Kan. 541; 64 Pac. Rep. 70. In the absence of express provision excluding the husband from inheriting from his wife, under the laws of descent and distribution of the Creek Nation, in force at the time of descent cast, the operation of said laws is not affected by the fact that the husband murdered his wife, but not for the purpose of at once obtaining the inheritance: *De Graffenreid v. Iowa Land & T. Co.* (Okl.), 95 Pac. Rep. 624.

REFERENCES.

Person convicted of murder of decedent, not entitled to succeed: See *Kerr's Cal. Cyc. Civ. Code*, § 1409, and note. Descent to murderer: See note 5 L. R. A. 344, 345. Homicide as affecting devolution of property: See note 3 L. R. A. 726-730. Murderer, succession by, to property of victim: See notes 2 Am. & Eng. Ann. Cas. 658; 7 Am. & Eng. Ann. Cas. 976.

11. **Inheritance by aliens.** The constitution of Kansas, providing that "no distinction shall ever be made between citizens and aliens in reference to the purchase, enjoyment, or descent of property," made the statute of descents and distributions apply to aliens as well as to citizens, and enabled the former to inherit real property in such state: *Spark v. Bodensick*, 72 Kan. 5; 82 Pac. Rep. 463. Under the constitution of Washington, aliens are entitled to inherit real estate in that state, from, by, or through ancestors, whether such ancestors be aliens or citizens. This being true, and the state having failed to forfeit the title of the alien by proceedings in the nature of office found, at any time prior to his death, the real estate owned by such alien at the time of his death descends to his alien heirs, who are authorized to receive the same and become entitled thereto, and the state thereupon loses its right to declare any escheat by forfeiture. Prior to the alien's death, the state may declare a forfeiture or escheat, but cannot do so afterwards. Upon the death of the alien the real estate descends to his alien heirs: *Abrams v. State* (Wash.), 88 Pac. Rep. 327, 332. Under a statute declaring that "any person, whether citizen or alien, may take, hold, or dispose of property within this state," all aliens, whether residents or non-residents of this state, may take by descent as well as by purchase: *Estate of Billings*, 65 Cal. 593, 594; 4 Pac. Rep. 639; *State v. Rogers*, 13 Cal. 159. Foreigners of the white race, or of African descent, eligible to become citizens of the United States under the naturalization laws thereof, while bona fide residents of this state, shall have the same rights in respect to the acquisition, possession, enjoyment, transmission, and inheritance of all property, other than real estate, as native-born citizens; provided, that such aliens owning real estate at the time of the adoption of this amendment may remain such owners; and provided further, that the legislature may, by statute, provide for the disposition of real estate which shall hereafter be acquired

by such aliens by descent or devise: Cal. Const. 1879, art. i, § 17, amdt. Nov. 16, 1894. A statute which permits non-resident aliens to inherit real and personal estate is constitutional: *State v. Rogers*, 13 Cal. 160. See *Kerr's Cal. Cyc. Civ. Code*, § 671. The legislature is not prohibited by § 17, art. i, of the California constitution of 1879 from extending the right of inheritance to non-resident aliens, as it has done by section 671 of the Civil Code of that state: *Estate of Billings*, 65 Cal. 593, 595; 4 Pac. Rep. 639.

REFERENCES.

Aliens may inherit when, and how: See note *Kerr's Cal. Cyc. Civ. Code*, §§ 672, 1404. Alien's right to inherit: See note 31 L. R. A. 177-183. Rights of aliens to transmit or receive an inheritance: See note 12 Am. St. Rep. 93. Effect of naturalization on alien's right to inherit: See note 31 L. R. A. 181, 182. Effect of state statutes and constitutions upon inheritance through an alien: See note 31 L. R. A. 146-158. Effect of state constitution and statutes upon inheritance by or from an alien: See note 31 L. R. A. 85-107. Effect of treaties upon alien's right to inherit: See note 32 L. R. A. 177-189.

12. Inheritance by Indians. The special act of Congress of 1885, affecting none but the Umatilla reservation of Indians, and the confederated tribes inhabiting the same, and providing, among other things, "that the law of alienation and descent in force in the state of Oregon shall apply thereto after patents have been executed, except as herein otherwise provided," was not affected by a subsequent act of Congress providing that, for the purpose of determining the descent of land to the heirs of any deceased Indian, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life, "the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child": *McBean v. McBean*, 37 Or. 195; 61 Pac. Rep. 418, 421. In case of the death of the head of an Indian family, title to the decedent's property necessarily descends to some person, and where, under the terms of the treaty in pursuance of which a patent was issued, the President has not prescribed any rules or regulations to secure to the family the possession and enjoyment of such property, and there is no showing as to the customs of the tribe respecting such a matter, the court is compelled to follow the laws of descent of the state, provided they do not conflict with any of the terms of the treaty or patent, to secure such estate to the family: *Guyatt v. Kautz*, 41 Wash. 115; 83 Pac. Rep. 9, 12. Under the Federal statute providing for the allotment of Indian lands, the laws of descent of the state apply to such lands: *Guyatt v. Kautz*, 41 Wash. 115; 83

Pac. Rep. 9, 12. The descent of lands patented to a Shawnee Indian by the treaty of May 10, 1854, is to be determined by the law and rules established by the tribe: *Hannon v. Taylor*, 57 Kan. 1; 45 Pac. Rep. 51. As to descent and distribution under the laws of the Creek Nation, see *De Graffenreid v. Iowa Land & T. Co. (Okl.)*, 95 Pac. Rep. 624. The word "heirs," in the Creek law of descent and distribution, is construed to mean children: *De Graffenreid v. Iowa Land & T. Co. (Okl.)*, 95 Pac. Rep. 624. The Indian appropriation bill, approved May 27, 1902 (32 U. S. Stats. 258, sec. 888), substituted the laws of descent and distribution of Arkansas for those of the Creek Nation provided for in the "Original Agreement," but it was not provided that such laws should become effective immediately. They did not take effect until July 1, 1902: *De Graffenreid v. Iowa Land & T. Co. (Okl.)*, 95 Pac. Rep. 624.

13. Taking by contract, and not by succession. Where a member of a mutual benefit society has made his certificate payable to his heirs, they do not take the fund by descent, but by contract. The rights of the beneficiaries in a certificate taken out by such a member are such as the contract confers, and are not rights arising by operation of statutory rules respecting descent and distribution. The contract, and not the statute, fixes their rights, and they have such rights only as the contract of insurance vests in them. Reference therefore must be had to the terms of the agreement, and not to the provision of the statute, to ascertain the rights of the parties: *Burke v. Modern Woodmen*, 2 Cal. App. 611; 84 Pac. Rep. 275, 276. If such a person died, leaving ten heirs, each heir would be entitled to one tenth of the proceeds of the certificate: *Burke v. Modern Woodmen*, 2 Cal. App. 611, 84 Pac. Rep. 275, 276. If a timber-culture claimant die before obtaining title, and the grant is to his heirs, such heirs do not take by inheritance, but take equally, regardless of the proportions in which they would take under the law of succession of the state. The heirs, in such cases, must be found by the law of the state or territory in which the land is situated, because the United States has no general law of succession: *Cooper v. Wilder*, 111 Cal. 191; 43 Pac. Rep. 591, 592. By the law of California, the widow is an heir of the husband: *Cooper v. Wilder*, 111 Cal. 191; 43 Pac. Rep. 591, 592.

14. Inheritance by or through illegitimate children.

(1) **Right of. Acknowledgment.** The right of an illegitimate child to inherit from its father is given by statute, and such child may inherit when the father has acknowledged it as his child by an instrument in writing properly witnessed; but he only inherits from his father, directly, and as an illegitimate child. He does not inherit the estates of his lineal or collateral kindred: *Eddie v. Eddie*, 8 N. D. 376; 79 N. W. Rep. 856. A child which is the offspring of an un-

authorized matrimonial union between a white man and an Indian woman cannot inherit from its father: *In re Walker's Estate*, 5 Ariz. 70; 46 Pac. Rep. 67, 69.

REFERENCES.

Right of illegitimate children to inherit in certain events: See note *Kerr's Cal. Cyc. Civ. Code*, § 1387. Inheritance by children of illegitimates: See *Kerr's Cal. Cyc. Civ. Code*, § 1388, note 2. Power of illegitimates to inherit and to transmit inheritances: See note 12 Am. St. Rep. 101. Inheritance by, through, or from illegitimate: See note 23 L. R. A. 753-758. Illegitimates as next of kin: See note 15 L. R. A. 301. Inheritance from or through mother: See *Kerr's Cal. Cyc. Civ. Code*, § 1387, notes 19-25. Legitimation of illegitimate child: See note 1 L. R. A. (N. S.) 773.

(2) **Succession to estate of illegitimate not acknowledged or adopted.** Section 1388 of the California Civil Code provides the rule of succession as to the whole estate of an illegitimate, not acknowledged nor adopted by its father, who dies intestate, without lawful issue, except in so far as it may be qualified by § 1387 of said code, and this rule, being contrary to the general rule of succession prescribed by § 1386 of the same code, must prevail over everything contained in that section; because it is provided in said § 1386 that the estate must be succeeded to and must be distributed in the manner therein stated, "unless otherwise expressly provided" in such code. But this rule of succession has reference solely to the separate property of the deceased husband or wife. Sections 1401 and 1402 of said code purport to provide the rules as to community property: *Estate of De Cigaran (Cal.)*, 89 Pac. Rep. 833, 836. If an illegitimate daughter, who has never been acknowledged by her father, dies possessed of separate estate, it passes on her death, intestate, and without issue, not to her surviving husband, but to another illegitimate child of her predeceased mother, by another father, who had likewise never been adopted or acknowledged by her father. "We may not be able to see any good reason for the exclusion of the surviving spouse of the illegitimate, where she dies without lawful issue, and the giving of the estate to the mother or her heirs in preference to such spouse; but that fact is immaterial where the legislature has said in unmistakable terms that it shall so be": *Estate of De Cigaran (Cal.)*, 89 Pac. Rep. 833, 836.

(3) **Sufficiency of acknowledgment. Evidence of recognition.** The required statutory acknowledgment of an illegitimate child by his father need not be made for the express purpose of admitting the child to heirship; a collateral acknowledgment in writing of this kind is a sufficient compliance with the statute. It might be that the father would desire to recognize his child for many other reasons; and if such recognition were made for any reason, it ought to be sufficient

to enable the child to become an heir to his estate, and to place it, so far as the estate is concerned, on an equality in law with the legitimate children: *In re Rohrer*, 22 Wash. 151; 60 Pac. Rep. 122. A question having arisen as to who was the father of the child, through whom the mother claimed, proof tending to show general and notorious recognition of the child as his own by him was competent to establish the rule of inheritance: *Reville v. Dubach*, 60 Kan. 572; 57 Pac. Rep. 522. A statute which provides that a father may legitimate an illegitimate child by receiving it into his family, with consent of his wife, and publicly acknowledging it to be his own, applies only to illegitimate minor children of a father. Paternity cannot be established by general reputation, but if proof aliunde has been given of membership of the family of a deceased, declarations, made after the child has reached the age of majority, as to the facts of paternity and illegitimacy of the child, are admissible on the question of paternity, but not to prove the public acknowledgment required to be made when the child was a minor, because acts done by the father, which go to constitute a legitimation, must be done while the child is a minor: *Estate of Heaton*, 135 Cal. 385; 67 Pac. Rep. 321; and the consent which such statute contemplates must be a consent given after knowledge is brought home to the wife that the child is the illegitimate offspring of her husband: *Estate of Heaton*, 135 Cal. 385; 67 Pac. Rep. 321. The criterion referred to in the statute is the treatment usually accorded to legitimate children, and it is not material that the alleged father ever had a child of his own, that there might be a criterion by which to determine how he would treat his legitimate child: *Estate of Heaton (Cal.)*, 73 Pac. Rep. 186.

REFERENCES.

Sufficiency of acts of acknowledgment of illegitimate child: See *Kerr's Cal. Cyc. Civ. Code*, § 1387, note 27. Evidence of declarations to show maternity of illegitimate child: See note 11 *L. R. A. (N. S.)* 1052.

(4) **Presumption as to legitimacy.** It is well settled, on grounds of public policy affecting children born during marriage, as well as the parties themselves, that the presumption of legitimacy as to children born in lawful wedlock cannot be rebutted by the testimony of the husband or the wife to the effect that sexual intercourse has or has not taken place between them; nor are the declarations of the husband or wife competent as bearing on the question. Illegitimacy may be proved, but it cannot be proved by the evidence of a husband or wife, that, while living together, they did not have sexual intercourse: *Estate of Mills*, 137 Cal. 298; 70 Pac. Rep. 91. A child born in wedlock is presumed to be legitimate, and this presumption cannot be overthrown by the general and notorious recognition of it by a putative father, or by his assertions, however solemnly expressed, that

the child was begotten by him: *Bethany Hospital Co. v. Hale*, 64 Kan. 367; 67 Pac. Rep. 848. If testimony is introduced which tends to show that a woman, who claims to be the illegitimate daughter and sole heir of an unmarried man, was born in wedlock, the presumption of legitimacy can only be overcome by the clearest and most conclusive evidence of non-access by the husband: *Bethany Hospital Co. v. Hale*, 64 Kan. 367; 67 Pac. Rep. 848. For evidence showing that plaintiff was born in lawful wedlock, though after her father's death, see *Kaylton v. Kaylton*, 45 Or. 116; 74 Pac. Rep. 491, 494.

(5) **Illegitimacy, how inferred.** The illegitimacy of a child may be inferred from the fact that its alleged father was never married until seven or eight years after the child's birth; that he was acquainted with and had relations with the mother; and from the declarations made by him to numerous witnesses that the child was his: *Estate of Heaton* (Cal.), 73 Pac. Rep. 186, 187.

(6) **Construction of Utah statute.** The evident intention of the Utah statute is, that illegitimate children shall have vested in them inheritable blood and the right to inherit from the father, when acknowledged by him, in the same manner and to the same extent as if they had been born legitimate, and the right, when once vested in the illegitimate, extends to his descendants, and they likewise become heirs in the event of the death of their father. Hence where a man had an illegitimate child by an Indian girl, accepted such child as his own, took him into his home, cared for and raised him as his own child, manifesting that affection for the child in many ways that point unerringly to a father, such child thereby acquires inheritable blood, which he may transmit to his child, and on his death before his father, the children of such illegitimate child inherit his estate: *In re Garr's Estate* (Utah), 86 Pac. Rep. 757, 759. The territorial act of Utah of March 3, 1852, providing that "illegitimate children and their mothers inherit in like manner from the father, whether acknowledged by him or not, provided that it may be made to appear to the satisfaction of the court that he was the father of such illegitimate child or children," was disapproved by the anti-polygamy act of July 1, 1862: *Pratt v. Pratt*, 7 Utah, 278; 26 Pac. Rep. 576; *Handley's Estate*, 7 Utah, 49; 24 Pac. Rep. 673.

(7) **Right of non-resident alien.** Where a non-resident alien, before the enactment of a statute making every illegitimate child an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child, acknowledged, in writing, in the presence of competent witnesses, that he was the father of a certain illegitimate child, but died after such statute took effect, such child is entitled to his real property, in a state where such acknowledgment was made and such statute exists, because

such acknowledgment and statute establish the fact that he was the father of the child, and such fact, being thus established, makes the child an heir of his deceased father: *Moen v. Moen* (S. D.), 92 N. W. Rep. 13.

(8) **Pretermitted illegitimate child.** If an illegitimate child is unintentionally omitted from its mother's will, it is entitled to share in her estate, in the same manner as if legitimate, though it had never been legitimated by the subsequent intermarriage of her parents, or by the acknowledgment or adoption of her father: *Estate of Wardell*, 57 Cal. 484, 492. An illegitimate child is not forgotten in a will if it is referred to as "Otto" instead of its real name, and a legacy is given to it as the child of the woman named, if she has no other child, and it is evident that the child named was in the mind of the testator. It is not necessary, after the acknowledgment by a father of his illegitimate child, that there should be an intermarriage between the father and the mother of the child either before or after such acknowledgment; and the fact of the father's death does not absolve his estate completely from such allowance as the statute provides for minor children. It follows, therefore, that such a child is entitled to an allowance from his father's estate as his "child": *In re Kornetzky*, 20 Wash. 563, sub nom. *In re Gorkow's Estate*, 56 Pac. Rep. 385, 387, 388.

15. **What law governs.** For the purposes of determining who are the heirs of a deceased person, resort is to be had to the laws of the state under which the descent is cast; and the "heirs" of a person are those whom the law appoints to succeed to his estate in case he dies without disposing of it by will: *Burke v. Modern Woodmen*, 2 Cal. App. 611; 84 Pac. Rep. 275, 276. The descent of real property is governed by the law of inheritance in the state in which the land is situated. Title to the same cannot be affected by the decree of a court of another state: *Cooper v. Ives*, 62 Kan. 395; 63 Pac. Rep. 434. If both the real and personal property of an intestate is situated within this state, which is also his domicile at the time of his death, the laws of this state govern the descent and distribution thereof, following the rule that the descent of personal property is governed by the law of the domicile of the owner, and real property by the law of the place where situated: *Eddie v. Eddie*, 8 N. D. 376; 79 N. W. Rep. 856.

REFERENCES.

For further authorities concerning succession, see note *Kerr's Cal. Cyc. Civ. Code*, §§ 1383-1409.

CHAPTER III.

PROCEEDINGS RELATIVE TO ESCHEATED ESTATES.

- § 42. Property escheats when.
- § 43. Attorney-general to bring action.
- § 44. Manner of commencing.
- § 45. Form. Information of attorney-general.
- § 46. Form. Order to show cause.
- § 47. Receiver of rents and profits.
- § 48. Appearance, pleadings, trial, judgment, and sale.
- § 49. Form. Judgment.
- § 50. Proceedings after judgment by persons claiming escheated estates.
- § 51. Form. Petition by heir to recover money escheated to the state.

ESCHEAT.

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|---------------------------------------|--|
| 1. General doctrine. | 7. Non-resident aliens. |
| 2. Jurisdiction. Probate courts. | 8. Pleading and practice. |
| 3. Property of outlawed corporations. | 9. Judgments. |
| 4. Land of Mormon Church. | 10. Limitation of actions. |
| 5. Aliens. | 11. Recovery of escheated property,
and proceedings therefor. |
| 6. Premature action. | |

§ 42. **Property escheats when.** All property, real and personal, within the limits of this state, which does not belong to any person, belongs to the people. Whenever the title to any property fails for want of heirs or next of kin, it reverts to the people. **Kerr's Cyc. Pol. Code, § 41.**

§ 43. **Attorney-general to bring action.** It shall be the duty of the attorney-general to institute investigation for the discovery of all real and personal property which may have or should escheat to the state, and for that purpose shall have full power and authority to cite any and all persons before any of the superior courts of this state to answer investigations and render accounts concerning said property, real or personal, and to examine all books and papers of any and all corporations. When any real or personal property shall be discovered, which should escheat to

the state, the attorney-general must institute suit in the superior court of the county where said property shall be situated, for the recovery, to escheat the same to the state. The proceedings in all such actions shall be those provided for in title eight, part three, Code of Civil Procedure. The attorney-general may, for the purposes and objects of this section, employ counsel to act in his place and stead for the discovery and recovery of both personal and real property, and in such proceedings, both in investigation for discovery or proceedings for recovery, such counsel so employed shall have the power and authority of the attorney-general. The compensation for services of such counsel shall be determined by the board of examiners, and paid out of the sums so found to be escheated and recovered to the state, and not otherwise; provided, that the state of California shall in no case be responsible for any charges for attorney fees for suits prosecuted under this act, but the attorney-general is hereby authorized to pay to the person or persons discovering the same the costs and charges of prosecuting any suit or suits under this act, a sum not in any case exceeding ten per cent of the sums actually received as provided in this act. **Kerr's Cyc. Pol. Code, § 474.**

§ 44. Manner of commencing. When the attorney-general is informed that any estate has escheated to this state, he must file an information, in behalf of the state, in the superior court of the county in which said estate, or any part thereof, is situate, setting forth a description of the estate, the name of the person last possessed thereof, and the person claiming the estate, if known, and the facts and circumstances in consequence of which the estate is claimed to have escheated, with an allegation that, by reason thereof, the state of California has right by law to such estate. Upon such information, a summons must issue to said claimant and possessor, requiring them to appear and answer the information within the time allowed by law in civil actions; and the court must make an order setting forth briefly the contents of the information, and requiring all persons interested in the estate to appear and show cause, if any they have, within

forty days from the date of the order, why such estate should not vest in this state; which order must, prior to the expiration of such time, be published for at least one month, in a newspaper published in the county, if one is published therein, and in case no newspaper is published in the county, in some other newspaper in this state. **Kerr's Cyc. Code Civ. Proc.** (**Kerr's Stats. and Amdts.**, p. 489), § 1269.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, secs. 183, 184, p. 389.

Arizona. Rev. Stats. 1901, pars. 2471, 2472, 2473.

Montana. Code Civ. Proc., sec. 2250.

Nevada. Comp. Laws, sec. 3060.

North Dakota. Rev. Codes 1905, § 5204.

Oklahoma. Rev. Stats. 1903, sec. 6912.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 5615, 5616.

South Dakota. Civ. Code 1904, § 1111.

Utah. Rev. Stats. 1898, sec. 2440.

Wyoming. Rev. Stats. 1899, sec. 2307.

§ 45. Form. Information of attorney-general.

[Title of court.]

[Title of action.]¹ { No. ____² Dept. No. ____
[Title of form.]

Now comes ____, the attorney-general of the state of ____, who, being informed that the certain estate herein-after described has escheated to said state, files this information and complaint in behalf of said state, and alleges:

That on or about the ____ day of ____, 19____, one ____ died in said state; that, at the time of his death, the said ____ was seised in fee of the following described real property, namely, ____;³ and that said property is situated in the county⁴ of ____, wherein this information is filed;⁵

That the said ____ died intestate, and left no heirs, widow, or known kindred capable of inheriting said real property;

That the said ____⁶ late of the county⁷ of ____, was the last person lawfully possessed of said land, but that the defendants, ____ and ____, are now in the possession of said property, and claim an interest therein adverse to said state and against law;

That more than ____^s years have elapsed since the death of the said ____, and that no part of the estate aforesaid has been sold, as is provided by law, for the payment of the debts of said decedent;

That neither the said defendants, nor either nor any of them, has any right to said estate, or to any interest therein; but that, by reason of the facts and circumstances heretofore and herein set forth, the said real property has escheated to the said state of ____, and that the lawful right to said estate is now in the said state of ____.

Wherefore the plaintiff prays that the aforesaid described estate be adjudged to belong to the state of ____; that the said state is entitled to the possession of said estate, and that a decree issue that said state be seised thereof; that plaintiff recover costs of suit against the defendants; that the court make an order that such property^s be sold by the sheriff of the county wherein it is situate, at public sale, for gold coin, after giving such notice of the time and place of sale as may be prescribed by the court in said order; and that said sheriff be further directed to make report of his proceedings as required by law.

____, Attorney-General.

Explanatory notes. 1. As, The State of ____, Plaintiff, v. John Doe and Richard Roe, Defendants. 2. File number. 3. Describe the property. 4. Or, city and county. 5. The information must be filed in the designated court of the county in which said estate, or any part thereof, is situated. 6. Name of decedent. 7. Or, city and county. 8. Insert "five," or other statutory number of years, where the decedent left surviving heirs who are non-resident foreigners, and who fail to appear and claim such succession within five years after the death of decedent. Otherwise, omit the paragraph. 9. Unless it consists of money. Use the same form of summons as in an ordinary civil action.

§ 46. Form. Order to show cause.

[Title of court.]

[Title of cause.] { No. ____¹ Dept. No. ____
[Title of form.] }

It appearing from the information of ____, the attorney-general of the state of ____, filed on the ____ day of ____,

19—, in the — court of the county³ of —, that — died intestate on or about the — day of —, 19—, in the county³ of —, state of —, leaving in said county⁴ the following described real property, to wit: —;⁵ that at the time of his death the said — was seised in fee of said property; that he was the last person lawfully possessed of said land; that he left no heirs surviving him;⁶ and that by reason of such facts and circumstances, the property mentioned has escheated to the said state of —, and that said state is rightfully entitled by law thereto;—

It is therefore ordered, That all persons interested in the estate of —, deceased, appear and show cause, if any they have, within forty days from the date of this order, why such estate should not vest in the said state of —.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2-4. Or, city and county. 5. Describe the property. 6. Or state the facts, if there are any non-resident foreign heirs, who have failed to appear and to claim the succession. See *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1404.

§ 47. **Receiver of rents and profits.** The court, upon the information being filed, and upon application of the attorney-general, either before or after answer, upon notice to the party claiming the estate, if known, may upon sufficient cause therefor being shown, appoint a receiver to take charge of such estate, or any part thereof, or to receive the rents, income and profits of the same until the title of such estate is finally settled. *Kerr's Cyc. Code Civ. Proc.* (*Kerr's Stats. and Amdts.*, p. 489), § 1270.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. *Carter's Code*, sec. 185, p. 389.

Montana. *Code Civ. Proc.*, sec. 2251.

Nevada. *Comp. Laws*, sec. 3064.

Oregon. *Bellinger and Cotton's Ann. Codes and Stats.*, § 5617.

§ 48. **Appearance, pleadings, trial, judgment, and sale.** All persons named in the information may appear and answer, and traverse or deny the facts stated therein at any time before the time for answering expires, and any other

person claiming an interest in such estate may appear and be made a defendant, by motion for that purpose in open court within the time allowed for answering, and if no such person appears and answers within the time, then judgment must be rendered that the state is the owner of the property in such information claimed.

[Trial of issues.] But if any person appears and denies the title set up by the state, or traverses any material fact set forth in the information, the issue of fact must be tried as issues of fact are tried in civil actions. If, after the issues are tried, it appears from the facts found or admitted that the state has good title to the property in the information mentioned, or any part thereof, judgment must be rendered that the state is the owner and entitled to the possession thereof, and that it recover costs of suit against the defendants who have appeared and answered.

[Order of sale.] In any judgment rendered, or that has heretofore been rendered by any court, escheating property to the state, on motion of the attorney-general, the court must make an order that such property, unless it consists of money, be sold by the sheriff of the county where it is situate, at public sale, for gold coin, after giving notice of the time and place of sale, as may be prescribed by the court in such order; that the sheriff, within five days after such sale, make a report thereof to the court, and upon the hearing of such report, the court may examine the report and witnesses in relation thereto, and if the proceedings were unfair, or if the sum bid [was] disproportionate to the value, or if it appears that a sum exceeding said bid, exclusive of the expense of a new sale, may be obtained, the court may vacate the sale, and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place.

[New sale may be ordered when.] If an offer greater in amount than that named in the report is made to the court in writing, by a responsible person, the court may, in its discretion, accept such offer and confirm the sale to such person, or order a new sale. If it appears to the court that the sale was legally made, and fairly conducted, and that the sum bid

is not disproportionate to the value of the property sold, and that a sum exceeding such bid, exclusive of the expense of a new sale, cannot be obtained, or if the increased bid above mentioned is made and accepted by the court, —

The court must make an order confirming the sale, and directing the sheriff, in the name of the state, to execute to the purchaser or purchasers a conveyance of said property sold; and said conveyance vests in the purchaser or purchasers all the right and title of the state therein, and the sheriff must, out of the proceeds of such sale, pay the cost of said proceedings incurred on behalf of the state, including the expenses of making such sale, and also an attorney's fee, if additional counsel was employed in said proceedings, to be fixed by the court, not exceeding ten per cent on the amount of such sale, and the residue thereof must be paid by said sheriff into the state treasury. **Kerr's Cyc. Code Civ. Proc.** (**Kerr's Stats. and Amdts.**, p. 489), § 1271.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 186, p. 389.

Arizona. Rev. Stats. 1901, pars. 2474, 2475, 2476, 2477, 2479, 2480.

Kansas. Gen. Stats. 1905, §§ 3053, 3054.

Montana. Code Civ. Proc., sec. 2252.

Nevada. Comp. Laws, secs. 3061, 3063.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 5618, 5619.

§ 49. Form. Judgment.

[Title of court.]

[Title of cause.]

{ No. ____¹ Dept. No. ____
[Title of form.]

This cause having come on regularly for hearing this ____ day of ____, 19__, and it appearing from the information of the attorney-general, filed herein on behalf of the state of ____, that ____, on or about the ____ day of ____, 19__, died in the county ² of ____, state of ____, leaving real property therein described as follows, to wit: ____; ³ that the said ____⁴ was the last person lawfully possessed of said land; that he died without having disposed of said property by will; that he left no heirs surviving him; ⁵ and no persons having appeared or answered herein within the time allowed by law, —

Probate — 5

It is therefore ordered, adjudged, and decreed, That, by reason of said facts, the state of — is the owner, and is entitled to the possession, of the property described in the information mentioned; that said state be seised thereof; that the sheriff of the said county⁶ of —, state of —, that being the county⁷ in which said real property is situate, be, and he is hereby, directed to sell said real property, at public sale, for gold coin, after giving notice of the time and place of sale, by —; ⁸ and that he make report of his proceedings as required by law.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, city and county. 3. Give description. 4. Decedent. 5. Or as the case may be, if the decedent left non-resident foreign heirs, who have failed to appear and to claim the succession within the time prescribed by the statute. 6, 7. Or, city and county. 8. Posting notice or by publication, as prescribed by the court. The sheriff's report of sale may be the same as his return under a judgment foreclosing a mortgage; and the order confirming his sale may be substantially in the same form as an order confirming a sale of real estate made by an administrator.

§ 50. Proceedings after judgment by persons claiming escheated estates. Within twenty years after judgment in any proceeding had under this title, a person not a party or privy to such proceeding may file a petition in the superior court of the county of Sacramento, showing his claim or right to the property, or the proceeds thereof. A copy of such petition must be served on the attorney-general at least twenty days before the hearing of the petition, who must answer the same; and the court thereupon must try the issue as issues are tried in civil actions, and if it is determined that such person is entitled to the property, or the proceeds thereof, it must order the property, if it has not been sold, to be delivered to him, or if it has been sold and the proceeds paid into the state treasury, then it must order the controller to draw his warrant on the treasury for the payment of the same, but without interest or cost to the state, a copy of which order, under the seal of the court, shall be a sufficient voucher for drawing such warrant.

[Limitation of action.] All persons who fail to appear and file their petitions within the time limited are forever

barred; saving, however, to infants, and persons of unsound mind, the right to appear and file their petitions at any time within the time limited, or within five years after their respective disabilities cease. **Kerr's Cyc. Code Civ. Proc.** (**Kerr's Stats. and Amdts.**, p. 490), § 1272.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 187, p. 390.

Arizona. Rev. Stats. 1901, pars. 2483, 2484.

Kansas. Gen. Stats. 1905, § 3054.

Montana. Code Civ. Proc., sec. 2253.

Nevada. Comp. Laws, sec. 3063.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5620.

§ 51. Form. Petition by heir to recover money escheated to the state.

[Title of court.]

[Title of cause.]

{ No. ____¹ Dept. No. ____
[Title of form.]

The undersigned, your petitioner, respectfully represents and alleges:

That he is the brother and heir at law of ____, late of ____, in the county ² of ____, state of ____;

That on or about ____, 19____, the aforesaid died intestate in said county ³ and state, leaving certain property in the said county ⁴ of ____, described as follows, to wit: ____;⁵ and being of the value of ____ dollars (\$____);

That on or about the ____ day of ____, 19____, an information was filed in the ____⁶ of the county ⁷ of ____, state of ____, by the attorney-general of said state, wherein it was alleged that the said ____ had died in said last-named county,⁸ leaving certain property therein described, which said ____ had not disposed of by will, and leaving no heir or known kindred or widow capable of inheriting the same, and that by reason thereof the said property had escheated to the said state of ____;

That, no legal heirs entitled to the said estate having appeared to answer the said information, judgment was rendered by the aforesaid last-named court on the ____ day of ____, 19____, that the said property be escheated to the said state of ____, and that said state be seised thereof;

That, at the time of the aforesaid proceeding, the undersigned, your petitioner, was a resident of the state of ____; * that he had no notice of the pendency of said proceedings, by citation, advertisement, or otherwise, and that he did not appear therein, either in person or by attorney;

That your petitioner, as heir at law of the aforesaid ____, is entitled as of right to the said property hereinbefore described.

Wherefore your petitioner prays judgment that he be declared to be the rightful owner of all of said property, and that said property be relinquished to him. _____

_____, Attorney for Petitioner.

Explanatory notes. 1. Give file number. 2-4. Or, city and county. 5. Describe the property. 6. Name the court. 7, 8. Or, city and county. 9. Other than the one in which the petition is filed.

ESCHEAT.

- | | |
|---------------------------------------|---|
| 1. General doctrine. | 7. Non-resident aliens. |
| 2. Jurisdiction. Probate courts. | 8. Pleading and practice. |
| 3. Property of outlawed corporations. | 9. Judgments. |
| 4. Land of Mormon Church. | 10. Limitation of actions. |
| 5. Aliens. | 11. Recovery of escheated property, and proceedings therefor. |
| 6. Premature action. | |

1. **General doctrine.** In this country, the general rule is, that, when the title to land fails for want of heirs, it escheats to the state. That rule is applicable in Idaho. If a non-resident foreigner does not appear and claim succession within five years after the death of the decedent, the real estate of the deceased escheats to the state without inquest in the nature of "office found" to vest title in the state. The title passes by operation of law, without court proceedings of any kind, where no proceeding, or inquest in the nature of "office found," is provided for by statute in such cases: *State v. Stevenson*, 6 Ida. 387; 55 Pac. Rep. 886. In California, there seems to be no limit within which native-born American citizens may come forward and claim property to which they have succeeded, at any time before a judgment or decree, in a proceeding to escheat, has been entered; and, when the provisions of the various codes of said state bearing upon the subject-matter are construed together, the inference is, that, in every case of a failure of succession for want of heirs or kindred of a decedent, an action of escheat becomes necessary to vest the title in the state, whether the estate so escheated consists of real or personal property. The state, however, does not

come in by way of succession; but, in the event of the absence of all who are entitled to come in by succession, whether the property be real or personal, it goes to the state by escheat: *Estate of Miner*, 143 Cal. 194; 76 Pac. Rep. 968. The state cannot maintain a claim to an estate, by way of escheat or otherwise, if the next of kin show their right to inherit, as it is not the policy of the state to absorb private property, if the legal heirs of a decedent are discovered: *In re Sullivan's Estate* (Wash.), 94 Pac. Rep. 483, 486. The state has power, through the instrumentality of a statute, to prevent an unjust escheat to it, by validating an unattested will: *Estate of Sticknoth*, 7 Nev. 223, 229.

REFERENCES.

Property and estate escheat to the state when: See note *Kerr's Cal. Cyc. Civ. Code*, § 1406. Property escheated is subject to charges, as other property: See note *Kerr's Cal. Cyc. Civ. Code*, § 1407. Escheat: See note 12 L. B. A. 529-533.

2. Jurisdiction. Probate courts. Determining whether property has escheated to the state, and deciding the questions involved in such a proceeding, constitute no part of the ordinary duties of a probate court; but the statute provides a method of procedure by which it may be judicially determined that the property of an intestate dying without heirs has escheated to the state. Any proceeding, however, commenced for that purpose must necessarily be in subordination to the rules of law essential to the orderly administration of justice. And the escheat law does not undertake to interfere in any way with the jurisdiction of courts in probate matters. It nowhere provides that the filing of an information in one court to escheat personal property of the decedent will oust another court of a previously acquired jurisdiction to settle the estate of the deceased, or vest in one court the right to determine questions which, by law, belong exclusively to another court. A circuit court would therefore have no authority to make an order requiring those found by a county court to be the heirs of decedent to turn over to a receiver in escheat proceedings the property distributed to them by an administrator under direction of the county court: *State v. O'Day*, 41 Or. 495; 69 Pac. Rep. 542, 545. The decree of a probate court, that the affairs of an estate have been finally settled, and that there are no heirs, or other claimants thereof, and ordering that "the county treasurer of this city and county forthwith pay into the state treasury all moneys and effects in his hands belonging to said estate," does not have the effect of a judgment so as to vest the title in the state, ipso facto, and without the necessity of an action in the nature of an escheat: *Estate of Miner*, 143 Cal. 194, 196; 76 Pac. Rep. 968. After an allotment to a non-resident minor heir at law of the intestate, a probate court has no power to direct that such share shall, in case of the non-resident heir's failure to

appear and claim it within a year, be distributed among the other heirs: *Pyatt v. Brockman*, 6 Cal. 418.

3. Property of outlawed corporations. It was not the intention of the statute of Idaho, passed in 1903, and relating to corporations which failed to comply with the requirements thereof, to provide for or to declare a legislative forfeiture of previously acquired titles, and the act contained no provision for a judicial determination of forfeiture; but if a forfeiture had been intended, and had actually taken place, the property of the corporation, where it failed to comply with the law, would have escheated to the state, subject to the payments of the debts of the corporation, and not to any private party; and such escheat or forfeiture could not avail one who could not claim his title from or through the state, but claims title from the general government: *War Eagle etc. Min. Co. v. Dickie* (Ida.), 94 Pac. Rep. 1034, 1036.

4. Land of Mormon Church. Under section 3 of the act of Congress of July 1, 1862, which act was intended to affect only the rights and interests of the Mormon Church in Utah, and which declared that all real estate acquired or held in any territory of the United States by any corporation or association for religious or charitable purposes of greater value than fifty thousand dollars should be forfeited and escheated to the United States, but which section provided that the existing vested rights in real estate should not be impaired by the provisions of the act, it is evident that it was not the intention of the government, by its legislation, to distribute, or in any manner to interfere with, any interest, whatever the nature thereof might be, which had been acquired prior to the passage of the act. The act looked to the future only. Hence the possessory rights of the several occupants, including the church, in lots of the city of Salt Lake, together with the improvements thereon at the time of the passage of the act, were preserved unimpaired, and such property was not subject to forfeiture or escheat under the provisions of the act: *United States v. Tithing Yard and Officers*, 9 Utah, 273; 34 Pac. Rep. 55.

5. Aliens. Aliens can acquire title to real property by purchase, or other act of the party, and hold the same until "office found"; that is, until an official determination of the matter by the government upon an inquisition held for that purpose. Until then no individual can question the rights of the claimant on the ground of his alienage and non-residence, either collaterally in an action of ejectment, or directly in any other way: *Ramirez v. Kent*, 2 Cal. 558; *People v. Folsom*, 5 Cal. 373; *Norris v. Hoyt*, 18 Cal. 217. At common law, an alien might take land by deed, and hold the same as against all persons whomsoever, subject only to the right of the state to claim it by escheat upon "office found," or by some other act

or procedure equivalent thereto; and until such action is taken by the state, the alien might dispose of his interest in the realty, either by conveyance or devise, and his grantees or devisees would thereupon acquire title notwithstanding his alienage. An alien could neither take nor transmit real property by descent, having no inheritable blood. If he died intestate without having made conveyance of the land acquired by deed, the same immediately vested by escheat in the state, without any inquest. An alien may purchase lands or take them by devise and hold them against all the world but the state. Nor can he be divested of his estate even by the state, until after a formal proceeding called "office found"; and, until that is done, may sell and convey or devise the land and pass a good title to the same: *Abrams v. State* (Wash.), 88 Pac. Rep. 327, 329. Though the state may declare an escheat of land conveyed to an alien while he holds it, it loses that right after he has conveyed the land to a citizen for a good and valuable consideration: *State v. World Real Estate etc. Co.* (Wash.), 89 Pac. Rep. 471. Where the statute provides that a non-resident alien, who takes by succession, must appear and claim the property within five years, and declares that no non-resident foreigner can take by succession unless he claims the property within five years, that portion of the estate to which the non-resident would be entitled if he claimed it in five years, but which he does not so claim, vests in the state, not strictly by escheat for want of heirs, but by virtue of the effect of the statute. It does not return to the estate to be distributed to the other heirs: *Estate of Pendergast*, 143 Cal. 135; 76 Pac. Rep. 962. The state may escheat the property of an alien during his life, but after his death it descends to his heirs: *Abrams v. State* (Wash.), 88 Pac. Rep. 327, 332.

REFERENCES.

Termination of right to declare escheat by death of alien or transfer in his lifetime: See note 12 L. R. A. (N. S.) 186.

6. **Premature action.** A statute requiring the alien to "appear and claim the property" relates to an appearance and claim, to be proved by acts within the state indicating that the alien asserts right to it; but a non-resident alien has a full five years within which "to appear and claim" the property. Hence a proceeding brought by the attorney-general to escheat the property of a non-resident alien is premature if instituted within five years after the death of the intestate: *State v. Smith*, 70 Cal. 153; 12 Pac. Rep. 121, 123; *People v. Roach*, 76 Cal. 294; 18 Pac. Rep. 407; *State v. Miller*, 149 Cal. 208; 85 Pac. Rep. 609.

7. **Non-resident aliens.** Under our law of succession, the title to the estate of a person dying intestate vests in the heirs, whether known or unknown, immediately upon his death. In the case of non-resident alien heirs, this title becomes barred on forfeiture, at the

end of five years from the death of the deceased, unless within that time such heir appears and claims the property. And this occurs without any judicial proceedings, and even if the heirs are well known. The resident heirs, however, are not barred, *ipso facto*, by any statutory forfeiture. They can be barred only by judgment in a proceeding by information, and then only after the lapse of twenty years from the judgment: *State v. Miller*, 149 Cal. 208; 85 Pac. Rep. 609.

8. Pleading and practice. Under a statute regulating proceedings by the attorney-general for the forfeiture of escheated estates, and providing that the information must set forth the facts in consequence of which the estate is claimed to have escheated, with an allegation that by reason thereof the state has a right to the estate, it is a sufficient allegation in an information, as against resident heirs, that there are no heirs to take the estate; and it is a sufficient allegation as to non-resident alien heirs that five years have elapsed within which no such heirs have appeared to claim the estate: *State v. Miller*, 149 Cal. 208; 85 Pac. Rep. 609. Where the statute provides that all persons named in the information, or any person claiming an interest in the estate, may appear and answer, and that if no such person does appear, judgment must be rendered that the state is the owner of the property, the failure of claimants to appear is sufficient to support a judgment of forfeiture in an escheat proceeding; and it is not necessary to offer any evidence in support of the allegation that there are no heirs: *State v. Miller*, 149 Cal. 208; 85 Pac. Rep. 609, 611. The real purpose and effect of the proceeding, with regard to unknown heirs, is, not to establish, by ordinary modes of proof, the known existence of heirs, but merely to make a statutory, *prima facie* showing of failure of heirs, in order to start the running, as against such known appearing heirs, of the period of twenty years after which such heirs will be barred, if not under legal disability; otherwise, within five years after such disability ceases: *State v. Miller*, 149 Cal. 208; 85 Pac. Rep. 609, 611. Where the state has no right whatever in the land at the time of the commencement of an action, and this is shown by its answer in intervention, such answer does not state a cause of action to escheat the lands to the state: *State v. Ellis* (Kan.), 79 Pac. Rep. 1066, 1133. Although an information alleging the escheat of the estate of an intestate contains an averment that the estate is being badly managed by the administrator, the court has no power to compel the administrator to turn over the personal estate to a receiver that has been appointed by the court. The statute relating to escheats nowhere contemplates, even when a receiver is appointed, that he shall be the custodian of the estate beyond the realty, and rents and profits thereof, but expressly provides that the administrator shall proceed to settle the estate as in other cases: *Territory v. Forrest*, 1 Ariz. 49; 25 Pac. Rep. 527.

9. Judgments. Escheat proceedings should not be commenced, or if commenced, should not be adjudicated, until the administration of the estate has been concluded, and the debts and liabilities of the estate, and the costs and expenses of administration, have been paid: *State v. Simmons*, 46 Or. 159; 79 Pac. Rep. 498. A statute authorizing the attorney-general to institute an investigation for the recovery of property which has escheated, or should escheat, to the state, and giving him full power and authority to cite any and all persons before any of the superior courts of the state to answer investigations, and to render accounts concerning said property, real or personal, and to examine books and papers of any and all corporations, contemplates no other judgment as the result of the investigation for discovery than an adjudication or declaration that the person cited has or has not fully answered all questions propounded to him; has, if ordered to render any, rendered full, true, and just accounts; and if so ordered, has submitted all his books and papers, without concealment: *People v. Hibernia Sav. & L. Soc.*, 72 Cal. 21; 13 Pac. Rep. 48, 50. A judgment that an administrator deliver the property involved to the sheriff cannot be rendered until the state alleges and shows, and the court finds, that all claims and demands against the estate, and all costs and expenses of administration, have been fully paid and discharged, and that the estate has been settled. Any other rule would lead to conflict of jurisdiction and confusion: *State v. Simmons*, 46 Or. 159; 79 Pac. Rep. 498. A statutory provision for a trial must be taken to refer solely to the issue between the claimant and the state concerning the share claimed by such person, and not to the right of the state against persons not appearing. The meaning and effect of such a statute is, that if, on the trial of such issue, the proof shows that the claimant is not an heir, nor entitled to the estate, or some share thereof, then such claimant must fail, and judgment must thereupon go in favor of the state, for the whole of the property described, although there may be no proof of the non-residence of heirs, other than the constructive proof afforded by the fact that no heir or person entitled has appeared. If the statute is silent in regard to the effect of a finding that the person appearing is entitled to a part of the estate, it is obvious that, in such event, there should be a judgment in his favor for such share: *State v. Miller*, 149 Cal. 208; 85 Pac. Rep. 609. If no person appear and answer within the time prescribed by the statute, then judgment must be rendered that the state be seised of the property claimed in the information: *State v. Miller*, 149 Cal. 208; 85 Pac. Rep. 609.

10. Limitation of actions. The twenty-year limitation prescribed by statute within which to file a petition to determine one's right to escheated property is exclusive, and no reference need be made to the limitations prescribed for ordinary actions: *In re Pomeroy's Petition*, 33 Mont. 69; 81 Pac. Rep. 629.

11. **Recovery of escheated property, and proceedings therefor.** Where the object of an action is to identify the petitioners as the heirs of the intestate, and to entitle them to recover money escheated to the state, it indicates a legal inquiry for which the proceeding was instituted, and which courts of law are competent to try. The proceeding, therefore, is one at law: *Fenstermacher v. State*, 19 Or. 504; 25 Pac. Rep. 142. In an action against the state to recover escheated property of a person who died intestate, and without known heirs, declarations of the deceased concerning his past life and history are, *ex necessitate*, and as a matter of common sense, admissible to identify him as a relative of plaintiff. If they were not admitted, there would be, in many cases, a failure of justice: *Young v. State*, 36 Or. 417; 59 Pac. Rep. 812. In an action to recover the proceeds of escheated property, it is proper to deduct from the fund the total expense of the state in defending and preserving it, including the fees of special counsel employed by the state: *Young v. State*, 36 Or. 417; 59 Pac. Rep. 812, 814. In an action to recover the proceeds of escheated property, the court has authority to deduct from the fund the total expense of the state in defending it, although the answer of the state to the petition is defective because it does not allege that any expense had been incurred: *Young v. State*, 36 Or. 417; 58 Pac. Rep. 812, 814. In an action against the state to recover the proceeds of escheated lands, the claimant, on recovering a judgment therefor, from which the state appeals, is not entitled to interest on the sum allowed from the time of the demand until the judgment is affirmed. And if, on the trial of such an action, the court grants an extra allowance as attorneys' fees, such allowance will not be increased on appeal, in the absence of a showing as to the reasonable value of the services performed: *Young v. State*, 36 Or. 417; 60 Pac. Rep. 711. In Montana, property reduced to possession by the state in escheat proceedings, prior to the enactment of the Code of Civil Procedure, cannot be recovered by the heir in a proceeding under such code: *In re Pomeroy's Petition*, 33 Mont. 69; 81 Pac. Rep. 629. A statute which grants the right of succession to aliens, and provides a mode by which non-resident aliens may be compensated out of the treasury of the state for property of their ancestor which has been converted, and the proceeds of which have been paid to the state treasurer, has no application to a case in which a citizen of the United States appears as a claimant: *In re Pomeroy's Petition*, 33 Mont. 69; 81 Pac. Rep. 629, 630.

REFERENCES.

Proceedings to escheat property to state: See note *Kerr's Cal. Cyc. Code Civ. Proc.*, §§ 1269-1272. Proceedings against defaulters having money or property belonging to the state, by escheat or otherwise: See *Kerr's Cal. Cyc. Pol. Code*, § 437, and notes.

PART II.

GUARDIAN AND WARD.

CHAPTER I.

GUARDIANSHIP OF MINORS.

- § 52. Guardian, what.
- § 53. Ward, what.
- § 54. Kinds of guardians.
- § 55. General guardian, what.
- § 56. Special guardian, what.
- § 57. Appointment by will.
- § 58. Awarding custody. Appointment of general guardian.
- § 59. Form. Petition for writ of habeas corpus for detention of child.
- § 60. Form. Writ of habeas corpus.
- § 61. Form. Return to writ of habeas corpus.
- § 62. Relation confidential.
- § 63. Guardian is under direction of court.
- § 64. Death of a joint guardian.
- § 65. Removal of guardian.
- § 66. Guardian appointed by parent, how superseded.
- § 67. Suspension of power of guardian.
- § 68. Release by ward.
- § 69. Guardian's discharge.

MINORS, AND THEIR CUSTODY. GUARDIANS, COMMITMENT, AND HABEAS CORPUS.

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| <ul style="list-style-type: none"> 1. Kinds of guardians. 2. Guardian ad litem. <ul style="list-style-type: none"> (1) Who is, virtually. (2) Application of statutes. (3) Appointment, and duty of court. (4) No presumption as to appointment. (5) Validity of appointment. (6) Appearance for ward. Waiver of notice. | <ul style="list-style-type: none"> (7) Appeal. Affirmance of judgment. 3. Testamentary guardian. <ul style="list-style-type: none"> (1) Guardian appointed by deed is. (2) Mother's incapacity to appointment. (3) Mother's consent to father's appointment. (4) Powers of. Validity of acts. 4. Commitment of infants. |
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| 5. Habeas corpus for custody of children. | (6) Attacking adoption proceedings. |
| (1) Nature of proceeding. | (7) Attacking guardianship proceedings. |
| (2) Jurisdiction of courts. Temporary order. | (8) Discharge and dismissal of writ. |
| (3) What matters, only, will be considered. | (9) Former adjudication as res judicata. |
| (4) Welfare of infant controls. | (10) Writ of prohibition. |
| (5) Awarding child to proper custody. | (11) Appeal. |

§ 52. **Guardian, what.** A guardian is a person appointed to take care of the person or property of another. **Kerr's Cyc. Civ. Code, § 236.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 330.

North Dakota.* Rev. Codes 1905, § 4119.

Oklahoma.* Rev. Stats. 1903, sec. 3808.

South Dakota.* Civ. Code 1904, § 139.

§ 53. **Ward, what.** The person over whom or over whose property a guardian is appointed is called his ward. **Kerr's Cyc. Civ. Code, § 237.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 331.

North Dakota.* Rev. Codes 1905, § 4120.

Oklahoma.* Rev. Stats. 1903, sec. 3809.

South Dakota.* Civ. Code 1904, § 140.

§ 54. **Kinds of guardians.** Guardians are either: 1. General; or, 2. Special. **Kerr's Cyc. Civ. Code, § 238.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 332.

North Dakota.* Rev. Codes 1905, § 4121.

Oklahoma.* Rev. Stats. 1903, sec. 3810.

South Dakota.* Civ. Code 1904, § 141.

§ 55. **General guardian, what.** A general guardian is a guardian of the person, or of all the property of the ward within this state, or of both. **Kerr's Cyc. Civ. Code, § 239.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1965.**Montana.*** Civ. Code, sec. 333.**North Dakota.*** Rev. Codes 1905, § 4122.**Oklahoma.*** Rev. Stats. 1903, sec. 3811.**South Dakota.*** Probate Code 1904, § 142.**Utah.** Rev. Stats. 1898, sec. 3983.

§ 56. **Special guardian, what.** Every other is a special guardian. **Kerr's Cyc. Civ. Code, § 240.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1966.**Montana.*** Civ. Code, sec. 334.**North Dakota.*** Rev. Codes 1905, § 4123.**Oklahoma.*** Rev. Stats. 1903, sec. 3812.**South Dakota.*** Civ. Code 1904, § 143.**Utah.** Rev. Stats. 1898, sec. 3983.

§ 57. **Appointment by will.** A guardian of the person or estate, or of both, of a child born, or likely to be born, may be appointed by will or by deed, to take effect upon the death of the parent appointing:

1. If the child be legitimate, by the father, with the written consent of the mother; or by either parent, if the other be dead or incapable of consent.

2. If the child be illegitimate, by the mother. **Kerr's Cyc. Civ. Code, § 241.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 892, p. 329.**Arizona.*** Rev. Stats. 1901, par. 1967.**Colorado.** 3 Mills's Ann. Stats., sec. 2090.**Idaho.*** Code Civ. Proc. 1901, sec. 4350.**Kansas.** Gen. Stats. 1905, § 3402.**Montana.*** Civ. Code, sec. 335.**New Mexico.** Comp. Laws 1897, sec. 1439.**North Dakota.*** Rev. Codes 1905, § 4124.**Oklahoma.*** Rev. Stats. 1903, sec. 3813.**Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5264.**South Dakota.*** Civ. Code 1904, § 144.**Utah.** Rev. Stats. 1898, sec. 3984.**Washington.** Pierce's Code, § 2745.

§ 58. Awarding custody. Appointment of general guardian. In awarding the custody of a minor, or in appointing a general guardian, the court or officer is to be guided by the following considerations:

1. By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; and if the child is of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question;

2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father;

3. Of two persons equally entitled to the custody in other respects, preference is to be given as follows:

(1) To a parent;

(2) To one who was indicated by the wishes of a deceased parent;

(3) To one who already stands in the position of a trustee of a fund to be applied to the child's support;

(4) To a relative.

4. Any parent who knowingly or wilfully abandons, or having the ability so to do, fails to maintain his minor child under the age of fourteen years, forfeits the guardianship of such child; and any parent or guardian who knowingly permits his child or ward to remain for the space of one year in any orphan asylum of this state, wherein such child is supported by charity, and who, during such period, fails to give notice in writing to the managers or officers of such asylum that he is such parent or guardian, abandons and forever forfeits all right to the guardianship, care, custody, and control of such child. The officers and managers of any orphan asylum having any such abandoned child in its care have the preferred right to the guardianship of such child. **Kerr's Cyc. Civ. Code, § 246.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1972.**Colorado.** 3 Mills's Ann. Stats., sec. 2090.**Montana.** Civ. Code, sec. 340.**North Dakota.** Rev. Codes 1905, §§ 4129, 4130.**Oklahoma.** Rev. Stats. 1903, secs. 3818, 3819.**South Dakota.** Civ. Code 1904, §§ 149, 150.**Utah.** Rev. Stats. 1898, sec. 3995.**§ 59. Form. Petition for writ of habeas corpus for detention of child.**

[Title of court.]

[Title of matter.]¹{ Department No. ____
[Title of form.]To the Honorable ____, Judge of the ____ Court of the
County² of ____, State of ____.

The petition of ____, the undersigned, respectfully shows:

That the petitioner is a resident of the county³ of ____,
state of ____; that he resides in the town⁴ of ____; and
that he is engaged in the business of ____, in said town;⁵That on the ____ day of ____, 19____, said petitioner was
married to ____, at ____, in the county⁶ of ____, state
of ____, and that on the ____ day of ____, 19____, a child,
namely, ____,⁷ was born as the issue of such marriage;That on the ____ day of ____, 19____, the said child was
taken from the custody of your petitioner, its father, ____;⁸
that said child is an infant of tender years; and that it is
now unlawfully imprisoned, detained, confined, and re-
strained of its liberty by ____,⁹ at ____,¹⁰ in the county¹¹
of ____, state of ____;That said infant has not been committed, nor is it de-
tained by virtue of any process or mandate issued by any
court of the United States, or of any judge thereof, nor is
it committed or detained by virtue of the final judgment or
decree of a competent tribunal of civil or criminal jurisdic-
tion, or the final order of such a tribunal, made in a special
proceeding instituted for any cause, nor by virtue of an
execution or other process issued upon such a judgment,
decree, or final order, according to the best knowledge or
belief of your petitioner;

That the imprisonment and restraint of said infant is illegal; and that the illegality thereof consists in this, to wit:¹²

That your petitioner is entitled by law to the absolute and exclusive control of the said child;

That your petitioner is a fit and proper person to have the care, custody, and control of said child, and is pecuniarily able to provide for its support, maintenance, and education; but that the said — is financially unable to suitably provide for the support, maintenance, and education of said child;

That no previous application has been made by me for a writ of habeas corpus to secure the custody of such child.

Wherefore your petitioner prays that a writ of habeas corpus issue to the said —, commanding her¹³ to produce my said child, —, before your honor, at a time and place therein to be specified, together with the cause of its imprisonment and restraint; and that your honor make an order herein awarding to me the custody of my said child, and for such other and further relief as to your honor may seem just and proper. And your petitioner will ever pray, etc. —, Petitioner.

[Add ordinary verification.]

Explanatory notes. 1. As, "In the Matter of the Application of — for a Writ of Habeas Corpus, for the Custody of —, an Infant." 2, 3. Or, city and county. 4, 5. Or as the case may be. 6. Or, city and county. 7. Give its name. 8. State how, in detail. 9, 10. State by whom, and the place where, naming all the parties, if they are known, or describing them, if they are not known. 11. Or, city and county. 12. That the father has been deprived of his lawful custody of the child without his consent; that it is his duty to care for it; and that the child, where it is, is subjected to unfit, improper, and harmful influences, etc. 13. Or as the case may be.

§ 60. Form. Writ of habeas corpus.

[Title of court.]

[Title of matter.]¹

{ No. —.² Dept. No. —
[Title of form.]

The People of the State of —.

To —,³ Greeting.

We command you, That you have the body of —,⁴ by you imprisoned, detained, and restrained, as it is alleged,

by whatsoever name said _____⁵ shall be called or charged, before _____,⁶ judge of the _____ court of _____ county,⁷ state of _____, at the court-room of said court, at _____,⁸ in said county⁹ and state, on the _____ day of _____, 19____, at _____ o'clock, in the afternoon¹⁰ of that day, to do and receive what shall then and there be considered concerning the said _____;¹¹ and have you then and there this writ.

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. As, "In the Matter," etc. 2. Give file number. 3. Name of respondent, and residence. 4. 5. Name the infant. 6. Name of judge. 7. Or, city and county. 8. Give location of court-room. 9. Or, city and county. 10. Or as the case may be. 11. Name of infant.

§ 61. Form. Return to writ of habeas corpus.

[Title of court.]

[Title of matter.]¹

{ No. _____² Dept. No. _____
[Title of form.]

In obedience to the writ of habeas corpus issued herein, and directed to me, I, the undersigned, hereby certify and make return as follows, to wit:

I admit the marriage, and the birth of the child, as stated in the petition for said writ; but I deny that petitioner is entitled by law to the absolute and exclusive control of said child; and deny that it is illegally imprisoned, detained, or restrained of its liberty; and deny that, by reason of my custody thereof, it is subjected to unfit, improper, or harmful influences.

I admit that said child is of tender years; but allege that I am its mother, and that said child is of that tender age at which the care and control of a mother is especially needed.³

Wherefore your respondent prays that the said writ of habeas corpus be dismissed. _____

Dated _____, 19____.

[Add ordinary verification.]

Explanatory notes. 1. As, "In the Matter," etc. 2. Give file number. 3. State reasons, in detail, and in separate paragraphs, why the child should remain where it is; the financial ability of its custodians to provide for its maintenance, support, and education; reasons why

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the child's father should not have its custody; and any other facts showing that the welfare of the child will be promoted by leaving it in respondent's custody. Or, if the custody is denied, say: "In obedience to the within [or annexed] writ, I certify and return that neither at the time of the allowance of said writ, nor at any time since, has the said — been in my custody; that at no time have I imprisoned the said —, or restrained him of his liberty; and that he is not now imprisoned or restrained by me; wherefore I cannot have his body before the judge of the court, as by said writ I am commanded."

§ 62. Relation confidential. The relation of guardian and ward is confidential, and is subject to the provisions of the title on trust. **Kerr's Cyc. Civ. Code, § 250.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1976.
- Montana.*** Civ. Code, sec. 344.
- North Dakota.*** Rev. Codes 1905, § 4134.
- Oklahoma.** Rev. Stats. 1903, sec. 3823.
- South Dakota.** Civ. Code 1904, § 154.

§ 63. Guardian is under direction of court. In the management and disposition of the person or property committed to him, a guardian may be regulated and controlled by the court. **Kerr's Cyc. Civ. Code, § 251.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.** Rev. Stats. 1901, par. 1977.
- Kansas.** Gen. Stats. 1905, § 4157.
- Montana.*** Civ. Code, sec. 345.
- North Dakota.*** Rev. Codes 1905, § 4135.
- Oklahoma.*** Rev. Stats. 1903, sec. 3824.
- South Dakota.*** Civ. Code 1904, § 155.

§ 64. Death of a joint guardian. On the death of one of two or more joint guardians, the power continues to the survivor, until a further appointment is made by the court. **Kerr's Cyc. Civ. Code, § 252.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1978.
- Montana.*** Civ. Code, sec. 346.

North Dakota.* Rev. Codes 1905, § 4136.

Oklahoma. Rev. Stats. 1903, sec. 3825.

South Dakota.* Civ. Code 1904, § 156.

Utah. Rev. Stats. 1898, sec. 3987.

§ 65. **Removal of guardian.** A guardian may be removed by the superior court for any of the following causes:

1. For abuse of his trust;
2. For continued failure to perform its [his] duties;
3. For incapacity to perform its [his] duties;
4. For gross immorality;
5. For having an interest adverse to the faithful performance of his duties;
6. For removal from the state;
7. In the case of a guardian of the property, for insolvency; or,
8. When it is no longer proper that the ward should be under guardianship. **Kerr's Cyc. Civ. Code, § 253.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1979.

Montana.* Civ. Code, sec. 347.

North Dakota.* Rev. Codes 1905, § 4137.

Oklahoma.* Rev. Stats. 1903, sec. 3826.

South Dakota.* Civ. Code 1904, § 157.

Utah. Rev. Stats. 1898, sec. 3991.

§ 66. **Guardian appointed by parent, how superseded.** The power of a guardian appointed by a parent is superseded:

1. By his removal, as provided by section two hundred and fifty-three;
2. By solemnized marriage of the ward; or,
3. By the ward's attaining majority. **Kerr's Cyc. Civ. Code, § 254.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1980.

Montana.* Civ. Code, sec. 348.

North Dakota.* Rev. Codes 1905, § 4138.

Oklahoma.* Rev. Stats. 1903, sec. 3827.

South Dakota.* Civ. Code 1904, § 158.

Utah. Rev. Stats. 1898, sec. 3996.

§ 67. **Suspension of power of guardian.** The power of a guardian appointed by a court, is suspended only:

1. By order of the court; or,
2. If the appointment was made solely because of the ward's minority, by his attaining majority; or,
3. The guardianship over the person of the ward, by the marriage of the ward. **Kerr's Cyc. Civ. Code, § 255.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 1981.

Montana.* Civ. Code, sec. 349.

North Dakota.* Rev. Codes 1905, § 4139.

Oklahoma.* Rev. Stats. 1903, sec. 3828.

South Dakota.* Civ. Code 1904, § 159.

§ 68. **Release by ward.** After a ward has come to his majority, he may settle accounts with his guardian, and give him a release, which is valid if obtained fairly and without undue influence. **Kerr's Cyc. Civ. Code, § 256.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 350.

North Dakota.* Rev. Codes 1905, § 4140.

Oklahoma.* Rev. Stats. 1903, sec. 3829.

South Dakota.* Civ. Code 1904, § 160.

Utah.* Rev. Stats. 1898, sec. 3997.

§ 69. **Guardian's discharge.** A guardian appointed by a court is not entitled to his discharge until one year after the ward's majority. **Kerr's Cyc. Civ. Code, § 257.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 351.

North Dakota.* Rev. Codes 1905, § 4141.

Oklahoma.* Rev. Stats. 1903, sec. 3830.

South Dakota.* Civ. Code 1904, § 161.

Utah.* Rev. Stats. 1898, sec. 3998.

MINORS AND THEIR CUSTODY. GUARDIANS, COMMITMENT, AND HABEAS CORPUS.

- | | |
|---|--|
| 1. Kinds of guardians.
2. Guardian ad litem. <ol style="list-style-type: none"> (1) Who is, virtually. (2) Application of statutes. (3) Appointment, and duty of court. (4) No presumption as to appointment. (5) Validity of appointment. (6) Appearance for ward. Waiver of notice. (7) Appeal. Affirmance of judgment. 3. Testamentary guardian. <ol style="list-style-type: none"> (1) Guardian appointed by deed is. (2) Mother's incapacity to appoint. (3) Mother's consent to father's appointment. (4) Powers of. Validity of acts. | 4. Commitment of infants.
5. Habeas corpus for custody of children. <ol style="list-style-type: none"> (1) Nature of proceeding. (2) Jurisdiction of courts. Temporary order. (3) What matters, only, will be considered. (4) Welfare of infant controls. (5) Awarding child to proper custody. (6) Attacking adoption proceedings. (7) Attacking guardianship proceedings. (8) Discharge and dismissal of writ. (9) Former adjudication as res judicata. (10) Writ of prohibition. (11) Appeal. |
|---|--|

1. Kinds of guardians. At common law there were four kinds of guardians, namely: 1. By nature; 2. For nurture; 3. In socage; and 4. In chivalry: *Lord v. Hough*, 37 Cal. 657, 660. But, here, guardians are either general or special; a general guardian, in this state, being a guardian of the person, or of all the property of the ward, or both; and every other being a special guardian: See Civil Code of California, §§ 238, 239, 240. The guardianship by nature extends only to the custody of the person of the ward, and not to his property. To entitle the guardian to manage the property of his ward, he must be duly appointed by some competent authority. So guardianship by nurture extends only to the person, and determines when the infant arrives at the age of fourteen: *Kendall v. Miller*, 9 Cal. 591, 592. If a father abandon his child under the age of fourteen, he forfeits his guardianship, and can no longer claim custody of the child: *In re Vance*, 92 Cal. 195; 28 Pac. Rep. 229. One who wrongfully intermeddles with the property of an infant is sometimes held by equity as a guardian, but only, as in the case of an administrator de son tort, for the purpose of accounting; he acquires none of the rights of a guardian: *Aldrich v. Willis*, 55 Cal. 81, 85.

2. Guardian ad litem.

(1) **Who is, virtually.** One who has been appointed by a probate judge as an attorney for minor defendants, after service of citation,

to represent the minors upon a contest as to the validity of a will, is virtually a guardian ad litem, although he is not called by that name: *Carpenter v. Superior Court*, 75 Cal. 596, 600; 19 Pac. Rep. 174.

(2) **Application of statutes.** Provisions of the statute on parties to civil actions, in relation to guardians ad litem for minor defendants, do not apply to probate proceedings. For some purposes, probate proceedings are not "civil actions." So far as the appointment of an attorney to "represent" the minor is concerned, that matter is governed by the special proceedings providing for such appointment: *Carpenter v. Superior Court*, 75 Cal. 596, 599; 19 Pac. Rep. 174. The courts of probate of the territory of Hawaii, in the matter of the care and supervision of the estate of minors, possess, except as modified by statute, all the powers which the court of chancery in England possessed under the common law: *Hoare v. Allen*, 13 Haw. 257, 262.

(3) **Appointment, and duty of court.** The law in relation to the appointment of a general guardian does not interfere with the power of the court to appoint a guardian ad litem: *Hydoman v. Stowe*, 9 Utah, 23; 33 Pac. Rep. 227, 229; and where a minor heir has no guardian, it becomes the duty of the court, before proceeding to act, to appoint some disinterested person as guardian, for the sole purpose of appearing for him and to take care of his interests: *Townsend v. Tallant*, 33 Cal. 45, 52; 91 Am. Dec. 620; but a guardian ad litem should not be allowed to admit away the rights of his ward: *Waterman v. Lawrence*, 19 Cal. 210, 217. It is the duty of the court to protect the rights of an infant, although he appears by a guardian ad litem, and no pleading by the guardian, which has the effect of surrendering the infant's rights, or of prejudicing his interests, should be permitted or considered; especially where it is not only subversive of all his interest, but is not necessary to the presentation and protection of any of his rights: *Seaton v. Tohill*, 11 Col. App. 211; 53 Pac. Rep. 170, 172. In determining whether a guardian ad litem was appointed for an infant, the court will not go outside of the record: *Batchelder v. Baker*, 79 Cal. 266; 21 Pac. Rep. 754. It is not necessary that there should be a new guardian ad litem every time a pleading is amended: *Carpenter v. Superior Court*, 75 Cal. 596, 600; 19 Pac. Rep. 174. The probate court has no authority to appoint attorneys for absent or minor heirs. Where the administrator applies for leave to sell lands to pay debts, and there are minor heirs with no general guardian, a guardian ad litem, and not an attorney, must be appointed for the sole purpose of representing the minor heirs, before action can be taken upon such petition: *Townsend v. Tallant*, 33 Cal. 45, 52; 91 Am. Dec. 620. A court of law has no authority, in the absence of statute, to allow fees, in the nature of counsel fees, to guardians ad litem to be paid by the opposite party: *Allen v. Lucas*, 15 Haw. 52, 56.

(4) **No presumption as to appointment.** Where there is a petition for leave to sell real estate, and there are minor heirs with no general guardian, it is the duty of the court to appoint a guardian to represent them before the petition shall have been acted on; and if the record fails to show that a guardian ad litem was appointed, it will not be presumed that such a guardian was appointed: *Townsend v. Tallant*, 33 Cal. 45, 52; 91 Am. Dec. 617.

(5) **Validity of appointment.** If a court appoints a guardian ad litem of a minor sixteen years of age, upon the application of the guardian alone, and the minor does not exercise, and is not given an opportunity to exercise, his right of nomination, the order is erroneous, but not void. And in such a case, if the minor, after attaining his majority, affirmed the proceedings instituted by his guardian, he thereupon becomes bound thereby, and the defect is cured: *Johnston v. Southern Pac. Co.*, 150 Cal. 535; 89 Pac. Rep. 348, 350. The provisions of the statute relating to the appointment of guardians ad litem, where infants are parties, apply only where there is no general guardian, or where he does not act. Cases frequently arise where the interests of the minors are best subserved by the special appointment of a guardian ad litem, even though he may have a general guardian. In such cases the court would make a special appointment; but where the court does not specially appoint for the particular action, the general guardian may appear, and it is his duty to appear, for his ward: *Gronfier v. Puymiol*, 19 Cal. 629, 632. The two positions — that of administrator and that of guardian of an infant heir — are not necessarily incompatible, so far as general uses are concerned; but where the administrator seeks to divest the title of the heir by a sale under an order of court, his position is hostile to the heir, and he cannot represent the heir, but a guardian ad litem should be appointed for the sole purpose of appearing for the heir and of taking care of his interests: *Townsend v. Tallant*, 33 Cal. 45, 52; 91 Am. Dec. 620.

REFERENCES.

Rights, powers, and duties of guardians ad litem and next friends of infants: See note 97 Am. St. Rep. 995-1006.

(6) **Appearance for ward. Waiver of notice.** If a father appears as guardian for his minor children, without having qualified, and defends an action against them with respect to their separate property, the minors, though legally served, are not bound by the proceedings. A nunc pro tunc order appointing him their guardian before judgment rendered against them is unauthorized, and the minors would not be bound by the judgment. The court will, in its discretion, make any such order in favor of a minor not violative of the established principles of law, but the court will not indulge in any presumption against minors, where it is sought to divest

them of their title to property, and they are left without lawful defense or representation, due to the failure on the part of the plaintiff's counsel and the court to see to it that they were represented. It is not for the court to say, after the trial is over, and when the judge is about to announce judgment taking from them the property left them by their mother, that the father, whom the judge was about to convict of fraud and wrong-doing, had given the minors the defense the case deserved and the real facts warranted: *Power v. Lenoir*, 22 Mont. 169; 56 Pac. Rep. 106, 111. In partition proceedings a ward must appear by his guardian ad litem, and not by his general guardian: *Saville v. Saville*, 63 Kan. 861; 66 Pac. Rep. 1043, 1045. It is only when a person is a party that the court has jurisdiction to appoint a guardian ad litem: *Boyd v. Dodson*, 66 Cal. 360; 5 Pac. Rep. 617. If the appointment is made on the day set for trial, and the guardian ad litem appears specially, objecting to proceed with the trial, on the ground that he has not had time to prepare for trial, and the case is adjourned three days by order of court, without objection, such appearance is a waiver of the statutory five-day notice of the setting of the case for trial: *Granger v. Sheriff*, 133 Cal. 146; 65 Pac. Rep. 873. The power to appoint a *procchein ami*, like the power to appoint a guardian ad litem, is inherent in every court. In the territory of Hawaii a district magistrate may permit the next friend of an infant to bring an action for him in such court. It may be better practice to obtain a formal order admitting the next friend to prosecute, but this is not absolutely essential. It is sufficient if the court recognizes the next friend and does not dissent. The main thing is to have the leave or sanction of the court: *Ahin v. District Magistrate*, 11 Haw. 279, 281.

(7) **Appeal. Affirmance of judgment.** Where an action was commenced in the name of a minor by her mother, designated in the title as "guardian," the judgment will be affirmed, though no appointment as guardian was alleged or proved. The mother, being the ward's natural guardian, and having assumed all the duties and liabilities, became subject to all the obligations and restraints of a next friend; and the action being for the benefit of the infant, the mother was substantially such a next friend, so far as the conduct of the case was concerned, as if she had been so described. The court will not overturn a verdict and judgment for lack of a formality in name which could have been supplied, if necessary, at any time before or after judgment: *Abbott v. Abbott*, 68 Kan. 824; 75 Pac. Rep. 1041.

3. Testamentary guardian.

(1) **Guardian appointed by deed is.** A guardian appointed by deed must be held to be a testamentary guardian, as such appoint-

ment cannot take effect until the death of the parent; but, to become such a guardian, he must qualify by giving a bond; it is not enough that he be named in the deed as guardian: *Murphy v. Superior Court*, 84 Cal. 592, 596, 597; 24 Pac. Rep. 310.

REFERENCES.

Right to appoint testamentary guardian: See note 2 L. R. A. (N. S.) 203, 204.

(2) **Mother's incapacity to appoint.** The common law did not recognize the rights of a testator to appoint a guardian for his children during their minority. While it made various provisions for the care of infants, and their estates, the right to make a testamentary disposition of the guardianship of the children was denied or withheld. It was years after the power to dispose of his property by will had been established by various statutes that the right to make a testamentary disposition of the guardianship of his minor children was conferred. This right was given by the statute of 12 Car., c. 24, and, by the words of that act, the father, only, can appoint the guardian or guardians, who shall have the custody of his children, and the control of their estates, during minority. The power thus conferred, when exercised to its fullest extent, invested the testamentary guardian with an authority over the children, and control of their estates, almost as coextensive as that enjoyed by the father himself. On his appointment, he supersedes all other guardians, and all control on the part of the mother. So absolute is this power, that it may be exerted in utter disregard of the claims of maternal affection, and despite its protests, and the custody of the children be committed to a stranger, and the life of the mother embittered by depriving her of the society of her offspring. It matters not how amiable and refined she may be, how competent in every respect to direct the education, and to participate, at least, in the custody of her children, the paramount right of the testamentary guardian deprives her of all right to interfere with his custody of them or their education: *Ingalls v. Campbell*, 18 Or. 461; 24 Pac. Rep. 904, 905. This statute, shorn of its verbiage, has been substantially re-enacted in Oregon. The statute did not impose upon nor recognize any civil disability in the wife, nor create any civil disability in her which did not previously exist, but was a new and added right conferred upon the mother, and left her where she was before its enactment. Hence the want of capacity in the wife to make such an appointment is not a civil disability created by statute: *Ingalls v. Campbell*, 18 Or. 461; 24 Pac. Rep. 904, 905. The result, in that state, is, that, while the mother has as full and complete control of the children and their estates at the father's death as the father has at the mother's death, yet the mother has no right to appoint a guardian: *Ingalls v. Campbell*, 18 Or. 461; 24 Pac. Rep. 904, 906.

(3) **Mother's consent to father's appointment.** The mother's consent, in writing, to the appointment, by the father, of a guardian for a minor child is required, under § 241 of the Civil Code of California, in all cases, if she is living; but her consent to a testamentary appointment may be effectually given after the father's death, as well as before. The father's appointment is ineffective before his death. There is in fact no appointment at all until the death; and it is only upon his death that her consent becomes of any importance. The appointment, if she survive, is of no effect if she dissents, and she, being the survivor, may withhold her consent, and may appoint whomsoever she chooses, or may herself apply to the court for the appointment of a guardian, under § 747 of the Code of Civil Procedure of that state. She is then in control of the entire matter, and the appointment of a testamentary guardian, made by the father, before his death, becomes valid and effectual upon the death of the father and the subsequent written consent of the mother: *Guardianship of Estate of Baker*, 35 Cal. Dec. 505, 507 (May 12, 1908).

REFERENCES.

Effect of attempt by father to appoint a guardian for his child against the surviving mother: See note 13 L. R. A. (N. S.) 288-294.

(4) **Powers of. Validity of acts.** Under the statute of California, the power to appoint guardians is vested, — 1. In the father; 2. In the mother; and 3. In the probate court. But a testamentary guardian has only the powers of the probate guardian, and the powers of a guardian, by whomsoever appointed, are the same, except as modified, in the case of a testamentary guardian, by the will in which he has been appointed. A testator may make such special and lawful directions as he may see proper to give with reference to the education of a minor, his settlement in life, or the management of his estate; but the testamentary guardian cannot take the personal custody of the ward so long as there is a mother who is competent, willing, and worthy to have the custody and tuition of her child: *Lord v. Hough*, 37 Cal. 657, 669. There is no necessity for the issuance of any letters of guardianship to authorize a testamentary guardian to act. His authority comes directly from the will: *Norris v. Harris*, 15 Cal. 226, 256. A guardian appointed by deed is not estopped from questioning the validity of his own appointment on the ground that he never gave a bond, if he has received nothing under the appointment, and has never acted as guardian: *Murphy v. Superior Court*, 84 Cal. 592; 24 Pac. Rep. 310. Where a testamentary guardian for minor children is named by the last will and testament of a decedent, and there is reasonable ground to believe that the will is valid and legal, a general guardian of the minors is justified in incurring the expenses necessary in resisting a contest of such will, even though he should fail to establish its validity: In re

Brady, 10 Ida. 366; 79 Pac. Rep. 75. The acts of a testamentary guardian before letters are issued to him and he qualifies are void: Aldrich v. Willis, 55 Cal. 81, 85.

REFERENCES.

Appointment of guardian by will, etc.: See **Kerr's Cal. Cyc. Civ. Code**, § 241, and notes.

4. **Commitment of infants.** The probate court of Kansas has power to commit to the "State Industrial School for Girls" any girl, under a specified age, who is incorrigible and habitually disregards the commands of her father, mother, or guardian, or leads a vagrant life, or resorts to immoral places or practices, or neglects to perform labor suitable to her years and condition, or to attend school; and this power is not violative of any constitutional right: *In re Gassaway*, 70 Kan. 695; 79 Pac. Rep. 113. The superior court of California has no power to commit to a reform school a person over the age limited by statute at the time of commitment; nor is there any power in an institution to receive such person and retain him or her in custody: *Ex parte Wood* (Cal. App.), 90 Pac. Rep. 961. If the statute provides that if a minor under the age of eighteen years is accused of the commission of any crime by a grand jury, they may, in their discretion, instead of finding an indictment against him, return to the superior court that it appears to them that the accused is a fit and suitable person to be committed to the care and guardianship of a designated state institution for the reformation of minors, and that the court may thereupon order such commitment, if satisfied from the evidence that it ought to be made, such minor cannot be imprisoned as a criminal without a trial by jury; and the order of commitment of the superior court, in such a case, is void as a judgment of imprisonment, where there was no jury trial, and it is equally void as an award of guardianship, if the parents of the minor were not made parties to the proceeding: *Ex parte Becknell*, 119 Cal. 496; 51 Pac. Rep. 692. As a father cannot be deprived of his child without an adjudication by a court of competent jurisdiction that he has abandoned or deserted it, or is unfit to have its custody and control, and the mother attempts to surrender the child to a charitable institution on a void adjudication that the father has abandoned it, and without notice to or consent of the father, the proceeding is unauthorized: *State v. Wheeler*, 43 Wash. 183; 86 Pac. Rep. 394, 397. The marriage of a female minor takes her out of the class known as "children and minors," under the act providing for the commitment of "dependent" children, and makes her an adult person, so far as such act is concerned: *Ex parte Lewis*, 3 Cal. App. 738; 86 Pac. Rep. 996. A court of chancery, always jealous of the rights of wards, will interfere to ratify wrong committed against their persons or property, whether they have been in form plaintiffs or defendants

in the proceedings in which the wrong was inflicted: *Bent v. Maxwell etc. Ry. Co.*, 3 N. M. 158; 3 Pac. Rep. 721, 732. It is a commanding principle of justice, and has become one of the maxims of the law, that a minor cannot apply to his own use the beneficial part of a transaction and reject its burdens: *Peers v. McLaughlin*, 88 Cal. 294, 299; 26 Pac. Rep. 119.

5. Habeas corpus for custody of children.

(1) **Nature of proceeding.** It has long been established, that the right of custody of minor children may be litigated in habeas corpus proceedings. A proceeding by habeas corpus for the purpose of obtaining the custody of a child is, not to set the child free, but to determine whether the petitioner is entitled to its custody; and the correct view or ruling is, that the jurisdiction of the question of the custody of a child under a writ of habeas corpus is of an equitable nature, and courts are given large discretion in the matter. In cases of this character, where the controversy arises over the custody of a child, the real issue is one between private parties contesting a question of private right, under the form of habeas corpus proceedings, in which there arises no question of personal liberty. In such cases the question of personal freedom is not involved, as an infant, for humane and obvious reasons, is presumed to be in the custody of some one until it has obtained its majority. Such cases are not decided upon the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but upon the court's view of the best interests of those whose welfare requires that they be in the custody of one person or another. In such cases the question of personal freedom is not involved, except in the sense of a determination as to which custodian shall have charge of one not entitled to be freed from restraint: *Tytler v. Tytler* (Wyo.), 89 Pac. Rep. 1, 2; *In re Hamilton*, 66 Kan. 754; 71 Pac. Rep. 817; *Andrino v. Yates* (Ida.), 87 Pac. Rep. 787. In some of the earlier cases in this country, the courts were inclined to follow the common-law doctrine that the father had an absolute right to his children, superior to that of the mother and all others; but, on habeas corpus proceedings to determine the rightful and lawful custody, even in states which once followed the common-law rule, and whether the contention is between the father and mother for possession, or between the father and strangers, the question is now determined upon the more humane ground, generally recognized, that the welfare and interest of the child in controversy is the paramount question under consideration: *McKercher v. Green*, 13 Col. App. 270; 58 Pac. Rep. 406, 409. In contests between parents and third persons as to the custody by such parents, the opinion is now universal, that neither of the parties has any right that can be allowed to militate against the welfare of the infant. The real question in a case like this is, not what is the right of the father or other relatives

to the custody of the child, nor whether the right of the one is superior to that of the other, but what are the rights of the child. When, therefore, a court is asked to lend its aid to put the infant into the custody of the father, and withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant. It is an entire mistake to suppose that the court, at all events, is bound to deliver over the infant to its father, or that the latter has an absolute vested right to its custody: *McKercher v. Green*, 13 Col. App. 270; 58 Pac. Rep. 406, 409, 410.

REFERENCES.

Habeas corpus for custody of children: See notes 20 Am. Dec. 330-337; 2 Am. St. Rep. 183-187.

(2) **Jurisdiction of courts. Temporary order.** The jurisdiction of the question of the custody of a child, under a writ of habeas corpus, is of an equitable nature, and courts have large discretion in the matter: *Andrino v. Yates* (Ida.), 87 Pac. Rep. 787. In Kansas the probate courts have jurisdiction in habeas corpus cases: In *re Gassaway*, 70 Kan. 695; 79 Pac. Rep. 113; but in Idaho and Wyoming, jurisdiction of the care and custody of infant children is committed to the district courts and the judges thereof: In *re Miller*, 4 Ida. 711; 43 Pac. Rep. 870; *Tytler v. Tytler* (Wyo.), 89 Pac. Rep. 1, 2. In Idaho, the district judge at chambers has all the powers of a court in habeas corpus proceedings, and the judge may issue an order for the temporary care and custody of a person alleged to be illegally restrained of his liberty, to continue until the hearing of the determination of the writ of habeas corpus. Such order need not be issued by the clerk, under the seal of the court; the signature of the judge is sufficient. The statutes in that state, in regard to the writ of habeas corpus, must be liberally construed, with a view to effect their object and to promote justice: In *re Dolling*, 4 Ida. 715; 43 Pac. Rep. 871.

(3) **What matters, only, will be considered.** In a habeas corpus proceeding for the custody of a child, the court will, where it is possible, keep the family of the remaining members of it together, if possible, especially where there is one willing to keep the family together not only because they are the children of one of his relatives, but also because it was the wish of their dead father: *Jones v. Bowman*, 13 Wyo. 79; 77 Pac. Rep. 439, 442. The proceeding in such cases is confined within very narrow limitations, and cannot be extended to the adjudication of claims and money demands and unsettled accounts between the parties. The only jurisdiction of the court is to determine who has the better right to the custody of the child, and to decree it to such custody. It is only those matters which have a necessary connection with the question of the validity of the detention that will be considered, and all other matters will

be uniformly rejected: *Foulke v. People*, 4 Col. App. 519; 36 Pac. Rep. 640. A court, on a habeas corpus proceeding for the custody of an infant, will not give the slightest weight to the religious belief of the parties, especially where the statute of the state not only fails to make any distinction as to religious beliefs, but absolutely prohibits any distinction being made on account thereof: *Jones v. Bowman*, 13 Wyo. 79; 77 Pac. Rep. 439.

(4) **Welfare of infant controls.** The cardinal principle upon a habeas corpus proceeding is the welfare of the child, and to regard the benefit of the infant; to make the welfare of the child paramount to the claims of either parent. The court will not regard the parental right as controlling, when to do so would imperil the personal safety, morals, health, or happiness of the child. In determining this delicate and often difficult question, the court looks to the character, condition, habits, and other surroundings of claimants: *McKercher v. Green*, 13 Col. App. 270; 58 Pac. Rep. 410; *Andrino v. Yates* (Ida.), 87 Pac. Rep. 787, 789; *Jones v. Bowman*, 13 Wyo. 79; 77 Pac. Rep. 439; *Tytler v. Tytler* (Wyo.), 89 Pac. Rep. 1, 2. The practice of consulting the infant's wish is well established in such cases, not that it should control in that matter, but that the court may more wisely exercise its discretion, and may learn its feelings, its attachments, its probable welfare and contentment: *Andrino v. Yates* (Ida.), 87 Pac. Rep. 787, 789.

(5) **Awarding child to proper custody.** The right of a father with respect to his minor child is not an absolute, paramount, proprietary right or interest in or to the custody of the infant, but is in the nature of a trust reposed in him. The right to the custody of minor children is a joint one, to be enjoyed by their parents so long as the latter live together and exercise the right; but the right of the father as to the custody of his minor child being limited, he has no legal, arbitrary right to keep such child away from its mother, if the separation from her endangers its health, and especially if it is of such an age as to require a mother's care. Upon the separation of the parents, the joint right of custody is severed; it must then go to one or the other. If the parents cannot agree as to which shall have such custody, and resort to the courts to determine that question, it is clear that the court will regard the welfare of the child as the paramount consideration: *Tytler v. Tytler* (Wyo.), 89 Pac. Rep. 1, 2; and the petitioner must abide the law of the place where the question is litigated, regardless of the law of the domicile: *Tytler v. Tytler* (Wyo.), 89 Pac. Rep. 1, 2. In a contest for the custody of an infant, by a proceeding in habeas corpus, between the father and the immediate family of the deceased mother, the custody of the child will be awarded to such family, if the moral and financial qualifications of both parties are equal, but it appears that the child had never known its father, that the only member of the father's

household was his mother, about eighty years of age, and that whatever the child knew of home and its surroundings was learned from and connected with said family of the deceased mother: *McKercher v. Green*, 13 Col. App. 270; 58 Pac. Rep. 406, 410. Where the parents are living apart, and the mother has made an unauthorized attempt to surrender her child to a charitable institution, without notice to or consent of the father, the court will, on habeas corpus, award the custody of the child to the father, it appearing that he is a proper person to have it: *State v. Wheeler*, 43 Wash. 183; 86 Pac. Rep. 394, 398. The parents are the natural guardians, and prima facie are entitled to the custody, of their minor children. A verbal agreement by the father, committing his child to the care and custody of another until it shall have attained its majority, is void, and such child will be restored to its father upon a writ of habeas corpus. The authorities almost universally agree that a parol agreement by the father, placing his child in the custody of another, is revocable at any time by the father, and that, upon a habeas corpus proceeding, the child will be delivered to the father, unless considerations of the welfare of the child control: *Foulke v. People*, 4 Col. App. 519; 36 Pac. Rep. 640, 643. So where a child has been unlawfully committed to a reform school, it will be discharged, on habeas corpus, from the custody of the superintendent of the school and restored to the custody of its parents: *Ex parte Becknell*, 119 Cal. 496; 51 Pac. Rep. 692. Where the legal right of the parent is not clear, the best interests of the child will govern the decision of the court. The legal right, however, to the custody of a minor may be abandoned or forfeited by the acts or conduct of the parent, and in such a case he is equitably estopped from asserting such legal right: *Andrino v. Yates (Ida.)*, 87 Pac. Rep. 787. Where a number of white children of tender years were sent to Arizona by the New York Foundling Hospital, and such children were given to some impecunious, illiterate, and vicious half-breed Mexican Indians, but were afterwards taken from them by American residents of the locality, who cared for the same, and provided them with suitable homes, and the hospital filed its petition for a writ of habeas corpus to procure the custody of the children, the court held that neither the petitioner nor the respondents had any such legal claim as authorized it, for that reason, to award to either of the parties the care and custody of the children, but, in considering what was best to subserve the best welfare of the children, the court decided that it would be for their best interests that no change be made in their custody; and that they be left in the "changing West, the land of opportunity and hope," to grow to manhood and to womanhood, and where they would have the fullest opportunity possible for them to be judged, not upon the unfortunate condition of birth, but upon the record they themselves might make, and the character they should develop: *New York Foundling Hospital v. Gatti (Ariz.)*, 79 Pac. Rep. 231, 233, 238.

(6) **Attacking adoption proceedings.** Where a child has a mother living, and it has been adopted by another, without notice to the mother, the adoption proceedings are void, and the mother, on habeas corpus, is entitled to the custody of her child, where she is shown to be capable, worthy, and affectionate, and has done nothing to impair her right, though respondents have better financial resources. This should not be allowed to turn the scale. "Children born in mangers and humble log cabins have been known to do well": *Carter v. Botts* (Kan.), 93 Pac. Rep. 584. Where an order of adoption is collaterally attacked on a writ of habeas corpus, the judgment as to the validity of the adoption is conclusive, in a subsequent proceeding to vacate the order of adoption, though no objection was made in the habeas corpus proceeding that the attack was collateral: *In re Clifford's Estate*, 37 Wash. 460; 79 Pac. Rep. 1001, 1002.

(7) **Attacking guardianship proceedings.** The right to the guardianship of a minor cannot be tried upon habeas corpus: *Andrino v. Yates* (Ida.), 87 Pac. Rep. 787. Upon the appointment of a guardian for the person of a minor, the authority of the parent ceases, and the guardian, if duly appointed, is legally entitled to the custody of the minor; and this right of the guardian to the custody of the minor can be attacked collaterally only upon the ground of want of jurisdiction in the court to make the order of appointment; and when, upon proceedings in habeas corpus, the respondent justifies his custody of the minor by such an order, an impeachment thereof is a collateral attack: *In re Lundberg*, 143 Cal. 402, 403; 77 Pac. Rep. 156. If the respondent is the duly appointed guardian of a person of a Chinese girl, his right to her custody, irrespective of the question of parentage, cannot be denied on habeas corpus, not only because as guardian of her person he is her legal custodian, but because his appointment involved a determination by a competent tribunal as to who was her father: *In re Chin Mee Ho*, 140 Cal. 263, 266; 73 Pac. Rep. 1002. The appointment of a guardian is in the nature of a judgment, from which an appeal may be taken; and, unless it is taken within the prescribed statutory time after the order of appointment is rendered, it becomes final, and cannot be collaterally attacked by the parents on habeas corpus: *Ex parte Miller*, 109 Cal. 643, 647; 42 Pac. Rep. 428. An appointment of a guardian of the person of a minor, made without actual notice to the parent, but in all other respects in accordance with all statutory requirements, is not void, and is not open to collateral attack on habeas corpus: *In re Lundberg*, 143 Cal. 402; 77 Pac. Rep. 156, 160. In a great majority of cases the minor is in the care of its parents, and in such cases notice to them is therefore essential. But where the child is in the care of some other person, notice to that person will ordinarily reach the parents at once, in the absence of fraud, if the parents have not practically abandoned the child and ceased

to make inquiry in regard thereto. The court to which an application for an order for the appointment is made will always make inquiry as to the relatives, and require notice to be given to them, where the giving of such notice is practicable. If it subsequently develops that a parent has, by such proceedings, been deprived of the custody of his minor child, the order may be annulled or vacated by appropriate proceedings; and the court having jurisdiction of a guardianship proceeding will always, on seasonable application by a parent who did not in fact have notice, liberally exercise the discretionary power confided to it, to give the parent full opportunity to be heard on the question as to the necessity of the appointment of another as guardian. And finally, the guardian so appointed may be removed whenever it is no longer proper that the ward should be under guardianship: *In re Lundberg*, 143 Cal. 402; 77 Pac. Rep. 156, 159. The petitioner for a writ of habeas corpus for the custody of a child cannot base his claim on a supposed rightful authority to control the child's person in this state by virtue of his appointment as guardian in another state, and the jurisdiction of a court of this state to decide, on habeas corpus, or other proper process, concerning the care and custody of infants is paramount, and cannot be taken away by a decree of an inferior tribunal of this state; and where neither the petitioner nor the respondent is entitled to the custody of the child, the court, in the exercise of its sound judicial discretion, having regard to the welfare and permanent good of the child as a predominant consideration, will determine to whose custody it shall be committed: *Jones v. Bowman*, 13 Wyo. 79; 77 Pac. Rep. 439, 442.

(8) **Discharge and dismissal of writ.** In a habeas corpus proceeding for the custody of a minor committed to a state reform school, the minor must be discharged from the custody of the superintendent of such institution and restored to the custody of his parents, where the facts show that he was illegally committed for want of notice to his parents: *Ex parte Becknell*, 119 Cal. 496, 497; 51 Pac. Rep. 692. And the writ of habeas corpus must be dismissed, where it appears that the child is not in the respondent's custody: *In re Christal*, 141 Cal. 523, 524; 75 Pac. Rep. 103.

(9) **Former adjudication as res judicata.** In a habeas corpus proceeding involving the custody of minor children, all matters in issue arising upon the same state of facts determined in a prior proceeding should be regarded as settled and concluded: *In re Hamilton*, 66 Kan. 754; 71 Pac. Rep. 817. The principle of res judicata is applicable to proceedings on habeas corpus, so far, at least, as they involve an inquiry into and a determination of the rights of conflicting claimants to the custody of minor children. The decision on a former writ is conclusive in a subsequent application, unless some new fact has occurred which has altered the state of the case, or the

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relative claims of the parents or other contestants for the custody of the child in some material respect. Thus a judgment awarding the custody of a child to its adoptive parents is *res judicata* of the issues in a subsequent proceeding between the same parties on the same facts to vacate the order of adoption, though the former was a habeas corpus proceeding: *In re Clifford*, 37 Wash. 460; 79 Pac. Rep. 1001, 1002.

REFERENCES.

Habeas corpus decree as to custody of infant as *res judicata*: See note 67 L. R. A. 783-788.

(10) **Writ of prohibition.** A writ of prohibition to prevent proceedings before a district court, or the judge thereof, will not be issued in habeas corpus proceedings for the custody of a child, unless it is so clear that such court is acting outside of or beyond its jurisdiction that there is no reasonable doubt of the fact: *In re Miller*, 4 Ida. 711; 43 Pac. Rep. 870, 871.

(11) **Appeal.** In Kansas, an appeal will lie from a judgment of the district court in habeas corpus proceedings determining the rights of conflicting claimants to the custody of a child: *Bleakley v. Smart* (Kan.), 87 Pac. Rep. 76; and in Colorado a decree in habeas corpus for the custody of an infant may be reviewed upon a writ of error, as such a decision clearly possesses every element necessary to constitute a final judgment. It is conclusive between the parties as to the only question and subject-matter before the court and presented in the record, namely, the custody of the child. Such an order, decision, judgment, or whatever it may be called, puts an end to the particular action. It leaves nothing further to be done in the determination, becomes *res judicata*, and therefore constitutes a final judgment: *McKercher v. Green*, 13 Col. App. 270; 58 Pac. Rep. 406, 408; but the appellate court will ordinarily decline to review the evidence: *In re Freeman*, 54 Kan. 493; 38 Pac. Rep. 558. So in Wyoming, where an appeal is taken from a decision in a habeas corpus proceeding brought to secure the custody of a minor child, the case does not go before the appellate court for trial *de novo*; and the court, sitting as a court of review, in considering the evidence, will not assume to weigh it, but only look into the record to ascertain whether the judge abused his discretion in awarding the custody of the child: *Tytler v. Tytler* (Wyo.), 89 Pac. Rep. 1, 3. No appeal lies from a non-appealable order, and the appeal will be dismissed if taken by a party who is not aggrieved by the refusal of the court to change the custody of the child: *St. Clair v. Williams*, 23 Wash. 552; 63 Pac. Rep. 206. In a habeas corpus proceeding for the custody of a child, the giving of a supersedeas bond has no effect whatever upon the possession, custody, and control of the child in question. It does not give a right to the custody of the child, pending the appeal: *State v. Poindexter* (Wash.), 87 Pac. Rep. 1069.

CHAPTER II.

GUARDIANSHIP OF MINORS. (CONTINUED.)

- § 70. Superior court to appoint guardians. On what petition.
- § 71. Form. Petition for appointment of guardian.
- § 72. Form. Notice of application for letters of guardianship.
- § 73. Form. Order appointing day for hearing petition for guardianship, and directing notice to be given.
- § 74. Form. Another form of order appointing day for hearing petition for guardianship, and directing notice to be given.
- § 75. Form. Consent of relative to appointment.
- § 76. Form. Order appointing guardian.
- § 77. Form. Short form of order appointing guardian.
- § 78. Form. Consent of guardian.
- § 79. When minor may nominate guardian. When not.
- § 80. Appointment of, by court. Minor over fourteen.
- § 81. Nomination by minors after fourteen.
- § 82. Form. Nomination of guardian by minor.
- § 83. Who may be guardian. Marriage does not affect guardianship.
- § 84. Powers and duties of guardian.
- § 85. Bond of guardian, conditions of.
- § 86. Form. Bond of guardian upon qualifying.
- § 87. Form. Justification of sureties on bond of guardian.
- § 88. Form. Bond of guardian (upon qualifying), executed by corporation.
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- § 90. Form. Letters of guardianship.
- § 91. Form. Oath of guardian.
- § 92. Form. Certificate of clerk as to copy of letters of guardianship.
- § 93. Court may insert conditions in order.
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- § 95. Maintenance of minor out of income of his own property.
- § 96. Form. Petition for allowance for expenses of education and maintenance.
- § 97. Form. Order of allowance for expenses of education and maintenance.
- § 98. Guardian to give bond. Powers limited.
- § 99. Power to appoint guardian ad litem not impaired.

- § 100. Transfer of proceedings from one county to another county.
Petition for removal.
- § 101. Form. Petition for removal of proceeding.
- § 102. Form. Order fixing time of hearing on petition for removal.
- § 103. Form. Order for removal of proceeding.
- § 104. When power of guardian is superseded.

§ 70. **Superior court to appoint guardians. On what petition.** The superior court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will or deed, and who are inhabitants or residents of the county, or who reside without the state and have estate within the county. Such appointment may be made on the petition of a relative or other person on behalf of the minor, or on the petition of the minor, if fourteen years of age. Before making such appointment, the court must cause such notice as such court deems reasonable to be given to any person having the care of such minor, and to such relatives of the minor residing in the county as the court may deem proper. In all such proceedings, when it appears to the satisfaction of the court, either from a verified petition, or from affidavits, that the welfare of the minor will be imperiled if such minor is allowed to remain in the custody of the person then having the care of such minor, the court may make an order providing for the temporary custody of such minor until a hearing can be had on such petition; and when it appears to the court that there is reason to believe that such minor will be carried out of the jurisdiction of the court before which the application is made, or will suffer some irreparable injury before compliance with such order providing for the temporary custody of such minor can be enforced, such court may at the time of making such order providing for the temporary custody of such minor cause a warrant to be issued, reciting the facts, and directed to the sheriff, coroner, or constable of the county, commanding such officer to take such minor from the custody of the person in whose care such minor then is and place such minor in custody in accordance with the order of the court. **Kerr's Cyc. Code Civ. Proc., § 1747.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, secs. 887, 888, p. 328.
Arizona. Rev. Stats. 1901, par. 1954.
Colorado. 3 Mills's Ann. Stats., secs. 4691, 4700, 4815 l.
Idaho. Code Civ. Proc. 1901, sec. 4339.
Kansas. Gen. Stats. 1905, § 3404.
Montana. Code Civ. Proc., sec. 2950.
Nevada. Comp. Laws, secs. 559, 560, 561.
New Mexico. Comp. Laws 1897, secs. 1434, 1441, 1973; and sec. 2052, as amended Laws 1903, sec. 2, p. 9.
North Dakota. Rev. Codes 1905, §§ 7892, 8236.
Oklahoma. Rev. Stats. 1903, sec. 1814.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 5258, 5259.
South Dakota. Probate Code 1904, § 366.
Utah. Rev. Stats. 1898, sec. 3994.
Washington. Pierce's Code, §§ 2729, 2828, 2828a.
Wyoming. Rev. Stats. 1899, sec. 4866.

§ 71. Form. Petition for appointment of guardian.

[Title of court.]

[Title of guardianship.]

{	Department No. _____
	[Title of form.]

To the Honorable the _____¹ Court of the County² of _____,
 State of _____.

The petition of _____ respectfully shows:

That your petitioner is _____³ of _____,⁴ a minor child
 of _____;⁵

That the said minor has no guardian legally appointed
 by will or otherwise, and is a resident of _____,⁶ and has
 estate within said county,⁷ which needs the care and atten-
 tion of some fit and proper person;

That said estate consists of real estate and personal prop-
 erty, particularly described as follows, to wit: _____;⁸

That therefore it is necessary and convenient that a
 guardian be appointed for the person and estate of said
 minor, _____;

That said _____⁹ is of the age of _____ years,¹⁰ and said
 minor is at present under the care of _____;¹¹

That the only relative of the said minor residing in said
 county¹² of _____ is _____.¹³

Wherefore your petitioner prays that he, or some other

fit and proper person, be appointed as guardian of the person and estate ¹⁴ of said minor; that notice be given to the said _____; ¹⁵ and that a day for hearing this petition be set.

Dated _____, 19____. _____, Petitioner.

Explanatory notes. 1. Title of court. 2. Or, City and County. 3. State relationship to minor. 4. Name of minor. 5, 6. Name the county in which appointment is sought. 7. Or, city and county. 8. Describe the property. 9. Name of minor. 10. Give age. 11. Name of custodian. 12. Or, city and county. 13. Name of relative. 14. Or either, as the case may be. 15. Name of relative.

§ 72. Form. Notice of application for letters of guardianship.

[Title of court.]

[Title of guardianship.] { No. ____.¹ Dept. No. ____
[Title of form.]

Notice is hereby given, That _____ has filed with the clerk of this court a petition, praying for letters of guardianship of the person and estate of _____, a minor, and that _____,² the _____ day of _____, 19____, at _____ o'clock in the forenoon³ of said day, at the court-room of said court, department No. _____, at the court-house⁴ in the county⁵ of _____, has been fixed by said court for hearing said petition, when and where any person interested may appear and show cause why the said petition should not be granted.

Dated _____, 19____. _____, Clerk.

By _____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Day of week. 3. Or, afternoon. 4. State location of court-house. 5. Or, city and county.

§ 73. Form. Order appointing day for hearing petition for guardianship, and directing notice to be given.

[Title of court.]

[Title of estate.] { No. ____.¹ Dept. No. ____
[Title of form.]

_____ having this day petitioned the court to be appointed guardian of the person and estate of said minor, —

It is ordered, That _____² the _____ day of _____, 19____, at _____ o'clock in the forenoon³ of said day is appointed for

the hearing of said petition, and that notice of the hearing be given to —, the person having the care of said minor, and to the following named relatives of said minor, residing in this county,⁴ to wit, — and —, by citation to be served on said parties at least five days⁵ before the hearing.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Day of week. 3. Or, afternoon. 4. Or, city and county. 5. Or, as directed by the court.

§ 74. Form. Another form of order appointing day for hearing petition for guardianship, and directing notice to be given.

[Title of court.]

[Title of guardianship.] { No. —¹ Dept. No. —
[Title of form.]

It is ordered by the court, That notice of the time and place of hearing the petition of — for the appointment of — as guardian of the person and estate of —, a minor child of — and —,² be given to —, who has custody of said minor, and to —, and to —, relatives of said minor, by notice served personally upon said persons at least — days before the time of such hearing, which hearing is now set down for —, 19—, at — o'clock in the forenoon³ of said day.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Names of parents. 3. Or as the case may be.

§ 75. Form. Consent of relative to appointment.

[Title of court.]

[Title of guardianship.] { No. —¹ Dept. No. —
[Title of form.]

The undersigned, a relative of —, a minor, hereby consents that — may be appointed guardian of the person and estate² of said minor. —

Dated —, 19—.

Explanatory notes. 1. Give file number. 2. Or either of them.

§ 76. Form. Order appointing guardian.

[Title of court.]

[Title of guardianship.]

{	No. ____ ¹	Dept. No. ____
	[Title of form.]	

The petition of —, praying to be appointed guardian of the person and estate of said minor, coming on regularly to be heard, upon due proof to the satisfaction of the judge of said court that notice has been given to the relatives of the said minor residing in this county,² and to the person under whose care said minor is, as required by law, and as directed by this court, and it duly appearing to the court that said minor has no legal guardian, that he is a resident of the said county,³ and that he has estate within the state of —, which needs the care and attention of some fit and proper person, which estate is of the value of — dollars (\$—), or thereabouts, —

It is hereby ordered, That said — be, and he is hereby, appointed guardian of the person and estate of said minor, and that letters of guardianship of the person and estate of said minor be issued to the said — upon his giving bond to said minor in the sum of — dollars (\$—) and taking the oath required by law.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2, 3. Or, city and county.

§ 77. Form. Short form of order appointing guardian.

[Title of court.]

[Title of guardianship.]

{	No. ____ ¹	Dept. No. ____
	[Title of form.]	

The petition of — for the appointment of —² as guardian of the persons and estates of — and —, minors, coming on regularly this day to be heard, and it appearing that notice of said hearing has been duly given as directed by the court and required by law, the court, after hearing the evidence, grants said petition, —

It is therefore ordered by the court, That — be, and he is hereby, appointed guardian of the persons and estates of the said — and —,³ minors, and that letters of

By _____, Deputy.

The same rule applies, of course, to orders and decrees in probate proceedings; but in such proceedings §1704 of the Code of Civil Procedure of California requires all orders and decrees of the court or judge to be entered at length in the minute-book of the court. The absence of the judge's signature would in no way impair the effect of the order or decree; and the statute does not require him to sign the minutes.

[Title of court.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

Dated _____, 19__.

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§ 79. When minor may nominate guardian. When not. If the minor is under the age of fourteen years, the court may nominate and appoint his guardian. If he is fourteen years of age, he may nominate his own guardian, who, if approved by the court, must be appointed accordingly. **Kerr's Cyc. Code Civ. Proc.**, § 1748.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 889, p. 328.
- Arizona.** Rev. Stats. 1901, par. 1955.
- Colorado.** 3 Mills's Ann. Stats., sec. 4700.
- Idaho.** Code Civ. Proc. 1901, sec. 4340.
- Kansas.** Gen. Stats. 1905, § 3406.
- Montana.*** Code Civ. Proc., sec. 2951.
- Nevada.** Comp. Laws, sec. 561.
- New Mexico.** Comp. Laws 1897, sec. 2053, as amended Laws 1903, sec. 3, p. 9.
- North Dakota.** Rev. Codes 1905, § 8237.
- Oklahoma.** Rev. Stats. 1903, sec. 1815.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5260.
- South Dakota.** Probate Code 1904, § 367.
- Utah.** Rev. Stats. 1898, sec. 3995.
- Washington.** Pierce's Code, § 2730.
- Wyoming.*** Rev. Stats. 1899, sec. 4867.

§ 80. Appointment of, by court. Minor over fourteen. If the guardian nominated by the minor is not approved by the court, or if the minor resides out of the state, or if, after being duly cited by the court, he neglects for ten days to nominate a suitable person, the court or judge may nominate and appoint the guardian in the same manner as if the minor were under the age of fourteen years. **Kerr's Cyc. Code Civ. Proc.**, § 1749.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 889, p. 328.
- Arizona.*** Rev. Stats. 1901, par. 1956.
- Colorado.** 3 Mills's Ann. Stats., sec. 4700.
- Idaho.*** Code Civ. Proc. 1901, sec. 4341.
- Montana.*** Code Civ. Proc., sec. 2952.
- Nevada.** Comp. Laws, sec. 561.
- New Mexico.** Comp. Laws 1897, sec. 1440; and sec. 2053, as amended Laws 1903, sec. 3, p. 9.

North Dakota.* Rev. Codes 1905, § 8238.

Oklahoma.* Rev. Stats. 1903, sec. 1816.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5260.

South Dakota.* Probate Code 1904, § 368.

Utah. Rev. Stats. 1898, sec. 3995.

Washington.* Pierce's Code, § 2731.

Wyoming.* Rev. Stats. 1899, sec. 4868.

§ 81. **Nomination by minors after fourteen.** When a guardian has been appointed by the court for a minor under the age of fourteen years, the minor, at any time after he attains that age, may nominate his own guardian, subject to the approval of the court. **Kerr's Cyc. Code Civ. Proc.** (**Kerr's Stats. and Amdts.**, p. 506), § 1750.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1957.

Idaho. Code Civ. Proc. 1901, sec. 4342.

Montana. Code Civ. Proc., sec. 2953.

Nevada. Comp. Laws, sec. 562.

New Mexico. Comp. Laws 1897, secs. 1435, 1461.

North Dakota. Rev. Codes 1905, § 8239.

Oklahoma. Rev. Stats. 1903, sec. 1817.

South Dakota. Probate Code 1904, § 369.

Utah. Rev. Stats. 1898, sec. 3995.

Washington. Pierce's Code, § 2732.

Wyoming. Rev. Stats. 1899, sec. 4869.

§ 82. **Form. Nomination of guardian by minor.**

[Title of court.]

[Title of guardianship.] { No. ____¹ Dept. No. ____
[Title of form.] }

I, _____, a minor fourteen years of age, hereby nominate _____ as guardian of my person and estate,² and respectfully request this honorable court to appoint him, the said _____, as such guardian. _____

Dated _____, 19____.

Explanatory notes. 1. Give file number. 2. Or either of them.

§ 83. **Who may be guardian. Marriage does not affect guardianship.** The father or the mother of a minor child under the age of fourteen years, if found by the court com-

petent to discharge the duties of guardianship, is entitled to be appointed a guardian of such minor child, in preference to any other person. The person nominated by a minor of the age of fourteen years as his guardian, whether married or unmarried, may, if found by the court competent to discharge the duties of guardianship, be appointed as such guardian. The authority of a guardian is not extinguished nor affected by the marriage of the guardian. **Kerr's Cyc. Code Civ. Proc.**, § 1751.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 887, p. 328.

Arizona. Rev. Stats. 1901, par. 1958.

Idaho. Code Civ. Proc. 1901, sec. 4343.

Kansas. Gen. Stats. 1905, § 3405.

Montana. Code Civ. Proc., sec. 2954.

Nevada. Comp. Laws, sec. 563.

North Dakota. Rev. Codes 1905, §§ 8046, 8240.

Oklahoma. Rev. Stats. 1903, sec. 1818.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5258.

South Dakota. Probate Code 1904, § 370.

Utah. Rev. Stats. 1898, sec. 3995.

Washington. Pierce's Code, § 2733.

Wyoming. Rev. Stats. 1899, sec. 4870.

§ 84. **Powers and duties of guardian.** Every guardian appointed has the custody and care of the education of the minor, and the care and management of his estate, until such minor arrives at the age of majority or marries, or until the guardian is legally discharged, unless he is appointed guardian only of the person of the ward. In that event, the guardian is charged with the custody of the ward, and must look to his support, health, and education. He may fix the residence of the ward at any place in the state, but not elsewhere without the permission of the court. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 507)**, § 1753.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 890, p. 328.

Arizona. Rev. Stats. 1901, par. 1960.

Colorado. 3 Mills's Ann. Stats., secs. 4721, 4732.

Idaho. Code Civ. Proc. 1901, sec. 4345.

Kansas. Gen. Stats. 1905, §§ 3409, 3410.
Montana. Code Civ. Proc., sec. 2956.
Nevada. Comp. Laws, sec. 564.
New Mexico. Comp. Laws 1897, sec. 1449.
North Dakota. Rev. Codes 1905, § 8242.
Oklahoma. Rev. Stats. 1903, sec. 1820.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5262.
South Dakota. Probate Code 1904, § 372.
Washington. Pierce's Code, § 2735.
Wyoming. Rev. Stats. 1899, sec. 4872.

§ 85. **Bond of guardian, conditions of.** Before the order appointing any person guardian under this chapter takes effect, and before letters issue, the court must require of such person a bond to the minor with sufficient sureties, to be approved by the judge, and in such sum as he shall order, conditioned that the guardian will faithfully execute the duties of his trust according to law, and the following conditions shall form a part of such bond without being expressed therein:

1. To make an inventory of all the estate, real and personal, of his ward, that comes to his possession or knowledge, and to return the same within such time as the court may order.
2. To dispose of and manage the estate according to law and for the best interest of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the care, custody, and education of the ward.
3. To render an account on oath of the property, estate, and moneys of the ward in his hands, and all proceeds or interests derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court directs, and at the expiration of his trust to settle his accounts with the court, or with the ward, if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys, and effects remaining in his hands, or due from him on such settlement, to the person who is lawfully entitled thereto. Upon filing the bond, duly approved, letters of guardianship must issue to the person appointed. In form the letters of guardianship must be substantially the same as letters of

administration, and the oath of the guardian must be indorsed thereon that he will perform the duties of his office as such guardian according to law. **Kerr's Cyc. Code Civ. Proc.**, § 1754.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 891, p. 328.
Arizona.* Rev. Stats. 1901, par. 1961.
Colorado. 3 Mills's Ann. Stats., secs. 4711, 4712, 4718.
Idaho.* Code Civ. Proc. 1901, sec. 4346.
Kansas. Gen. Stats. 1905, § 3407.
Montana.* Code Civ. Proc., sec. 2957.
Nevada. Comp. Laws, sec. 565.
New Mexico. Comp. Laws 1897, secs. 1442, 1455, 1468, 1906, 1973; and sec. 2053, as amended Laws 1903, sec. 3, p. 9.
North Dakota. Rev. Codes 1905, §§ 8047, 8048, 8049, 8056, 8243.
Oklahoma.* Rev. Stats. 1903, sec. 1821.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5263.
South Dakota.* Probate Code 1904, § 373.
Utah. Rev. Stats. 1898, sec. 3991.
Washington. Pierce's Code, §§ 2744, 2765, 2828e.
Wyoming.* Rev. Stats. 1899, sec. 4873.

§ 86. Form. Bond of guardian upon qualifying.

[Title of court.]

[Title of guardianship.]	{ No. ____ ¹ Dept. No. ____ [Title of form.]
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Know all men by these presents: That we, _____ as principal, and _____ and _____ as sureties, are held and firmly bound unto _____, a minor, in the sum of _____ dollars (\$_____), lawful money of the United States of America, to be paid to the said _____, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that, whereas an order was made by the _____² court of the county³ of _____, state of _____, on the _____ day of _____, 19____, appointing the above-bounden _____ the guardian of the person and estate of the said minor, and directing that letters of guardianship be issued to him upon his giving a bond to the said minor with sufficient sureties, to be approved by the

judge of said _____⁴ court, in the penal sum of _____ dollars (\$_____), conditioned that said guardian shall faithfully execute the duties of his trust, according to law, —

Now, therefore, if the said _____ shall faithfully execute the duties of his trust according to law, then this obligation shall be void and of no effect; otherwise it shall remain in full force and effect.

Dated, signed, and sealed with our seals, this _____ day of _____, 19____. _____ [Seal]
 _____ [Seal]
 _____ [Seal]

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, city and county. 4. Title of court.

§ 87. Form. Justification of sureties on bond of guardian.

State of _____, _____ }
 County¹ of _____, } ss.

_____ and _____, the sureties named in the above bond, being duly sworn, each for himself says that he is a resident and householder² in said state, and is worth the sum of _____ dollars (\$_____) over and above all his just debts and liabilities, exclusive of property exempt from execution.

Subscribed and sworn to before me this _____ day of _____, 19____. _____, Notary Public, etc.³

Explanatory notes. 1. Or, City and County. 2. Or, freeholder. 3. Or other officer taking the oath.

§ 88. Form. Bond of guardian (upon qualifying), executed by corporation.

[Title of court.]

[Title of guardianship.] { No. _____¹ Dept. No. _____
 { [Title of form.]

Know all men by these presents: That we, _____ as principal, and the _____² as surety, are held and firmly bound unto _____, a minor, in the sum of _____ dollars (\$_____), lawful money of the United States of America, to be paid to the said _____, for which payment well and truly to be

made we bind ourselves, our and each of our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that, whereas an order was made by the _____³ court of the county⁴ of _____, state of _____, on the _____ day of _____, 19____, appointing the above-bounden _____ the guardian of the person and estate of the said minor, and directing that letters of guardianship be issued to him upon his giving a bond to the said minor with sufficient sureties, to be approved by a judge of said _____⁵ court, in the penal sum of _____ dollars (\$_____), conditioned that said guardian shall faithfully execute the duties of his trust according to law, —

Now, therefore, if the said _____ shall faithfully execute the duties of his trust according to law, then this obligation shall be void; otherwise it shall remain in full force and effect.

In witness whereof, The seal and the signature of the said principal is hereto affixed, and the corporate seal and name of the said surety is hereto affixed and attested by its duly authorized officers, at _____, state of _____, this _____ day of _____, 19____. _____ [Seal]

[Corporate seal]

By _____, President.
_____, Secretary.

Explanatory notes. 1. Give file number. 2. Give name of company, a corporation organized, acting, and existing under the laws of the state of _____. 3. Title of court. 4. Or, city and county. 5. Title of court.

§ 89. Form. Acknowledgment, by corporation, of execution of guardian's bond upon qualifying.

[Title of court.]

[Title of guardianship.]

{ No. _____ Dept. No. _____
[Title of form.]

State of _____, }
County¹ of _____, } ss.

On this _____ day of _____, one thousand nine hundred and _____ (19____), before me, _____, a notary public in and for

the county² of —, state of —, residing therein, duly commissioned and sworn, personally appeared —, known³ to me to be the president, and —, known to me to be the secretary, of the —,⁴ the corporation described in and that executed the above bond, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the said county⁵ of —, the day and year in this certificate first above written.

—, Notary Public in and for the County⁶ of —, State of —.

Explanatory notes. 1, 2. Or, City and County. 3. Or, proved by the testimony of —, a credible witness, as to the question of identification. 4. Name the company. 5, 6. Or, city and county.

§ 90. Form. Letters of guardianship.

[Title of court.]

[Title of estate.]

{ No. —.¹ Dept. No. —
[Title of form.]

State of —,
County² of —, } ss.

— is hereby appointed guardian of the person and estate of —, a minor.

Witness —, clerk of the —³ court of the county⁴ of —, with the seal of said court affixed, this — day of —, 19—.

By order of the court.

[Seal]

—, Clerk.

By —, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Title of court. 4. Or, city and county.

§ 91. Form. Oath of guardian.

[Title of court.]

[Title of guardianship.]

{ No. —.¹ Dept. No. —
[Title of form.]

State of —,
County² of —, } ss.

I do solemnly swear that I will support the constitution of the United States, and the constitution of the state of —; and that I will faithfully discharge the duties of guardian

Probate — 8

of the person and estate of —, a minor, according to law.

Subscribed and sworn to before me this — day of —, 19—, —, Deputy County Clerk.

Explanatory notes. 1. Give file number. 2. Or, City and County. The oath of the guardian must be indorsed on his letters: See **Kerr's Cal. Cyc. Code Civ. Proc.**, § 1754.

§ 92. Form. Certificate of clerk as to copy of letters of guardianship.

[Title of court.]

[Title of guardianship.] { No. —.¹ Dept. No. —
[Title of form.]

State of —, }
County ² of —, } ss.

I, —, county clerk of the county ³ of —, and ex officio clerk of the —⁴ court, do hereby certify the foregoing to be a full, true, and correct copy of the letters of guardianship in the matter of the person and estate of —, a minor, now on file and of record in my office, and I further certify that the same have not been revoked or vacated.

Witness my hand and the seal of said court this — day of —, 19—. —, Clerk.

[Seal]

By —, Deputy Clerk.

Explanatory notes. 1. Give file number. 2, 3. Or, city and county. 4. Title of court.

§ 93. Court may insert conditions in order. When any person is appointed guardian of a minor, the court may, with the consent of such person, insert in the order of appointment, conditions not otherwise obligatory, providing for the care, treatment, education, and welfare of the minor and for the care and custody of his property. The performance of such conditions shall be a part of the duties of the guardian, for the faithful performance of which he and the sureties on his bond shall be responsible. **Kerr's Cyc. Code Civ. Proc.**, § 1755.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1962.

Idaho. Code Civ. Proc. 1901, sec. 4347.

North Dakota. Rev. Codes 1905, § 8244.
Oklahoma. Rev. Stats. 1903, sec. 1822.
South Dakota. Probate Code 1904, § 374.
Utah. Rev. Stats. 1898, sec. 3988.
Wyoming. Rev. Stats. 1899, sec. 4874.

§ 94. **Letters and bond to be recorded.** All letters of guardianship issued and all guardians' bonds executed under the provisions of this chapter, with the affidavits and certificates thereon, must be recorded by the clerk of the court having jurisdiction of the persons and estates of the wards. **Kerr's Cyc. Code Civ. Proc., § 1756.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1963.
Colorado. 3 Mills's Ann. Stats., sec. 4815n.
Idaho.* Code Civ. Proc. 1901, sec. 4348.
Kansas. Gen. Stats. 1905, § 3080.
Oklahoma.* Rev. Stats. 1903, sec. 1823.
South Dakota.* Probate Code 1904, § 375.
Utah. Rev. Stats. 1898, sec. 3991.
Wyoming.* Rev. Stats. 1899, sec. 4875.

§ 95. **Maintenance of minor out of income of his own property.** If any minor having a father living has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of the father's family and to all the circumstances of the case, the expenses of the education and maintenance of such minor may be defrayed out of the income of his own property, in whole or in part, as judged reasonable, and must be directed by the court; and the charges therefor may be allowed accordingly in the settlement of the accounts of his guardian. **Kerr's Cyc. Code Civ. Proc., § 1757.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 19, p. 360.
Arizona. Rev. Stats. 1901, par. 1964.
Idaho.* Code Civ. Proc. 1901, sec. 4349.
Montana.* Code Civ. Proc., sec. 2958.
Nevada.* Comp. Laws, sec. 570.
North Dakota.* Rev. Codes 1905, § 8245.

Oklahoma.* Rev. Stats. 1903, sec. 1824.

South Dakota.* Probate Code 1904, § 376.

Utah.* Rev. Stats. 1898, sec. 3999.

Wyoming. Rev. Stats. 1899, sec. 4876.

§ 96. Form. Petition for allowance for expenses of education and maintenance.

[Title of court.]

[Title of guardianship.]	{	No. ____ ¹	Dept. No. ____
		[Title of form.]	

The undersigned, —, your petitioner, respectfully represents to this honorable court that he is the duly appointed, qualified, and acting guardian of the person and estate of —, a minor; that said minor has a father living; that it is for the best interests of said minor that he be educated at —; ² that the sum of — dollars (\$—) per quarter or per annum will be required to pay for his tuition, maintenance, necessary school books, etc., while attending said institution; that the father of said minor ³ is unable financially to expend the said sum for the education and maintenance of said minor, either at said institution or at any other suitable place, but that said minor has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford.

Your petitioner therefore prays that this court issue an order authorizing the said guardian to expend the said sum of — dollars (\$—) per quarter or per annum for the purposes above set forth.

—, Petitioner.

—, Attorney for Petitioner.

Explanatory notes. 1. Give file number. 2. Name the institution. 3. Briefly state situation of father's family, and circumstances of the case.

§ 97. Form. Order of allowance for expenses of education and maintenance.

[Title of court.]

[Title of guardianship.]	{	No. ____ ¹	Dept. No. ____
		[Title of form.]	

It having been shown to this court from the petition of —, the guardian of the person and estate of —, a

minor, filed herein on the ____ day of ____, 19____, that said minor has a father living, but who is not able to maintain and educate the said minor in a suitable manner; and that said minor has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of the father's family and to all the circumstances of the case, ____

It is ordered, That ____, the guardian of the person and estate of ____, a minor, be, and he is hereby, authorized to expend the sum of ____ dollars (\$____), quarterly,² out of the income of the estate of said minor, for the purposes of said minor's maintenance and education at ____.³

Dated ____, 19____. ____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2. Or, annually. 3. Name the institution.

§ 98. Guardian to give bond. Powers limited. Every testamentary guardian must qualify and has the same powers and must perform the same duties with regard to the person and estate of his ward as guardians appointed by the court, except so far as his powers and duties are legally modified, enlarged, or changed by the will by which such guardian was appointed, and except that such guardian need not give bond unless directed to do so by the court from which the letters of guardianship issue. **Kerr's Cyc. Code Civ. Proc., § 1758.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 893, p. 329.

Arizona. Rev. Stats. 1901, par. 1982.

Idaho. Code Civ. Proc. 1901, sec. 4351.

Kansas. Gen. Stats. 1905, §§ 3402, 3403.

Montana. Code Civ. Proc., sec. 2959.

Nevada. Comp. Laws, sec. 565.

New Mexico. Comp. Laws 1897, sec. 2016.

North Dakota. Rev. Codes 1905, § 8246.

Oklahoma. Rev. Stats. 1903, sec. 1825.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5265.

South Dakota. Probate Code 1904, § 377.

Utah. Rev. Stats. 1898, sec. 3989.

Washington. Pierce's Code, § 2745.

Wyoming. Rev. Stats. 1899, sec. 4877.

§ 99. Power to appoint guardian ad litem not impaired. Nothing contained in this chapter affects or impairs the power of any court to appoint a guardian to defend the interests of any minor interested in any suit or matter pending therein. **Kerr's Cyc. Code Civ. Proc., § 1759.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 894, p. 329.

Arizona.* Rev. Stats. 1901, par. 1983.

Idaho.* Code Civ. Proc. 1901, sec. 4352.

Montana.* Code Civ. Proc., sec. 2960.

Nevada. Comp. Laws, sec. 571.

North Dakota.* Rev. Codes 1905, § 8247.

Oklahoma.* Rev. Stats. 1903, sec. 1826.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5266.

South Dakota.* Probate Code 1904, § 378.

Utah.* Rev. Stats. 1898, sec. 3990.

Washington. Pierce's Code, § 2746.

Wyoming.* Rev. Stats. 1899, sec. 4878.

§ 100. Transfer of proceedings from one county to another county. Petition for removal. The superior court of any county in this state in which is now pending, or in which there may be hereafter commenced, any proceeding which has for its object the guardianship of the estate of any minor or insane or incompetent person, or the guardianship of the person of any minor or insane or incompetent person, or both the guardianship of the estate and the guardianship of the person of a minor or insane or incompetent person, may make an order transferring such proceeding to the superior court of any other county in this state, in the manner herein provided; except that no such proceeding shall be transferred to the court of any county which at the time of such proceeding would not have jurisdiction to issue original letters in such matter or proceeding.

To obtain an order for such removal, the guardian of the person or estate, or both, of such minor or insane or incompetent person, shall file in the superior court of the county where such proceeding is pending, a verified petition setting forth the following matters:

1. The name of the county to the superior court of which it is sought to remove such proceedings;

2. The name of the county or counties in which the ward resides and that in which the guardian reside[s] ;

3. The name of the county or counties in which the property of such ward is situated, and a designation of the character and condition thereof ;

4. The reasons for such removal ;

5. The names and residences, so far as they are known to said guardian, of any relatives of such minor ward residing in said county in which said proceeding is pending ;

6. The names and residences, so far as the same are known to said guardian, of the relatives within the third degree of such insane or incompetent ward residing in said county.

Upon filing such petition an order shall be made by the court or judge fixing a time for hearing said petition, which shall be not less than five days thereafter, and directing that a copy of such order be sent through the United States mail to each of said relatives of such minor or insane or incompetent ward, named in said petition as resident in the county in which said proceeding is pending. The court may require such other or further notice of said hearing as it may deem proper.

At the time fixed for the hearing of said petition any relatives of such ward, or any person interested in the estate of such ward, may appear and file written grounds of opposition to said petition. If after hearing the evidence of the petitioner, and contestant if any, it shall appear to the court that it is for the best interest and advantage of said ward, or of the estate of said ward that the removal of said proceeding be had to the court designated in said petition, or to the superior court of any other county, it shall enter an order directing the removal thereof to said court and directing the clerk to forward all papers on file therein to the clerk of the court to which said proceeding has been ordered removed, and thereafter the court to which said proceeding has been removed shall have jurisdiction of all proceedings therein as fully as if said proceeding has been originally begun in said court. The clerk of the court to which said proceeding is removed shall be entitled to receive a fee of six dollars on filing the papers transmitted to him, in addition to the ex-

pense of such transmission, payable on receipt of the papers by him. **Kerr's Cyc. Code Civ. Proc.**, § 1760.

§ 101. Form. Petition for removal of proceeding.

[Title of court.]

[Title of proceeding.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To the Honorable the ____ Court of the County² of ____.

The petition of ____ respectfully shows:

That the above-entitled proceeding, which has for its object the guardianship of ____,³ is now pending in the above-named court, and that your petitioner is the guardian of ____;⁴

That your petitioner desires an order removing said proceeding to the ____ court of the county of ____;⁵

That said ward now resides in the county of ____,⁶ and said guardian, your petitioner, resides in the county of ____;⁷

That the property of said ward is situated in the county of ____,⁸ and is designated and is of the character and condition as follows: ____;⁹

That the reasons for such removal are: ____;¹⁰

That the names and residences, so far as they are known to said guardian, of any relatives of such minor ward residing in the county in which said proceeding is pending are: ____.¹¹

Wherefore petitioner prays that an order be made fixing a time for the hearing of this petition and directing notice to be given, and that, after hearing, an order be made removing said proceeding to the ____ court of the county of ____,¹² or such other order as may be proper.

[Add ordinary verification.] ____, Petitioner.

Explanatory notes. 1. Give file number. 2. Or, City and County. 3, 4. The person and estate, or of the person, or of the estate, etc. 5, 6, 7, 8. Or, city and county. 9. Give description, character, and condition of the property. 10. That it is for the best interest and advantage of said ward, or of the estate of said ward, that said proceeding be removed as requested, for the following reasons, naming them. 11. Give names and residences of relatives of minor ward;

or, in case of an insane or incompetent ward, give the names and residences of relatives, within the third degree, of such insane or incompetent ward, so far as the same are known to the guardian, residing in the county in which the proceeding is pending. 12. Or, city and county.

§ 102. Form. Order fixing time of hearing on petition for removal.

[Title of court.]

[Title of proceeding.] { No. ____.¹ Dept. No. ____
[Title of form.]

____, guardian of the estate of ____,² having filed a petition for the removal of the above-entitled proceeding to the ____ court of the county of ____,³ —

It is ordered, That the hearing on said petition be, and it is hereby, fixed for ____,⁴ the ____ day of ____, 19____, at the court-room of the ____ court in the county of ____,⁵ department No. ____, at ____ o'clock, — m.; and that a copy of this order be mailed to each of the relatives of said ward named in said petition as resident in this county, to wit, ____ and ____.⁶

Dated ____, 19____. ____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2. Or, guardian of the person and estate, or guardian of the person, etc. 3. Or, city and county. 4. Day of the week. 5. Or, city and county. 6. Give names of relatives as in petition; also any other or further notice as ordered.

§ 103. Form. Order for removal of proceeding.

[Title of court.]

[Title of proceeding.] { No. ____.¹ Dept. No. ____
[Title of form.]

The petition of ____, guardian of ____,² for an order removing the above-entitled proceeding to the ____ court of the county of ____,³ having been regularly heard by the court, after due proof made that a copy of the order fixing the time of hearing thereon had been mailed to each of the relatives of said ward as directed in said order; and it satisfactorily appearing to the court, from evidence adduced at said hearing, that it is for the best interest and advantage of said ward, ____,⁴ that the removal of said proceeding be had to the ____ court of the county of ____,⁵ —

It is ordered, That the above-entitled proceeding be, and the same is hereby, removed to the _____ court of the county of _____; ⁶ and the clerk of this court is hereby directed to forward all papers on file in said proceeding to the clerk of the _____ court of the county of _____, ⁷ to which the same is hereby removed.

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. Of the person and estate, or of the estate, or of the person, etc. 3. Or, city and county. 4. Or, the estate of said ward, or said ward and his estate. 5, 6, 7. Or, city and county.

§ 104. When power of guardian is superseded. The power of a guardian appointed by a court is superseded:

1. By order of the court;
2. If the appointment was made solely because of the ward's minority, by his attaining majority;
3. The guardianship over the person of the ward, by the marriage of the ward. **Kerr's Cyc. Code Civ. Proc.** (new section; see **Kerr's Stats. and Amdts.**, p. 507), § 1760[a].

CHAPTER III.

POWERS AND DUTIES OF GUARDIANS.

- § 105. To pay debts of ward out of ward's estate.
- § 106. Same. (New section on same subject.)
- § 107. Guardian to recover debts due his ward, and represent him.
- § 108. To manage estate, maintain ward, and to sell real estate.
- § 109. Form. Affidavit and order remitting clerk's fees.
- § 110. Form. Consent of guardian ad litem to settlement of administrator's account.
- § 111. Maintenance, support, and education of ward. How enforced.
- § 112. Powers of guardians in partition.
- § 113. To return inventory of estate of ward. Appraisers to be appointed. Like proceedings when other property is acquired.
- § 114. Settlements of guardians.
- § 115. Form. Guardian's annual account.
- § 116. Form. Order appointing referee of guardian's account, and adjourning settlement.
- § 117. Allowance of accounts of joint guardians.
- § 118. Expenses and compensation of guardians.

§ 105. To pay debts of ward out of ward's estate. Every guardian appointed under the provisions of this chapter, whether for a minor or any other person, must pay all debts due from the ward out of his personal estate and the income of his real estate if sufficient, if not, then out of his real estate upon obtaining an order for the sale or mortgage thereof, and dispose of the same in the manner provided in this title for the sale of real estates of decedents. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 508), § 1768.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 902, p. 330.
- Arizona.** Rev. Stats. 1901, par. 1988.
- Idaho.** Code Civ. Proc. 1901, sec. 4357.
- Kansas.** Gen. Stats. 1905, § 4156.
- Montana.** Code Civ. Proc., sec. 2980.
- Nevada.** Comp. Laws, sec. 575.
- North Dakota.** Rev. Codes 1905, § 8253.
- Oklahoma.** Rev. Stats. 1903, sec. 1831.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5275.

South Dakota. Probate Code 1904, § 383.

Utah. Rev. Stats. 1898, sec. 4008.

Washington. Pierce's Code, §§ 2739, 2771.

Wyoming. Rev. Stats. 1899, sec. 4898.

§ 106. **Same.** (New section on same subject.) Every guardian appointed under the provisions of this chapter, whether for a minor or any other person, must pay all just debts due from the ward, out of his personal estate, and the income of his real estate, if sufficient; if not, then out of his real estate, upon obtaining an order for the sale thereof, and disposing of the same in the manner provided in article four of this chapter. **Kerr's Cyc. Code Civ. Proc.** (new section; see **Kerr's Stats. and Amdts.**, p. 508), § 1768[a].

§ 107. **Guardian to recover debts due his ward, and represent him.** Every guardian must settle all accounts of the ward, and demand, sue for, and receive all debts due to him, or may, with the approbation of the court, compound for the same and give discharges to the debtor, on receiving a fair and just dividend of his estate and effects; and he must appear for and represent his ward in all legal suits and proceedings, unless another person be appointed for that purpose. **Kerr's Cyc. Code Civ. Proc.**, § 1769.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 902, p. 330.

Arizona. Rev. Stats. 1901, par. 1989.

Colorado. 3 Mills's Ann. Stats., secs. 4729, 4731, 4742.

Idaho.* Code Civ. Proc. 1901, sec. 4358.

Kansas. Gen. Stats. 1905, §§ 3410, 4156.

Montana.* Code Civ. Proc., sec. 2981.

Nevada.* Comp. Laws, sec. 577.

New Mexico. Comp. Laws 1897, secs. 1449, 1450.

North Dakota.* Rev. Codes 1905, § 8254.

Oklahoma. Rev. Stats. 1903, sec. 1832.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5275.

South Dakota.* Probate Code 1904, § 384.

Utah.* Rev. Stats. 1898, sec. 4009.

Washington. Pierce's Code, §§ 2736, 2767, 2770, 2771, 2828f.

Wyoming.* Rev. Stats. 1899, sec. 4899.

§ 108. To manage estate, maintain ward, and to sell real estate. Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance and support of the ward and his family, if there be any; and if such income and profits be insufficient for that purpose, the guardian may sell or mortgage the real estate, upon obtaining an order of the court therefor, as provided, and must apply the proceeds of such sale or mortgage, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any. **Kerr's Cyc. Code Civ. Proc., § 1770.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 903, p. 330.
Arizona. Rev. Stats. 1901, par. 1990.
Idaho.* Code Civ. Proc. 1901, sec. 4359.
Montana. Code Civ. Proc., sec. 2982.
Nevada. Comp. Laws, sec. 576.
New Mexico. Comp. Laws 1897, secs. 1445, 1446, 1447, 1469, 1911, 1912, 1974.
North Dakota. Rev. Codes 1905, § 8255.
Oklahoma. Rev. Stats. 1903, sec. 1833.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5276.
South Dakota. Probate Code 1904, § 385.
Utah. Rev. Stats. 1898, sec. 4007.
Washington. Pierce's Code, § 2739.
Wyoming. Rev. Stats. 1899, sec. 4900.

§ 109. Form. Affidavit and order remitting clerk's fees.

[Title of court.]

[Title of guardianship.]	{ No. ____ ¹ Dept. No. ____
	{ [Title of form.]

____, being first duly sworn, deposes and says: That she is the agent for the California Society for the Prevention of Cruelty to Children; ² that she is the petitioner in the above-entitled case; that said minor named above is destitute, and wholly dependent upon charity for support, and has not the means wherewith to pay costs; and that your petitioner, as said agent, has no funds out of which to pay the costs.

Wherefore she prays for an order of this court remitting the fees herein.

Subscribed and sworn to before me this ____ day of ____, 19____. _____, Deputy County Clerk.

Upon reading and filing the foregoing affidavit, and good cause appearing to the court therefor, it is ordered that the clerk of this court remit all fees in said matter.

Dated ____, 19____. _____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2. Or other society.

§ 110. Form. Consent of guardian ad litem to settlement of administrator's account.

[Title of court.]

[Title of estate.] { No. ____.¹ Dept. No. ____
[Title of form.]

I, ____, appointed by the ____² court of the county³ of ____, state of ____, on the ____ day of ____, 19____, to represent the minor, ____, who is interested in the estate of ____, deceased, upon the allowance and settlement of the ____⁴ account of the administrator⁵ of the estate of said deceased, rendered and presented for settlement and filed in said court on the ____ day of ____, 19____, hereby appear on behalf of said minor, ____,⁶ and consent to the allowance and approval of said account, and to the settlement thereof, as rendered and presented by said administrator.⁷

Dated ____, 19____. _____, Guardian ad Litem.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, city and county. 4. State what account. 5. Or, executor. 6. Giving his name. 7. Or, executor, etc., according to the fact.

§ 111. Maintenance, support, and education of ward. How enforced. When a guardian has advanced, for the necessary maintenance, support, or education of his ward, an amount not disproportionate to the value of his estate or his condition of life, and the same is made to appear to the satisfaction of the court, by proper vouchers and proofs, the guardian must be allowed credit therefor in his settlements. Whenever a guardian fails, neglects, or refuses to furnish suitable and necessary maintenance, support, or education for his ward, the court may order him to do so, and enforce

such order by proper process. Whenever any third person, at his request, supplies a ward with such suitable and necessary maintenance, support, or education, and it is shown to have been done after refusal or neglect of the guardian to supply the same, the court may direct the guardian to pay therefor out of the estate, and enforce such payment by due process. **Kerr's Cyc. Code Civ. Proc.**, § 1771.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1991.

Colorado. 3 Mills's Ann. Stats., sec. 4732.

Idaho.* Code Civ. Proc. 1901, sec. 4360.

Montana.* Code Civ. Proc., sec. 2983.

North Dakota.* Rev. Codes 1905, § 8256.

Oklahoma.* Rev. Stats. 1903, sec. 1834.

South Dakota.* Probate Code 1904, § 386.

Utah.* Rev. Stats. 1898, sec. 4013.

Wyoming.* Rev. Stats. 1899, sec. 4901.

§ 112. **Powers of guardians in partition.** The guardian may join in and assent to a partition of the real or personal estate of the ward, wherever such assent may be given by any person; provided, that such assent can only be given after the court having jurisdiction over said estate shall grant an order conferring such authority, which order shall only be made after a hearing in open court upon the petition of the guardian after notice of at least ten days, mailed by the clerk of the court to all the known relatives of the ward residing in the county where the proceedings are pending. The guardian may also consent to a partition of the real or personal estate of his ward without action, and agree upon the share to be set off to such ward, and may execute a release in behalf of his ward to the owners of the shares, of the parts to which they may be respectively entitled, upon obtaining from said court having jurisdiction over said estate, authority to so consent after a hearing in open court upon the petition of the guardian after notice of at least ten days, mailed by the clerk of the court to all the known relatives of the ward residing in the county where the proceedings are pending. **Kerr's Cyc. Code Civ. Proc.**, § 1772.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1992.**Idaho.** Code Civ. Proc. 1901, sec. 4361.**Montana.** Code Civ. Proc., sec. 2984.**Nevada.** Comp. Laws, sec. 576.**Oklahoma.** Rev. Stats. 1903, sec. 1835.**Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 482.**South Dakota.** Probate Code 1904, § 387.**Utah.** Rev. Stats. 1898, sec. 4012.**Washington.** Pierce's Code, § 2753.**Wyoming.** Rev. Stats. 1899, sec. 4902.

§ 113. To return inventory of estate of ward. Appraisers to be appointed. Like proceedings when other property is acquired. Every guardian must return to the court a verified inventory of the estate of his ward within three months after his appointment. He must annually thereafter, and at such other times as directed by the court, render a verified account of the estate of his ward. All the estate of the ward described in the first inventory must be appraised by appraisers appointed, sworn, and acting in the manner provided for regulating the settlement of the estates of decedents. Such inventory, with the appraisal of the property therein described, must be recorded by the clerk of the court in a proper book kept in his office for that purpose.

Whenever any other property of the estate of any ward is discovered, not included in the inventory of the estate already returned, and whenever any other property has been succeeded to, or acquired by any ward, or for his benefit, the like proceedings must be had for the return and appraisal thereof as are herein provided in relation to the first inventory and return. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 508), § 1773.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 904, p. 331.**Arizona.** Rev. Stats. 1901, par. 1993.**Colorado.** 3 Mills's Ann. Stats., secs. 4737, 4738, 4796, 4812, 4815n.**Idaho.** Code Civ. Proc. 1901, sec. 4362.**Kansas.** Gen. Stats. 1905, §§ 3080, 3408, 4155.**Montana.** Code Civ. Proc., sec. 2985.

Nevada. Comp. Laws, sec. 578.

New Mexico. Comp. Laws 1897, secs. 1455, 1910.

North Dakota. Rev. Codes 1905, § 8257.

Oklahoma. Rev. Stats. 1903, sec. 1836.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5277.

South Dakota. Probate Code 1904, § 388.

Utah. Rev. Stats. 1898, secs. 4010, 4011.

Washington. Pierce's Code, §§ 2739, 2768, 2769.

Wyoming. Rev. Stats. 1899, sec. 4903.

§ 114. **Settlements of guardians.** The guardian must upon the expiration of a year from the time of his appointment and as often thereafter as he may be required, present his account to the court for settlement and allowance, provided that no final account of the guardian of any insane person, who is or has been during such guardianship confined in a state hospital in this state, shall be settled or allowed unless notice of the settlement of said account shall have been first given to the secretary of the state commission in lunacy. **Kerr's Cyc. Code Civ. Proc.** (new section; see **Kerr's Stats. and Amdts.**, p. 509), § 1774[a].

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1994.

Colorado. 3 Mills's Ann. Stats., secs. 4796, 4806.

Idaho. Code Civ. Proc. 1901, sec. 4363.

Kansas. Gen. Stats. 1905, §§ 3419, 4170.

Montana. Code Civ. Proc., sec. 2986.

Nevada. Comp. Laws, sec. 578.

New Mexico. Comp. Laws 1897, secs. 1456, 1471, 1919.

North Dakota. Rev. Codes 1905, § 8258.

Oklahoma. Rev. Stats. 1903, sec. 1837.

South Dakota. Probate Code 1904, § 389.

Utah. Rev. Stats. 1898, secs. 4010, 4011.

Washington. Pierce's Code, §§ 2738, 2739, 2777.

Wyoming. Rev. Stats. 1899, sec. 4904.

§ 115. **Form. Guardian's annual account.**

[Title of court.]

[Title of matter.]	{	No. ____ ¹	Dept. No. ____
		[Title of form.]	

I, —, general guardian of —, an infant, do hereby make, render, and file the following account, and respectfully represent:

Probate — 9

That I was, on the ____ day of ____, 19__, duly appointed by the ____ court of the county² of ____, state of ____, the general guardian of the person and estate of ____, a minor, having no guardian legally appointed by will or deed, and who is an inhabitant³ of the said county⁴ of ____, state of ____;⁵

That within three months after my said appointment as guardian of the person and estate of said ____, a minor, I returned to this honorable court a verified inventory of the estate of my said ward;

That Schedule A, hereinafter set forth, hereby referred to, signed by me, and hereby made a part of this, my first annual account, contains a full and true statement of all of the property of said ward now remaining in my hands;

That Schedule B, hereinafter set forth, hereby referred to, signed by me, and hereby made a part of this, my first annual account, contains a full and true statement of the manner in which I have disposed of the property of said ward not now remaining in my hands;

That Schedule C, hereinafter set forth, hereby referred to, signed by me, and hereby made a part of this, my first annual account, contains a full and true statement of the amount and nature of each investment of money made by me, and of the manner in which the fund is at present invested;

That Schedule D, hereinafter set forth, hereby referred to, signed by me, and hereby made a part of this, my first annual account, contains a full and true account, in the form of debtor and creditor, of all my receipts and disbursements of money by reason of said guardianship, since ____, the date of my appointment as such guardian, and distinctly states the amount of the balance remaining in my hands, to be charged to me in the next year's account, as the sum of ____ dollars (\$____).

Dated ____, 19__.

Respectfully submitted.

____, Guardian of the Person and Estate of ____, a Minor.

Schedule A.

[Give statement of property remaining on hand; as, "I now have on hand," etc.⁶]

Schedule B.

[State manner in which property not on hand was disposed of.]

Schedule C.

[State amount and nature of investments made.]

Schedule D.

_____, Guardian of the Person and Estate of _____, a Minor.

Dr.

To _____ \$ _____

 _____ \$ _____

Cr.

By _____ \$ _____

 Balance on hand..... \$ _____

Verification.

State of _____, }
 County of _____ } ss.

_____, being duly sworn, says that the foregoing account by him subscribed is true, of his own knowledge, except as to those matters therein stated to be on information, and as to those matters he believes it to be true.

Subscribed and sworn to before me this _____ day of _____, 19____. _____, Notary Public.^s

Note. A guardian has it in his power to receive payment of all demands of his ward, and to make an effectual sale or other disposition of many kinds of personal property. The account should therefore consist of a charge of the whole amount of the personal estate, the same as if it were cash, with credit for the expenditures and losses only, and with a statement of the balance on hand, including both cash and personal property. The report should then show how the money is invested and of what the property consists.

Explanatory notes. 1. Give file number. 2. Or, city and county. 3. Or, resident. 4. Or, city and county. 5. Or, who resides without the state, and has estate within the said county, or city and county. 6. Give description. 7. Or, city and county. 8. Or, other officer taking oath.

§ 116. Form. Order appointing referee of guardian's account, and adjourning settlement.

[Title of court.]

[Title of guardianship.]

{ No. ____¹ Dept. No. ____
[Title of form.]

____, the guardian of the person and estate of ____ , a minor, having rendered his account for settlement, and notice of such settlement having been duly given as directed by this court, —

It is hereby ordered, That ____ , Esq., be, and he is hereby, appointed a referee to examine the said account and to make report thereon to this court within ____ days,² and that the settlement of said account be adjourned until ____ ,³ the ____ day of ____ , 19____ , at ____ o'clock, in the forenoon⁴ of said day.

Dated ____ , 19____ . ____ , Judge of the ____ Court.

Explanatory notes. 1. Title of court. 2. State the number of days. 3. Day of week. 4. Or, afternoon.

§ 117. Allowance of accounts of joint guardians. When an account is rendered by two or more joint guardians, the court may, in its discretion, allow the same upon the oath of any of them. **Kerr's Cyc. Code Civ. Proc., § 1775.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska.* Carter's Code, sec. 916, p. 332.

Arizona.* Rev. Stats. 1901, par. 1995.

Idaho.* Code Civ. Proc. 1901, sec. 4364.

Montana.* Code Civ. Proc., sec. 2987.

Nevada.* Comp. Laws, sec. 604.

North Dakota.* Rev. Codes 1905, § 8259.

Oklahoma.* Rev. Stats. 1903, sec. 1838.

Oregon.* Bellinger and Cotton's Ann. Codes and Stats., § 5289.

South Dakota.* Probate Code 1904, § 390.

Wyoming.* Rev. Stats. 1899, sec. 4905.

§ 118. Expenses and compensation of guardians. Every guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust, and he must also have such compensation for his services as the court in which his accounts are settled deems just and reasonable.

He must also be allowed all reasonable and proper disbursements, made after the legal termination of the guardianship, but while that relation, by consent or acquiescence of the parties, still subsists in fact, and before the discharge of the guardian by the court, and which were made by the consent, express or implied, of the ward, and for his benefit or the benefit of his estate. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 509), § 1776.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 915, p. 332.
- Arizona.** Rev. Stats. 1901, par. 1996.
- Colorado.** 3 Mills's Ann. Stats., sec. 4809.
- Idaho.** Code Civ. Proc. 1901, sec. 4365.
- Kansas.** Gen. Stats. 1905, § 3424.
- Montana.** Code Civ. Proc., sec. 2988.
- Nevada.** Comp. Laws, sec. 601.
- New Mexico.** Comp. Laws 1897, sec. 1931.
- North Dakota.** Rev. Codes 1905, § 8260.
- Oklahoma.** Rev. Stats. 1903, sec. 1839.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5288.
- South Dakota.** Probate Code 1904, § 391.
- Utah.** Rev. Stats. 1898, sec. 4014.
- Washington.** Pierce's Code, § 2754.
- Wyoming.** Rev. Stats. 1899, sec. 4906.

CHAPTER IV.

SALE OF PROPERTY AND DISPOSITION OF PROCEEDS.

- § 119. May sell property in certain cases.
- § 120. Sale of real estate to be made upon order of court.
- § 121. Application of proceeds of sales.
- § 122. Investment of proceeds of sales.
- § 123. Order for sale, how obtained.
- § 124. Form. Petition of guardian for order of sale.
- § 125. Form. Verification of guardian's petition for order of sale.
- § 126. Notice to next of kin, how given.
- § 127. Form. Order to show cause why application for leave to sell real estate should not be granted.
- § 128. Form. Order for sale of property by guardian.
- § 129. Form. Notice of guardian's sale of real estate (at public auction).
- § 130. Form. Notice of guardian's sale of real estate (at private sale).
- § 131. Copy of order to be served, published, or consent filed.
- § 132. Hearing of application.
- § 133. Who may be examined on such hearing.
- § 134. Costs to be awarded to whom.
- § 135. Order of sale to specify what.
- § 136. Bond before selling.
- § 137. Form. Bond of guardian on sale of real estate.
- § 138. Form. Justification of sureties on guardian's bond for sale of real property.
- § 139. Proceedings to conform with what title.
- § 140. Limit of order of sale.
- § 141. Conditions of sales of real estate of minor heirs. Bond and mortgage to be given for deferred payments.
- § 142. Court may order investment of money of ward.

§ 119. **May sell property in certain cases.** When the income of an estate under guardianship is insufficient to maintain the ward and his family, or to maintain and educate the ward when a minor, his guardian may sell his real or personal estate, or mortgage the real estate for that purpose, upon obtaining an order therefor. **Kerr's Cyc. Code Civ. Proc., § 1777.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 918, p. 333.
- Arizona.** Rev. Stats. 1901, par. 1997.
- Colorado.** 3 Mills's Ann. Stats., secs. 4749, 4795.
- Idaho.** Code Civ. Proc. 1901, sec. 4366.
- Kansas.** Gen. Stats. 1905, §§ 3426, 4157, 4158.
- Montana.** Code Civ. Proc., sec. 3000.
- Nevada.** Comp. Laws, sec. 579.
- New Mexico.** Comp. Laws 1897, sec. 1932.
- North Dakota.** Rev. Codes 1905, § 8261.
- Oklahoma.** Rev. Stats. 1903, sec. 1840.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5592.
- South Dakota.** Probate Code 1904, § 392.
- Utah.** Rev. Stats. 1898, sec. 4015.
- Washington.** Pierce's Code, §§ 2747, 2772.
- Wyoming.** Rev. Stats. 1899, sec. 4907.

§ 120. Sale of real estate to be made upon order of court.

When it appears to the satisfaction of the court, upon the petition of the guardian, that for the benefit of his ward his real estate, or some part thereof, should be sold, and the proceeds thereof put out at interest, or invested in some productive stock, or in the improvement or security of any other real estate of the ward, his guardian may sell the same for such purpose, upon obtaining an order therefor. **Kerr's Cyc. Code Civ. Proc.**, § 1778.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 919, p. 333.
- Arizona.*** Rev. Stats. 1901, par. 1998.
- Colorado.** 3 Mills's Ann. Stats., sec. 4750.
- Idaho.*** Code Civ. Proc. 1901, sec. 4367.
- Montana.** Code Civ. Proc., sec. 3001.
- Nevada.** Comp. Laws, sec. 580.
- New Mexico.** Comp. Laws 1897, sec. 1933.
- North Dakota.*** Rev. Codes 1905, § 8262.
- Oklahoma.*** Rev. Stats. 1903, sec. 1841.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5593.
- South Dakota.*** Probate Code 1904, § 393.
- Washington.** Pierce's Code, §§ 2747, 2773.
- Wyoming.*** Rev. Stats. 1899, sec. 4908.

§ 121. Application of proceeds of sales. If the estate is sold for the purposes mentioned in this article, the guardian

must apply the proceeds of the sale to such purposes, as far as necessary, and put out the residue, if any, on interest, or invest it in the best manner in his power, until the capital is wanted for the maintenance of the ward and his family, or the education of his children, or for the education of the ward when a minor, in which case the capital may be used for that purpose, as far as may be necessary, in like manner as if it had been personal estate of the ward. **Kerr's Cyc. Code Civ. Proc., § 1779.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 920, p. 333.
- Arizona.*** Rev. Stats. 1901, par. 1999.
- Idaho.*** Code Civ. Proc. 1901, sec. 4368.
- Montana.*** Code Civ. Proc., sec. 3002.
- Nevada.** Comp. Laws, sec. 581.
- New Mexico.** Comp. Laws 1897, sec. 1469.
- North Dakota.*** Rev. Codes 1905, § 8263.
- Oklahoma.*** Rev. Stats. 1903, sec. 1842.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5594.
- South Dakota.*** Probate Code 1904, § 394.
- Utah.*** Rev. Stats. 1898, sec. 4016.
- Wyoming.*** Rev. Stats. 1899, sec. 4909.

§ 122. **Investment of proceeds of sales.** If the estate is sold for the purpose of putting out or investing the proceeds, the guardian must make the investment according to his best judgment, or in pursuance of any order that may be made by the court. **Kerr's Cyc. Code Civ. Proc., § 1780.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.*** Carter's Code, sec. 921, p. 334.
- Arizona.*** Rev. Stats. 1901, par. 2000.
- Colorado.** 3 Mills's Ann. Stats., sec. 4728.
- Idaho.*** Code Civ. Proc. 1901, sec. 4369.
- Montana.*** Code Civ. Proc., sec. 3003.
- Nevada.** Comp. Laws, sec. 582.
- New Mexico.** Comp. Laws 1897, sec. 1469.
- North Dakota.*** Rev. Codes 1905, § 8264.
- Oklahoma.*** Rev. Stats. 1903, sec. 1843.
- Oregon.*** Bellinger and Cotton's Ann. Codes and Stats., § 5595.
- South Dakota.*** Probate Code 1904, § 395.
- Utah.*** Rev. Stats. 1898, sec. 4017.
- Wyoming.** Rev. Stats. 1899, sec. 4910.

§ 123. **Order for sale, how obtained.** To obtain an order for such sale, the guardian must present to the court in which he was appointed guardian a verified petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale. **Kerr's Cyc. Code Civ. Proc., § 1781.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.*** Carter's Code, sec. 923, p. 334.
- Arizona.*** Rev. Stats. 1901, par. 2001.
- Colorado.** 3 Mills's Ann. Stats., sec. 4751.
- Idaho.*** Code Civ. Proc. 1901, sec. 4370.
- Kansas.** Gen. Stats. 1905, §§ 3411, 4159.
- Montana.*** Code Civ. Proc., sec. 3004.
- Nevada.** Comp. Laws, sec. 583.
- New Mexico.** Comp. Laws 1897, sec. 1933; and sec. 2052, as amended Laws 1903, sec. 2, p. 9.
- North Dakota.** Rev. Codes 1905, § 8265.
- Oklahoma.*** Rev. Stats. 1903, sec. 1844.
- Oregon.*** Bellinger and Cotton's Ann. Codes and Stats., § 5597.
- South Dakota.*** Probate Code 1094, § 396.
- Washington.** Pierce's Code, § 2748.
- Wyoming.*** Rev. Stats. 1899, sec. 4911.

§ 124. **Form. Petition of guardian for order of sale.**

[Title of court.]

[Title of estate and guardianship.] { Department No. ____
[Title of form.] }

To the Honorable the ____¹ Court of the County² of ____, State of ____.

The petition of ____, the guardian of the person and estate of ____, a minor, respectfully shows:

That on the ____ day of ____, 19____, letters of guardianship were issued to your petitioner by this court; that your petitioner thereupon duly entered upon the discharge of his duties as such guardian; and that such letters have not been revoked;

That within three months after his appointment, to wit, on the ____ day of ____, 19____, ____, your petitioner, duly returned to this court a true inventory, and an appraisement

of all of the estate, real and personal, of his said ward that has come to his possession or knowledge;

That it is necessary ^a that all of the property of said ward, both real and personal, shall be sold;

That Schedule A, hereunto annexed, and made a part of this petition, contains a description of the real and personal estate of said ward, and sets forth the condition of such estate;

That the facts and circumstances upon which this petition is founded, and which render a sale of the said property necessary, are fully set forth in Schedule B, hereunto annexed, and made a part of this petition.

Wherefore your petitioner prays that this honorable court make an order directing the next of kin of the said ward, and all persons interested in the said estate, to appear before this court at a time and place therein specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order should not be granted for the sale of such estate; and that upon such hearing this honorable court may order said real estate to be sold, and that such other or further order may be made as is meet in the premises.

Dated _____, 19____.

_____, Guardian of the Person and Estate of _____, a Minor.

Schedule A.

[Describe the estate of the ward, and set forth its condition.]

Schedule B.

[State the facts and circumstances upon which the petition is founded, and which show that a sale of the ward's property is necessary.] _____, Attorney for Guardian.

[Add ordinary verification.]

Schedule A. Give description of real property. Give description of personal property.

Schedule B. Set forth condition of ward's estate, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale.

Explanatory notes. 1. Title of court. 2. Or, City and County. 3. Or, expedient, as the case may be.

§ 125. Form. Verification of guardian's petition for order of sale.

[Title of court.]

[Title of estate and guardianship.]

{ Department No. _____
[Title of form.]

State of _____,
County ¹ of _____, } ss.

_____, the petitioner above named, being duly sworn, says that he has read the foregoing petition, and knows the contents thereof, and that the same is true, of his own knowledge, except as to the matters which are therein stated on his information or belief, and that as to those matters he believes it to be true.

Subscribed and sworn to before me this _____ day of _____, 19____. _____, Notary Public, etc.²

Explanatory notes. 1. Or, City and County. 2. Or other officer taking the oath.

§ 126. Notice to next of kin, how given. If it appear to the court, or a judge thereof, from the petition, that it is necessary or would be beneficial to the ward that the real estate, or some part of it, should be sold, or that the real and personal estate should be sold, the court must thereupon make an order directing the next of kin of the ward, and all persons interested in the estate, to appear before the court, at a time and place therein specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order should not be granted for the sale of such estate. If it appear that it is necessary, or would be beneficial to the ward, to sell the personal estate, or some part of it, the court must order the sale to be made. **Kerr's Cyc. Code Civ. Proc., § 1782.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 924, p. 334.

Arizona.* Rev. Stats. 1901, par. 2002.

Colorado. 3 Mills's Ann. Stats., sec. 4752.

Idaho.* Code Civ. Proc. 1901, sec. 4371.

Kansas. Gen. Stats. 1905, §§ 3411, 4159.

Montana.* Code Civ. Proc., sec. 3005.

Nevada. Comp. Laws, secs. 583, 584.

New Mexico. Comp. Laws 1897, sec. 1933.

North Dakota. Rev. Codes 1905, § 8266.

Oklahoma.* Rev. Stats. 1903, sec. 1845.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5598.

South Dakota.* Probate Code 1904, § 397.

Washington. Pierce's Code, § 2749.

Wyoming.* Rev. Stats. 1899, sec. 4912.

§ 127. Form. Order to show cause why application for leave to sell real estate should not be granted.

[Title of court.]

[Title of guardianship.]	{	No. ____ ¹	Dept. No. ____
		[Title of form.]	

____, the guardian of the persons and estates ² of ____ and ____ minors, having this day presented to this court, and filed herein, his petition, duly verified, praying for an order of sale of certain real property belonging to the said minors, for the causes and reasons therein set forth; and it appearing to this court from the said petition that it is necessary, and would be beneficial to the said minors, that the said real estate described in said petition or some part of it shall be sold, —

It is hereby ordered, That the next of kin of said minors, and all persons interested in their said estates, appear before this court, in the court-room thereof,³ in the county ⁴ of ____, state of ____, on ____,⁵ the ____ day of ____, 19__, at ____ o'clock in the forenoon ⁶ of said day, to show cause why an order should not be granted for the sale of such estate, as prayed for in said petition, reference to which is hereby made for further particulars.

And it is hereby further ordered, That a copy of this order be published at least once a week for three successive weeks ⁷ in a newspaper printed and published in said county ⁸ of ____, state of ____.

Dated ____, 19__.

____, Judge.

Explanatory notes. 1. Give file number. 2. Or according to the fact. 3. State location of court-room. 4. Or, city and county. 5. Day of week. 6. Or, afternoon. 7. Or as prescribed by statute. 8. Or, city and county.

§ 128. Form. Order for sale of property by guardian.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.] }

Now comes —, the guardian of said —, a minor, by Mr. —, his attorney, and presents his petition for authority to sell certain property of said minor; and said guardian, by his attorney, having proved to the satisfaction of the court that due publication of the order to show cause herein has been duly made as required by law and by the order of the court,² the court proceeds to the hearing of said petition, and, after hearing the evidence and proofs offered, the court finds that a sale of all of the interest of the said ward in the property hereinafter described is necessary,³ —

It is therefore ordered by the court, That said —, as guardian of said —, be, and he is hereby, authorized to sell at private⁴ sale, in the manner and form prescribed by law, and after notice in form and manner as required by law,⁵ and upon the following terms, to wit, —,⁶ all of the interest of the said ward in the property hereinafter described; and that before making said sale, said guardian give a bond, in the form required by law, in the penal sum of — dollars (\$—).

The real estate hereby authorized to be sold is described as follows; to wit: —.⁷ —, County Clerk.

Entered —, 19—.

By —, Deputy.⁸

Explanatory notes. 1. Give file number. 2. Or, that all persons interested in said real estate, and the next of kin of said ward, have subscribed and filed their written consent to the making of the order applied for herein. If the matter has been continued, say here: "and the hearing having been regularly postponed to this day." 3. "Because," stating the reasons; or, "will be beneficial to the said ward, for the reason that," stating the reasons. 4. Or, public. 5. And on a day not less than eight days (or as otherwise prescribed) from the first publication of the notice. 6. State the terms. 7. Describe the land. 8. See note § 77, ante.

§ 129. Form. Notice of guardian's sale of real estate (at public auction).

[Title of court.]

[Title of guardianship.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Notice is hereby given, That, in pursuance of an order of the ____² court of the county³ of ____, state of ____, made on the ____ day of ____, 19____, in the above-entitled matter, the undersigned, ____, the guardian of the estate of ____, a minor, will sell at public auction, in one parcel, to the highest bidder, for cash, and subject to confirmation by said ____⁴ court, on ____,⁵ the ____ day of ____, 19____, at the hour of ____ o'clock, noon,⁶ in front of ____,⁷ county⁸ of ____, all the right, title, interest, and estate of the said ____, a minor, in and to an undivided one twenty-first of that certain lot, piece, or parcel of land situate, lying, and being in the county⁹ of ____, state of ____, and particularly described as follows, to wit: ____.¹⁰

Subject, however, to a life estate therein for the life of ____.

Terms and conditions of sale: Cash, in gold coin of the United States. Ten (10) per cent of the purchase-money to be paid on the day of the sale, and the balance on confirmation of sale by said ____¹¹ court. Deed and abstract at expense of purchaser.

____, Guardian of the Estate of ____, a Minor.

____, Attorney for Guardian.¹²

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, city and county. 4. Title of court. 5. Day of week. 6. Or as the case may be. A sale at public auction must be made between the hours of nine o'clock in the morning and the setting of the sun on the same day: *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1548. 7. Court-house or other place. 8, 9. Or, city and county. 10. Describe the land. 11. Title of court. 12. Give address.

§ 130. Form. Notice of guardian's sale of real estate (at private sale).

[Title of court.]

[Title of guardianship.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Notice is hereby given, That, in pursuance of an order of the ____ court² of the county³ of ____, state of ____, duly

given and made on the _____ day of _____, 19____, in the above-entitled estate, _____, guardian of the person and estate of _____, a minor, will sell, on or after _____, the _____ day of _____, 19____, in the county ⁴ of _____, state of _____, to the highest and best bidder, and upon the terms and conditions hereinafter mentioned, at private sale, subject to confirmation by said _____⁵ court, the following described real property belonging to the estate of said minor, _____.⁶

Terms and conditions of sale: Cash, in United States gold coin, upon delivery of the deed of said guardian, and after confirmation of sale by said _____⁷ court; deed at expense of purchaser.⁸

Bids and offers must be in writing, and may be left at the office of Messrs. _____,⁹ attorneys for said guardian, or may be delivered to said guardian personally, or may be filed with the clerk of said _____¹⁰ court, at any time after the first publication of this notice and before the making of said sale.

Dated _____, 19____.

_____, Guardian of the Person and Estate of _____, a Minor.

_____ and _____,¹¹ Attorneys for Guardian.

Explanatory notes. 1. Give file number. 2. Title of court. 3, 4. Or, city and county. 5. Title of court. 6. Give description. 7. Title of court. 8. Or, ten (10) per cent of the purchase price or purchase-money to be paid in cash, gold coin of the United States, at the time of sale; balance on confirmation of sale, in cash, or in deferred payments, to be evidenced by the promissory note or notes of purchaser or purchasers, secured by a mortgage or mortgages on the real estate sold, with such additional security as the court shall deem necessary and sufficient to secure the prompt payment of the amounts so deferred and the interest thereon. Deeds and abstracts at the expense of purchasers; the purchasers to assume the payment of, and take the property purchased subject to, all state and county taxes, and all assessments, charges, and encumbrances, of whatsoever name or nature, which are now or may hereafter become chargeable to or a lien against the property so to be purchased. Or, the terms of said sale will be cash, gold coin of the United States of America, and the entire amount of such bid or offer must be paid at the time of submitting or delivering said written bid. Or, cash in United States gold coin; ten (10) per cent of the purchase price payable at the time of sale, and balance on confirmation of sale by said court and

delivery of deed; and taxes for the current fiscal year to be prorated. Or as the case may be. 9. Give address. 10. Title of court. 11. Give address.

§ 131. Copy of order to be served, published, or consent filed. A copy of the order must be personally served on the next of kin of the ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition, or must be published at least once a week for three successive weeks in a newspaper printed in the county, or if there be none printed in the county, then in such newspaper as may be specified by the court in the order. If written consent to making the order of sale is subscribed by all persons interested therein, and the next of kin, notice need not be served or published. **Kerr's Cyc. Code Civ. Proc., § 1783.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 925, p. 334.
- Arizona.** Rev. Stats. 1901, par. 2003.
- Colorado.** 3 Mills's Ann. Stats., secs. 4753, 4757.
- Idaho.** Code Civ. Proc. 1901, sec. 4372.
- Kansas.** Gen. Stats. 1905, §§ 3411, 4159.
- Montana.*** Code Civ. Proc., sec. 3006.
- Nevada.** Comp. Laws, sec. 584.
- New Mexico.** Comp. Laws 1897, sec. 1933.
- Oklahoma.** Rev. Stats. 1903, sec. 1846.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5599.
- South Dakota.** Probate Code 1904, § 398.
- Washington.** Pierce's Code, § 2749.
- Wyoming.** Rev. Stats. 1899, sec. 4913.

§ 132. Hearing of application. The court, at the time and place appointed in the order, or such other time to which the hearing is postponed, upon proof of the service or publication of the order, must hear and examine the proofs and allegations of the petitioner, and of the next of kin, and of all other persons interested in the estate who oppose the application. **Kerr's Cyc. Code Civ. Proc., § 1784.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 2004.
- Colorado.** 3 Mills's Ann. Stats., sec. 4758.
- Idaho.*** Code Civ. Proc. 1901, sec. 4373.

Montana.* Code Civ. Proc., sec. 3007.
Nevada. Comp. Laws, sec. 585.
New Mexico. Comp. Laws 1897, sec. 1934.
North Dakota. Rev. Codes 1905, § 8267.
Oklahoma.* Rev. Stats. 1903, sec. 1847.
South Dakota.* Probate Code 1904, § 399.
Wyoming. Rev. Stats. 1899, sec. 4914.

§ 133. **Who may be examined on such hearing.** On the hearing, the guardian may be examined on oath, and witnesses may be produced and examined by either party, and process to compel their attendance, and testimony may be issued by the court, in the same manner and with like effect as in other cases provided for in this title. **Kerr's Cyc. Code Civ. Proc.**, § 1785.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 2005.
Idaho.* Code Civ. Proc. 1901, sec. 4374.
Montana.* Code Civ. Proc., sec. 3008.
Nevada. Comp. Laws, sec. 586.
North Dakota. Rev. Codes 1905, § 8268.
Oklahoma. Rev. Stats. 1903, sec. 1848.
South Dakota. Probate Code 1904, § 400.
Wyoming.* Rev. Stats. 1899, sec. 4915.

§ 134. **Costs to be awarded to whom.** If any person appears and objects to the granting of any order prayed for under the provisions of this article, and it appears to the court that either the petition or the objection thereto is sustained, the court may, in granting or refusing the order, award costs to the party prevailing, and enforce the payment thereof. **Kerr's Cyc. Code Civ. Proc.**, § 1786.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 935, p. 335.
Arizona.* Rev. Stats. 1901, par. 2006.
Idaho.* Code Civ. Proc. 1901, sec. 4375.
Montana.* Code Civ. Proc., sec. 3009.
Nevada. Comp. Laws, sec. 587.
Oklahoma.* Rev. Stats. 1903, sec. 1849.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5609.
South Dakota.* Probate Code 1904, § 401.
Wyoming.* Rev. Stats. 1899, sec. 4916.

Probate — 10

§ 135. **Order of sale to specify what.** If, after a full examination, it appears necessary, or for the benefit of the ward, that his real estate, or some part thereof[,] should be sold, the court may grant an order therefor, specifying therein the causes or reasons why the sale is necessary or beneficial, and may, if the same has been prayed for in the petition, order such sale to be made either at public or private sale. **Kerr's Cyc. Code Civ. Proc., § 1787.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 2007.
- Colorado.** 3 Mills's Ann. Stats., secs. 4759, 4760, 4763.
- Idaho.*** Code Civ. Proc. 1901, sec. 4376.
- Kansas.** Gen. Stats. 1905, §§ 4160, 4161.
- Montana.*** Code Civ. Proc., sec. 3010.
- Nevada.** Comp. Laws, sec. 588.
- New Mexico.** Comp. Laws 1897, secs. 1913, 1934; and sec. 2053, as amended Laws 1903, sec. 3, p. 9.
- North Dakota.*** Rev. Codes 1905, § 8269.
- Oklahoma.*** Rev. Stats. 1903, sec. 1850.
- South Dakota.*** Probate Code 1904, § 402.
- Washington.** Pierce's Code, §§ 2603, 2749, 2774.
- Wyoming.*** Rev. Stats. 1899, sec. 4917.

§ 136. **Bond before selling.** Every guardian authorized to sell real estate, must, before the sale, give bond to the ward, with sufficient surety, to be approved by the court, or a judge thereof, with condition to sell the same in the manner, and to account for the proceeds of the sale as provided for in this chapter and chapter seven of this title. **Kerr's Cyc. Code Civ. Proc., § 1788.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 927, p. 334.
- Arizona.** Rev. Stats. 1901, par. 2008.
- Colorado.** 3 Mills's Ann. Stats., sec. 4759.
- Idaho.*** Code Civ. Proc. 1901, sec. 4377.
- Kansas.** Gen. Stats. 1905, §§ 3414, 4153.
- Montana.*** Code Civ. Proc., sec. 3011.
- Nevada.** Comp. Laws, sec. 589.
- New Mexico.** Comp. Laws 1897, sec. 1915; sec. 2053, as amended Laws 1903, sec. 3, p. 9; and sec. 2054.

North Dakota. Rev. Codes 1905, §§ 8050, 8270.

Oklahoma. Rev. Stats. 1903, sec. 1851.

South Dakota. Probate Code 1904, § 403.

Utah. Rev. Stats. 1898, sec. 3991.

Washington. Pierce's Code, §§ 2744, 2749.

Wyoming. Rev. Stats. 1899, sec. 4918.

§ 137. Form. Bond of guardian on sale of real estate.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Know all men by these presents: That we, ____ as principal, and ____ and ____ as sureties, are held and firmly bound to said ____, a minor, in the sum of ____ dollars (\$____), lawful money of the United States of America, to be paid to the said ____, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that, whereas an order was made on the ____ day of ____, 19____, by the ____² court of the county³ of ____, state of ____, authorizing the above-named principal, as guardian of the estate of ____, to sell certain real estate of said ward, and bond in the sum above named was ordered to be given before the sale, —

Now, therefore, if the said ____, as such guardian, shall sell the said real estate in the manner prescribed by law for sales of real estate by executors and administrators, and shall account for and dispose of the proceeds of the sale in the manner provided by law, then this obligation to be void; otherwise to remain in full force and effect.

Dated, signed, and sealed with our seals, this ____ day of ____, 19____.

____ [Seal]

____ [Seal]

____ [Seal]

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, city and county.

§ 138. Form. Justification of sureties on guardian's bond for sale of real property.

[Title of court.]

[Title of estate and guardianship.] . { No. ____.¹ Dept. No. ____
[Title of form.]

State of _____, }
County ² of _____, } ss.

_____ and _____, being duly sworn, each for himself says,
That he is one of the sureties named in the above bond; that
he is a householder ³ and resident within said state, and is
worth the said sum of _____ dollars (\$_____) over and above
all his just debts and liabilities, exclusive of property exempt
from execution.

Subscribed and sworn to before me this _____ day of _____,
19____. _____, Notary Public, etc.⁴

Explanatory notes. 1. Give file number. 2. Or, City and County.
3. Or, freeholder. 4. Or other officer taking the oath.

§ 139. Proceedings to conform with what title. All the proceedings under petition of guardians for sales of property of their wards, giving notice and the hearing of such petitions, granting or refusing the order of sale, directing the sale to be made at public or private sale, reselling the same property, return of sale and application for confirmation thereof, notice and hearing of such application, making orders rejecting or confirming sales and reports of sales, ordering and making conveyances of property sold, accounting and the settlement of accounts, must be had and made as required by the provisions of this title concerning estates of decedents, unless otherwise specially provided in this chapter. **Kerr's Cyc. Code Civ. Proc., § 1789.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 905, p. 331, sec. 929, p. 335.

Arizona.* Rev. Stats. 1901, par. 2009.

Colorado. 3 Mills's Ann. Stats., secs. 4760, 4763, 4764, 4766, 4767.

Idaho.* Code Civ. Proc. 1901, sec. 4378.

Kansas. Gen. Stats. 1905, §§ 3416, 3417, 4162, 4163, 4164, 4166.

- Montana.*** Code Civ. Proc., sec. 3012.
Nevada. Comp. Laws, sec. 605.
New Mexico. Comp. Laws 1897, secs. 1913, 1915.
North Dakota.* Rev. Codes 1905, § 8271.
Oklahoma.* Rev. Stats. 1903, sec. 1852.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 5278, 5601, 5603.
South Dakota.* Probate Code 1904, § 404.
Utah. Rev. Stats. 1898, sec. 4015.
Washington. Pierce's Code, §§ 2749, 2750, 2751, 2752, 2774, 2775, 2776.
Wyoming.* Rev. Stats. 1899, sec. 4919.

§ 140. **Limit of order of sale.** No order of sale granted in pursuance of this article continues in force more than one year after granting the same, without a sale being had. **Kerr's Cyc. Code Civ. Proc., § 1790.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 930, p. 335.
Arizona.* Rev. Stats. 1901, par. 2010.
Idaho.* Code Civ. Proc. 1901, sec. 4379.
Kansas. Gen. Stats. 1905, § 3417.
Montana.* Code Civ. Proc., sec. 3013.
North Dakota.* Rev. Codes 1905, § 8272.
Oklahoma.* Rev. Stats. 1903, sec. 1853.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5604.
South Dakota.* Probate Code 1904, § 405.
Wyoming. Rev. Stats. 1899, sec. 4920.

§ 141. **Conditions of sales of real estate of minor heirs.**
Bond and mortgage to be given for deferred payments. All sales of real estate of wards must be for cash, or for part cash and part deferred payments, the credit in no case to exceed three years from date of sale, as in the discretion of the court is most beneficial to the ward. Guardians making sales must demand and receive from the purchasers, in case of deferred payments, notes, and a mortgage on the real estate sold, with such additional security as the court deems necessary and sufficient to secure the prompt payment of the amounts so deferred, and the interest thereon. **Kerr's Cyc. Code Civ. Proc., § 1791.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.** Rev. Stats. 1901, par. 2011.
Colorado. 3 Mills's Ann. Stats., sec. 4760.
Idaho. Code Civ. Proc. 1901, sec. 4380.
Kansas. Gen. Stats. 1905, § 3417.
Montana.* Code Civ. Proc., sec. 3014.
North Dakota. Rev. Codes 1905, § 8273.
Oklahoma.* Rev. Stats. 1903, sec. 1854.
South Dakota. Probate Code 1904, § 406.
Washington. Pierce's Code, §§ 2606, 2774.
Wyoming.* Rev. Stats. 1899, sec. 4921.

§ 142. **Court may order investment of money of ward.**
 The court, on the application of a guardian, or any person interested in the estate of any ward, after such notice to persons interested therein as the court shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein, and the court may make such other orders and give such directions as are needful for the management, investment, and disposition of the estate and effects as circumstances require. **Kerr's Cyc. Code Civ. Proc., § 1792.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 905, p. 331.
Arizona.* Rev. Stats. 1901, par. 2012.
Colorado. 3 Mills's Ann. Stats., sec. 4728.
Idaho.* Code Civ. Proc. 1901, sec. 4381.
Kansas. Gen. Stats. 1905, § 3410.
Montana.* Code Civ. Proc., sec. 3015.
Nevada. Comp. Laws, sec. 590.
New Mexico. Comp. Laws 1897, secs. 1453, 1916.
North Dakota.* Rev. Codes 1905, § 8274.
Oklahoma.* Rev. Stats. 1903, sec. 1855.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5278.
South Dakota.* Probate Code 1904, § 407.
Utah.* Rev. Stats. 1898, sec. 4018.
Washington. Pierce's Code, § 2742.
Wyoming.* Rev. Stats. 1899, sec. 4922.

CHAPTER V.

NON-RESIDENT GUARDIANS AND WARDS.

- § 143. Guardians of non-resident persons.
- § 144. Powers and duties of guardians appointed.
- § 145. Such guardians to give bonds.
- § 146. To what guardianship shall extend.
- § 147. Removal of non-resident ward's property.
- § 148. Proceedings on such removal.
- § 149. Discharge of person in possession.

§ 143. Guardians of non-resident persons. The superior court may appoint a guardian of the person and estate, or either, of a minor, insane or incompetent person, who has no guardian within the state, legally appointed by will, deed or otherwise, and who resides without the state, and has estate within the county[,] or, who, though not having such estate, is within the county, upon petition of any friend of such person or any one interested in his estate, in expectancy or otherwise. Before making such appointment, the court must cause notice to be given to all persons interested, in such manner as such court deems reasonable. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 509), § 1793.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 911, p. 332.

Arizona. Rev. Stats. 1901, par. 2018.

Colorado. 3 Mills's Ann. Stats., secs. 4702, 4703, 4706.

Idaho. Code Civ. Proc. 1901, sec. 4382.

Montana. Code Civ. Proc., sec. 3030.

Nevada. Comp. Laws, sec. 597.

North Dakota. Rev. Codes 1905, § 8275.

Oklahoma. Rev. Stats. 1903, sec. 1856.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5284.

South Dakota. Probate Code 1904, § 412.

Washington. Pierce's Code, §§ 2788, 2789.

Wyoming. Rev. Stats. 1899, sec. 4923.

§ 144. Powers and duties of guardians appointed. Every guardian, appointed under the preceding section, has the

same powers and performs the same duties, with respect to the estate of the ward found within this state, and with respect to the person of the ward, if he shall come to reside therein, as are prescribed with respect to any other guardian appointed under this chapter. **Kerr's Cyc. Code Civ. Proc., § 1794.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.*** Carter's Code, sec. 912, p. 332.
- Arizona.*** Rev. Stats. 1901, par. 2019.
- Colorado.** 3 Mills's Ann. Stats., secs. 4702, 4706.
- Idaho.*** Code Civ. Proc. 1901, sec. 4383.
- Montana.*** Code Civ. Proc., sec. 3031.
- Nevada.*** Comp. Laws, sec. 598.
- North Dakota.** Rev. Codes 1905, § 8276.
- Oklahoma.** Rev. Stats. 1903, sec. 1857.
- Oregon.*** Bellinger and Cotton's Ann. Codes and Stats., § 5285.
- South Dakota.** Probate Code 1904, § 413.
- Utah.*** Rev. Stats. 1898, sec. 4020.
- Washington.** Pierce's Code, §§ 2791, 2792.
- Wyoming.*** Rev. Stats. 1899, sec. 4924.

§ 145. **Such guardians to give bonds.** Every guardian must give bond to the ward, in the manner and with the like conditions as hereinbefore provided for other guardians, except that the provisions respecting the inventory, the disposal of the estate and effects, and the account to be rendered by the guardian, must be confined to such estate and effects as come to his hands in this state. **Kerr's Cyc. Code Civ. Proc., § 1795.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 913, p. 332.
- Arizona.*** Rev. Stats. 1901, par. 2020.
- Colorado.** 3 Mills's Ann. Stats., secs. 4702, 4706.
- Idaho.*** Code Civ. Proc. 1901, sec. 4384.
- Montana.*** Code Civ. Proc., sec. 3032.
- Nevada.*** Comp. Laws, sec. 599.
- North Dakota.** Rev. Codes 1905, § 8277.
- Oklahoma.*** Rev. Stats. 1903, sec. 1858.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5286.
- South Dakota.*** Probate Code 1904, § 414.
- Utah.*** Rev. Stats. 1898, sec. 4021.
- Washington.** Pierce's Code, § 2789.
- Wyoming.*** Rev. Stats. 1899, sec. 4925.

§ 146. To what guardianship shall extend. The guardianship which is first lawfully granted of any person residing without this state extends to all the estate of the ward within this state, and excludes the jurisdiction of the court of every other county. **Kerr's Cyc. Code Civ. Proc.**, § 1796.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.*** Carter's Code, sec. 914, p. 332.
Arizona.* Rev. Stats. 1091, par. 2021.
Colorado. 3 Mills's Ann. Stats., secs. 4702, 4706, 4815 l.
Idaho.* Code Civ. Proc. 1901, sec. 4385.
Montana.* Code Civ. Proc., sec. 3033.
Nevada. Comp. Laws, sec. 600.
Oklahoma.* Rev. Stats. 1903, sec. 1859.
Oregon.* Bellinger and Cotton's Ann. Codes and Stats., § 5287.
South Dakota.* Probate Code 1904, § 415.
Utah.* Rev. Stats. 1898, sec. 4022.
Wyoming.* Rev. Stats. 1899, sec. 4926.

§ 147. Removal of non-resident ward's property. When the guardian and ward are both non-residents, and the ward is entitled to property in this state, which may be removed to another state or foreign country without conflict with any restriction or limitation thereupon, or impairing the right of the ward thereto, such property may be removed to the state or foreign country of the residence of the ward, upon the application of the guardian to the superior court of the county in which the estate of the ward, or the principal part thereof, is situated. **Kerr's Cyc. Code Civ. Proc.**, § 1797.

ANALOGOUS AND IDENTICAL STATUTES

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 2022.
Colorado. 3 Mills's Ann. Stats., secs. 4735, 4736.
Idaho. Code Civ. Proc. 1901, sec. 4386.
Kansas. Gen. Stats. 1905, § 3433.
Montana. Code Civ. Proc., sec. 3034.
North Dakota.* Rev. Codes 1905, § 8278.
Oklahoma.* Rev. Stats. 1903, sec. 1860.
South Dakota.* Probate Code 1904, § 416.
Utah. Rev. Stats. 1898, sec. 4023.
Washington. Pierce's Code, §§ 2755, 2794.
Wyoming.* Rev. Stats. 1899, sec. 4927.

§ 148. **Proceedings on such removal.** The application must be made upon ten days' notice to the resident executor, administrator, or guardian, if there be such, and upon such application the non-resident guardian must produce and file a certificate, under the hand of the clerk and seal of the court, from which his appointment was derived, showing:

1. A transcript of the record of his appointment.
 2. That he has entered upon the discharge of his duties.
 3. That he is entitled, by the laws of the state, of his appointment[,] to the possession of the estate of the ward; or, must produce and file a certificate, under the hand and seal of the clerk of the court having jurisdiction in the country of his residence, of the estates of persons under guardianship, or of the highest court of such country, attested by a minister, consul, or vice-consul of the United States, resident in such country, that, by the laws of such country, the applicant is entitled to the custody of the estate of his ward, without the appointment of any court. Upon such application, unless good cause to the contrary is shown, the court must make an order granting to such guardian leave to take and remove the property of his ward to the state or place of his residence, which is authority to him to sue for and receive the same in his own name, for the use and benefit of his ward.
- Kerr's Oyc. Code Civ. Proc., § 1798.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, pars. 2023, 2024.

Colorado. 3 Mills's Ann. Stats., secs. 4735, 4736.

Idaho. Code Civ. Proc. 1901, sec. 4387.

Kansas. Gen. Stats. 1905, § 3433.

Montana. Code Civ. Proc., sec. 3035.

North Dakota. Rev. Codes 1905, § 8279.

Oklahoma. Rev. Stats. 1903, sec. 1861.

South Dakota. Probate Code 1904, § 417.

Utah. Rev. Stats. 1898, sec. 4024.

Washington. Pierce's Code, §§ 2755, 2794.

Wyoming.* Rev. Stats. 1899, sec. 4928.

§ 149. **Discharge of person in possession.** Such order is a discharge of the executor, administrator, local guardian, or other person in whose possession the property may be at the

time the order is made, on filing with the clerk of the court a receipt therefor of a foreign guardian of such absent ward, and transmitting a duplicate receipt, or a certified copy of such receipt, to the court from which such non-resident guardian received his appointment. **Kerr's Cyc. Code Civ. Proc.**, § 1799.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 2025.

Colorado. 3 Mills's Ann. Stats., sec. 4736.

Idaho. Code Civ. Proc. 1901, sec. 4388.

Montana. Code Civ. Proc., sec. 3040.

North Dakota. Rev. Codes 1905, § 8280.

Oklahoma. Rev. Stats. 1903, sec. 1862.

South Dakota. Probate Code 1904, § 418.

Utah. Rev. Stats. 1898, sec. 4025.

Washington. Pierce's Code, §§ 2794, 2795.

Wyoming. Rev. Stats. 1899, sec. 4929.

CHAPTER VI.

GENERAL AND MISCELLANEOUS PROVISIONS.

- § 150. Examination of persons suspected of defrauding wards or of concealing property.
- § 151. Removal and resignation of guardian, and surrender of estate.
- § 152. Guardianship, how terminated.
- § 153. New bond, when required.
- § 154. Guardian's bond to be filed. Action on.
- § 155. Limitation of actions on guardian's bond.
- § 156. Limitation of actions for the recovery of property sold.
- § 157. More than one guardian may be appointed.
- § 158. Order appointing guardian, how entered.
- § 159. What provisions of code apply to guardians.
- § 160. Decree that conveyance be made for incompetent.

GUARDIAN AND WARD.

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| 1. Appointment of guardians. | 6. Investments by guardian. |
| (1) Jurisdiction of court. | 7. Sales of land. |
| (2) Right to appointment. | (1) In general. |
| (3) Necessity of petition and notice. | (2) Petition for. |
| (4) Circumstances for consideration. | (3) Notice. Publication. |
| (5) Bond. Estoppel. | (4) Additional bond. |
| (6) Appointment here, notwithstanding foreign guardian. | (5) Order for. |
| (7) Validity of appointment. | (6) Validity of. |
| 2. Guardianship of Indians. | (7) Purchaser and his rights. |
| (1) In general. | (8) Setting aside. |
| 3. Control of property, support, maintenance, and custody of ward. | (9) Collateral attack. |
| (1) Control of property. | 8. Lease and demise of ward's property. |
| (2) Support and maintenance. | 9. Mortgage of ward's property. |
| (3) Contract for support. | (1) Petition as foundation of jurisdiction. |
| (4) Support of abandoned child. | (2) Authority to mortgage. |
| (5) Custody of ward. Access. | (3) Validity of order and mortgage. |
| 4. Duties and powers of guardians. | (4) Revival and foreclosure of former mortgage. |
| (1) In general. | 10. Non-resident guardians and wards. |
| (2) Power of guardian as to contracts. | 11. Accounting and settlement. |
| (3) Power of guardian to assign appropriation made for ward by probate court. | (1) In general. |
| 5. Rights and powers of guardians. | (2) Duty to account. |
| (1) Guardian may do what. | (3) Jurisdiction of courts. |
| (2) Guardian cannot do what. | (4) Exceptions to account. |
| (3) Actions by guardian. | (5) Admissibility of evidence. |
| (4) Actions against guardians. | (6) Proper charges against guardian. Interest. |
| | (7) Credits allowable to guardian. |
| | (8) What is not to be allowed. Compensation. |

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| (9) Death of ward before settlement. | (4) No disaffirmance of partition when. |
| (10) Conclusiveness. Attacking settlement. | 19. Bond of guardian, and liability thereon. |
| (11) Discharge of guardian. | (1) Failure to give a bond. |
| 12. Collateral attack. | (2) Purpose of bond. |
| 13. Jurisdiction of courts. | (3) Breach of bond. |
| 14. Jurisdiction of equity. | (4) New bond. |
| 15. Liability of guardians. | (5) Action on bond. |
| (1) For investments made without order of court. | (6) Liability of sureties. |
| (2) Protection of order of court. | (7) Defense to action. |
| (3) Liability of guardian in general. | (8) Limitation of actions. |
| 16. Embezzlement by guardian. | 20. Limitations of actions. |
| 17. Removal of guardians. | 21. Appeal. |
| 18. Rights and liabilities of ward. | (1) In general. |
| (1) In general. | (2) Appealable orders. |
| (2) Actions by ward. | (3) Findings. |
| (3) Actions against ward. | (4) Effect of, as stay. |
| | (5) Record. Presumption. |
| | (6) Affirmance. Reversal. |
| | (7) Dismissal. |

§ 150. Examination of persons suspected of defrauding wards or of concealing property. Upon complaint made by any guardian, ward, creditor, or other person interested in the estate, or having a prospective interest therein as heir or otherwise, against any one suspected of having concealed, embezzled, smuggled, or fraudulently disposed of, any of the money, goods, or effects, or an instrument in writing belonging to the ward or to his estate, the superior court may cite such suspected person to appear before such court, and may examine and proceed against him on such charge in the manner provided in this title with respect to persons suspected of and charged with concealing, embezzling, smuggling, or fraudulently disposing of the effects of a decedent. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 510), § 1800.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 910, p. 332.

Arizona. Rev. Stats. 1901, par. 2026.

Colorado. 3 Mills's Ann. Stats., sec. 4815d.

Idaho. Code Civ. Proc. 1901, sec. 4396.

Montana. Code Civ. Proc., sec. 3050.

Nevada. Comp. Laws, sec. 596.

North Dakota. Rev. Codes, 1905, § 8281.

Oklahoma. Rev. Stats. 1903, sec. 1863.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5283.

South Dakota. Probate Code 1904, § 419.

Utah. Rev. Stats. 1898, sec. 4019.

Wyoming. Rev. Stats. 1899, sec. 4941.

§ 151. Removal and resignation of guardian, and surrender of estate. When a guardian, appointed either by the testator or a court, becomes insane or otherwise incapable of discharging his trust or unsuitable therefor, or has wasted or mismanaged the estate, or failed for thirty days to render an account or make a return, the superior court may, upon such notice to the guardian as the court may require, remove him and compel him to surrender the estate of the ward to the person found to be lawfully entitled thereto. Every guardian may resign when it appears proper to allow the same; and upon the resignation or removal of a guardian, as herein provided, the court may appoint another in the place of the guardian who resigned or was removed. **Kerr's Cyc. Code Civ. Proc., § 1801.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 906, p. 331.

Arizona.* Rev. Stats. 1901, par. 2027.

Colorado. 3 Mills's Ann. Stats., secs. 4707, 4709, 4710.

Idaho. Code Civ. Proc. 1901, sec. 4394.

Kansas. Gen. Stats. 1905, §§ 3419, 4176.

Montana.* Code Civ. Proc., sec. 3051.

Nevada. Comp. Laws, secs. 569, 591.

New Mexico. Comp. Laws 1897, secs. 1436, 1457.

North Dakota. Rev. Codes 1905, § 8064.

Oklahoma.* Rev. Stats. 1903, sec. 1864.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5279.

South Dakota.* Probate Code 1904, § 420.

Utah. Rev. Stats. 1898, sec. 3991.

Washington. Pierce's Code, §§ 2743, 2781.

Wyoming. Rev. Stats. 1899, sec. 4892.

§ 152. Guardianship, how terminated. The marriage of a minor ward terminates the guardianship of the person of such ward, but not the estate; and the guardian of an insane or other person may be discharged by the court, when it appears on the application of the ward or otherwise, that the

guardianship is no longer necessary. **Kerr's Cyc. Code Civ. Proc.**, § 1802.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 907, p. 331.
- Arizona.** Rev. Stats. 1901, par. 2028.
- Idaho.** Code Civ. Proc. 1901, sec. 4395.
- Montana.*** Code Civ. Proc., sec. 3052.
- Nevada.** Comp. Laws, sec. 592.
- New Mexico.** Comp. Laws 1897, sec. 1459.
- North Dakota.** Rev. Codes 1905, § 8282.
- Oklahoma.** Rev. Stats, 1903, sec. 1865.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5280.
- South Dakota.** Probate Code 1904, § 421.
- Utah.** Rev. Stats. 1898, secs. 3992, 3996.
- Washington.** Pierce's Code, § 2785.
- Wyoming.*** Rev. Stats. 1899, sec. 4943.

§ 153. **New bond, when required.** The court may require a new bond to be given by a guardian whenever such court deems it necessary, and may discharge the existing sureties from further liability, after due notice given as such court may direct, when it shall appear that no injury can result therefrom to those interested in the estate. **Kerr's Cyc. Code Civ. Proc.**, § 1803.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 908, p. 331.
- Arizona.*** Rev. Stats. 1901, par. 2029.
- Colorado.** 3 Mills's Ann. Stats., sec. 4714.
- Idaho.*** Code Civ. Proc. 1901, sec. 4389.
- Kansas.** Gen. Stats. 1905, §§ 3419, 3431.
- Montana.** Code Civ. Proc., sec. 3053.
- Nevada.** Comp. Laws, secs. 566, 593.
- New Mexico.** Comp. Laws 1897, sec. 1444.
- Oklahoma.*** Rev. Stats. 1903, sec. 1866.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5281.
- South Dakota.*** Probate Code 1904, § 422.
- Utah.** Rev. Stats. 1898, sec. 3991.
- Washington.** Pierce's Code, § 2756.
- Wyoming.*** Rev. Stats. 1899, sec. 4944.

§ 154. **Guardian's bond to be filed. Action on.** Every bond given by a guardian must be filed and preserved in the office of the clerk of the superior court of the county, and

in case of a breach of a condition thereof, may be prosecuted for the use and benefit of the ward, or of any person interested in the estate. **Kerr's Cyc. Code Civ. Proc., § 1804.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 938, p. 336.
- Arizona.*** Rev. Stats. 1901, par. 2030.
- Idaho.*** Code Civ. Proc. 1901, sec. 4390.
- Montana.*** Code Civ. Proc., sec. 3054.
- Nevada.** Comp. Laws, sec. 594.
- New Mexico.** Comp. Laws 1897, sec. 1443.
- North Dakota.*** Rev. Codes 1905, § 8283.
- Oklahoma.*** Rev. Stats. 1903, sec. 1867.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5612.
- South Dakota.*** Probate Code 1904, § 423.
- Wyoming.*** Rev. Stats. 1899, sec. 4945.

§ 155. **Limitation of actions on guardian's bond.** No action can be maintained against the sureties on any bond given by a guardian, unless it be commenced within three years from the discharge or removal of the guardian; but if at the time of such discharge the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed. **Kerr's Cyc. Code Civ. Proc., § 1805.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 909, p. 331.
- Arizona.*** Rev. Stats. 1901, par. 2031.
- Idaho.*** Code Civ. Proc. 1901, sec. 4391.
- Montana.*** Code Civ. Proc., sec. 3055.
- Nevada.** Comp. Laws, sec. 595.
- North Dakota.*** Rev. Codes 1905, § 8284.
- Oklahoma.*** Rev. Stats. 1903, sec. 1868.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5282.
- South Dakota.*** Probate Code 1904, § 424.
- Wyoming.** Rev. Stats. 1899, sec. 4946.

§ 156. **Limitation of actions for the recovery of property sold.** No action for the recovery of any estate, sold by a guardian, can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship, or when

a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof. **Kerr's Cyc. Code Civ. Proc.**, § 1806.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 936, p. 336.
- Arizona.*** Rev. Stats. 1901, par. 2032.
- Colorado.** 3 Mills's Ann. Stats., sec. 4770.
- Idaho.*** Code Civ. Proc. 1901, sec. 4392.
- Montana.*** Code Civ. Proc., sec. 3056.
- North Dakota.*** Rev. Codes 1905, § 8285.
- Oklahoma.*** Rev. Stats. 1903, sec. 1869.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5610.
- South Dakota.*** Probate Code 1904, § 425.
- Wyoming.** Rev. Stats. 1899, sec. 4947.

§ 157. **More than one guardian may be appointed.** The court, in its discretion, whenever necessary, may appoint more than one guardian of any person subject to guardianship, each of whom must give a separate bond, and be governed and liable in all respects as a sole guardian. **Kerr's Cyc. Code Civ. Proc.** (**Kerr's Stats. and Amdts.**, p. 510), § 1807.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Arizona.** Rev. Stats. 1901, par. 2033.
- Idaho.** Code Civ. Proc. 1901, sec. 4397.
- Montana.** Code Civ. Proc., sec. 3057.
- Nevada.** Comp. Laws, sec. 602.
- North Dakota.** Rev. Codes 1905, § 8286.
- Oklahoma.** Rev. Stats. 1903, sec. 1870.
- South Dakota.** Probate Code 1904, § 426.
- Utah.** Rev. Stats. 1898, sec. 3987.
- Wyoming.** Rev. Stats. 1899, sec. 4948.

§ 158. **Order appointing guardian, how entered.** Any order appointing a guardian, must be entered as and become a decree of the court. The provisions of this title relative to the estates of decedents, so far as they relate to the practice in the superior court, apply to proceedings under this chapter. **Kerr's Cyc. Code Civ. Proc.**, § 1808.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Arizona.** Rev. Stats. 1901, par. 2034.
Idaho. Code Civ. Proc. 1901, sec. 4398.
Montana. Code Civ. Proc., sec. 3058.
Oklahoma. Rev. Stats. 1903, sec. 1871.
South Dakota. Probate Code 1904, § 427.
Utah. Rev. Stats. 1898, sec. 3993.
Wyoming. Rev. Stats. 1899, sec. 4949.

§ 159. **What provisions of code apply to guardians.** The provisions of sections ten hundred and fifty-six and ten hundred and fifty-seven are hereby declared to apply to guardians appointed by the court, and to the bonds taken or to be taken from such guardians, and to the sureties on such bonds. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 510), § 1809.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Arizona.** Rev. Stats. 1901, par. 2035.
Idaho. Code Civ. Proc. 1901, sec. 4393.
Montana. Code Civ. Proc., sec. 3059.

§ 160. **Decree that conveyance be made for incompetent.** When a person who is bound by a contract in writing to convey any real estate shall afterwards and before making the conveyance become and be adjudged to be an incompetent person, the court may make a decree authorizing and directing his guardian to convey such real estate to the person entitled thereto. Such decree may be made under the provisions of sections fifteen hundred and ninety-seven to sixteen hundred and seven, both inclusive, of this code, all of which provisions are hereby incorporated in this section; the word incompetent being substituted for the word deceased or decedent and the word guardian being substituted for the words administrator or executor, respectively, whenever said words occur. **Kerr's Cyc. Code Civ. Proc., § 1810.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- New Mexico.** Comp. Laws 1897, sec. 1917.

GUARDIAN AND WARD.

1. Appointment of guardians.
 - (1) Jurisdiction of court.
 - (2) Right to appointment.
 - (3) Necessity of petition and notice.
 - (4) Circumstances for consideration.
 - (5) Bond. Estoppel.
 - (6) Appointment here, notwithstanding foreign guardian.
 - (7) Validity of appointment.
2. Guardianship of Indians.
 - (1) In general.
3. Control of property, support, maintenance, and custody of ward.
 - (1) Control of property.
 - (2) Support and maintenance.
 - (3) Contract for support.
 - (4) Support of abandoned child.
 - (5) Custody of ward. Access.
4. Duties and powers of guardians.
 - (1) In general.
 - (2) Power of guardian as to contracts.
 - (3) Power of guardian to assign appropriation made for ward by probate court.
5. Rights and powers of guardians.
 - (1) Guardian may do what.
 - (2) Guardian cannot do what.
 - (3) Actions by guardian.
 - (4) Actions against guardians.
6. Investments by guardian.
7. Sales of land.
 - (1) In general.
 - (2) Petition for.
 - (3) Notice. Publication.
 - (4) Additional bond.
 - (5) Order for.
 - (6) Validity of.
 - (7) Purchaser and his rights.
 - (8) Setting aside.
 - (9) Collateral attack.
8. Lease and demise of ward's property.
9. Mortgage of ward's property.
 - (1) Petition as foundation of jurisdiction.
 - (2) Authority to mortgage.
 - (3) Validity of order and mortgage.
 - (4) Revival and foreclosure of former mortgage.
10. Non-resident guardians and wards.
11. Accounting and settlement.
 - (1) In general.
 - (2) Duty to account.
 - (3) Jurisdiction of courts.
 - (4) Exceptions to account.
 - (5) Admissibility of evidence.
 - (6) Proper charges against guardian. Interest.
 - (7) Credits allowable to guardian.
 - (8) What is not to be allowed. Compensation.
 - (9) Death of ward before settlement.
 - (10) Conclusiveness. Attacking settlement.
 - (11) Discharge of guardian.
12. Collateral attack.
13. Jurisdiction of courts.
14. Jurisdiction of equity.
15. Liability of guardians.
 - (1) For investments made without order of court.
 - (2) Protection of order of court.
 - (3) Liability of guardian in general.
16. Embezzlement by guardian.
17. Removal of guardians.
18. Rights and liabilities of ward.
 - (1) In general.
 - (2) Actions by ward.
 - (3) Actions against ward.
 - (4) No disaffirmance of parol partition when.

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| <p>19. Bond of guardian, and liability thereon.</p> <ul style="list-style-type: none"> (1) Failure to give a bond. (2) Purpose of bond. (3) Breach of bond. (4) New bond. (5) Action on bond. (6) Liability of sureties. (7) Defense to action. (8) Limitation of actions. | <p>20. Limitations of actions.</p> <p>21. Appeal.</p> <ul style="list-style-type: none"> (1) In general. (2) Appealable orders. (3) Findings. (4) Effect of, as stay. (5) Record. Presumption. (6) Affirmance. Reversal. (7) Dismissal. |
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1. Appointment of guardians.

(1) **Jurisdiction of court.** The appointment of guardians for the persons and estates of minors is an exercise of jurisdiction pertaining to the probate courts: *Monastes v. Catlin*, 6 Or. 119. The record must affirmatively show, with respect to the appointment of a guardian, that every act essential to give jurisdiction to the court was performed: *Seaverns v. Gerke*, 3 Saw. 353; Fed. Cas., No. 12,595. An application for letters of guardianship should be made in the county where the proposed ward resides: *Estate of Taylor*, 131 Cal. 180; 63 Pac. Rep. 180. The superior court of the county of which the minor is an inhabitant or resident has jurisdiction to appoint a guardian; and the minor is a resident of the county wherein he has resided for more than three years, and has not, during that period, had any other home, nor been absent or away from said county: *In re Reynor*, 74 Cal. 421, 424; 16 Pac. Rep. 229.

REFERENCES.

That letters of guardianship may be granted by a judge at chambers, see *Kerr's Cal. Cyc. Civ. Code*, § 166.

(2) **Right to appointment.** In all cases where the appointment of a guardian shall appear necessary or convenient, the father shall be first in legal right; and if the father be deceased, the mother, while unmarried, if they be competent to transact their own business, and are not otherwise unsuitable; and if another be appointed, he is not entitled to the personal custody and tuition of the ward, so long as the latter has a father or mother living, who is competent to care for and educate him, and is not otherwise unsuitable: *Lord v. Hough*, 37 Cal. 657, 668. The appointment of a guardian is therefore given first to the father, second to the mother, and lastly to the probate court: *Lord v. Hough*, 37 Cal. 657, 669. The order of court appointing a father as guardian of his infant child may contain directions concerning the custody of the person of the ward: *In re Linden*, Myr. Prob. 215. Where each of two persons filed a petition for letters of guardianship of the person of a minor, and no answer is filed to either petition, there are no issues made which demand findings of

fact: *In re Lewis*, 137 Cal. 682; 70 Pac. Rep. 926. The question as to which of two petitioners shall be appointed guardian over the person of a minor child is essentially a question of fact for the trial court, and if that court has decided it, the order will not be set aside for lack of evidence, where there was some substantial evidence to support the appointment: *In re Lewis*, 137 Cal. 682; 70 Pac. Rep. 926. The parent is entitled to the guardianship of his minor child, if he is competent to transact his own business, and is not unsuitable as a guardian: *Andrino v. Yates (Ida.)*, 87 Pac. Rep. 787. A parent is entitled to the guardianship of his child under the age of fourteen years, if he is a fit, proper, and competent person, in preference to any other person; nor is the right of the father, he being competent, to have the custody and control of his child at all affected by the finding of the court relative to the health of the child, and the better opportunity he would have for fresh air and exercise at the home of his grandmother, than at the residence of his father: *In re Salter*, 142 Cal. 412; 76 Pac. Rep. 51, 53. As to evidence which is not sufficient to show that the father of a child under fourteen years of age is not a fit, or proper, or competent person to have the care, custody, or control of his own child, see *In re Galleher*, 2 Cal. App. 364; 84 Pac. Rep. 352, 354. It is no objection to the appointment of a guardian for a minor that he would inherit a portion of the ward's estate in the event of the latter's death without issue: *In re Masterson's Estate (Wash.)*, 87 Pac. Rep. 1047, 1048.

REFERENCES.

That a corporation may act as the guardian of estates, see *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1348. Right of mother or reputed father to guardianship of illegitimate child: See note 65 L. R. A. 689-697.

(3) **Necessity of petition and notice.** The appointment of a guardian without giving any notice whatever is void: *Seaverns v. Gerke*, 3 Saw. 353; *Fed. Cas.*, No. 12,595. The appointment of a guardian is invalid except on proper petition filed, and after notice of the application: *Badenhoof v. Johnson*, 11 Nev. 87. But if parties have notice of what is in progress before the court, they may waive any formal notice by appearance and consent. Thus if all persons who are entitled to notice as a prerequisite to a valid appointment of a guardian for a minor under fourteen years of age, appear and consent to the appointment, no formal notice to them is necessary: *Smith v. Biscailuz*, 83 Cal. 344, 353; 21 Pac. Rep. 15; 23 Pac. Rep. 314. So in proceedings for the appointment of a guardian, where the father has custody of the minor, and petitions to be appointed guardian, notice to him of the proceedings is not necessary: *Asher v. Yorba*, 125 Cal. 513; 58 Pac. Rep. 137, 138. Under a statute which requires the court, before appointing a guardian, to cause such notice as is deemed reasonable to be given to the person having

care of the minor, and to such relatives as the court may deem proper, the court has authority to give notice by posting for ten days in three public places, and such notice under direction of the court is sufficient. The kind or character of the notice to be given is a matter for the judge to determine, and where personal notice is not absolutely required, a notice by posting is sufficient: *Asher v. Yorba*, 125 Cal. 513; 58 Pac. Rep. 137, 138. It has long been the settled practice to determine, in guardianship proceedings, questions as to the fitness and competency of parents to have the custody of their children; but notice to a parent of the minor of the appointment of a guardian is not in all cases essential to the jurisdiction of the court to appoint a guardian. In many cases where the interests of the minor make it essential that some one should at once be given authority to act as the legal custodian, it would be practically impossible to notify the parents, owing to ignorance of facts as to parentage, or as to the whereabouts of its parents. Undoubtedly, a parent should be notified, where possible, of proceedings, the effect of which may be to terminate his parental authority; and, undoubtedly, where such notice is not required to be given, a parent would be entitled, upon seasonable application, to be heard upon the question as to whether the appointment of another as the guardian of his child, without his knowledge, should not be set aside, that he might be heard upon the question of the necessity of appointing such other as guardian. But, under a statute which requires that notice shall be given to the person having the care of the minor, and which requires that notice is to be given to those relatives of the minor residing in the county, such "as the court may deem proper," the only persons to be notified are those having the care of the minor, and such relatives residing in the county "as the court may deem proper": *In re Lundberg*, 143 Cal. 402; 77 Pac. Rep. 156, 158. The appointment of a guardian without notice to a parent does not deprive the parent of a valuable right without due process of law. If actual notice to the parent were a prerequisite in such a proceeding, no appointment, in many cases, could be legally made, as he may have abandoned his child, and his whereabouts may be unknown. The right of the parent is of such a nature that it must yield to such reasonable regulations, after due notice, as the legislature may prescribe: *In re Lundberg*, 143 Cal. 402; 77 Pac. Rep. 156, 159.

(4) **Circumstances for consideration.** In considering the propriety of appointing a guardian, the parental request is entitled to great weight, and ought to prevail, unless some good reason to the contrary is shown: *Badenhoof v. Johnson*, 11 Nev. 87. The main consideration in appointing a guardian for the person and estate of an infant is the welfare of the child: *Willet v. Warren*, 34 Wash. 647; 76 Pac. Rep. 273; *In re Lundberg*, 123 Cal. 143, 402; 77 Pac. Rep. 156; *Guardianship of Brown*, 11 Haw. 679, 681. The child's own choice,

though it is not of a choosing age in law, is a circumstance for consideration; and the ties of natural affection are not to be disregarded, although it does not always follow that these ties exist because of kinship or consanguinity: *Willet v. Warren*, 34 Wash. 647; 76 Pac. Rep. 273, 274. The natural rights of the father to the care, control, and custody of his minor children cannot, and ought not, to be denied or disturbed, in the absence of good and substantial reasons; reasons made imperative by the necessities of such children, and the interest in and the duty owing to them by the state. But where it has been adjudicated by a court of competent jurisdiction that a father has recently, for three years, neglected to support his offspring, and has thereby caused his wife to get a divorce, such husband is not in a good attitude to come into court and ask for their custody, control, and guardianship. He should not be allowed the guardianship of his children until, by a substantial period of probation, he is shown to have amended his character and disposition regarding them, and to have acquired those worthy and substantial qualities of heart and mind that characterize the reputable man and considerate father: *Russner v. McMillan*, 37 Wash. 416; 79 Pac. Rep. 988, 989. So, where it is possible, the courts will give some consideration to keeping the children with the surviving members of the family to which they belong; but will give no weight to evidence of religious opinions, in such a proceeding, though the difficulties and disagreements concerning the child arose from differences in religious matters: *Jones v. Bowman*, 13 Wyo. 79; 77 Pac. Rep. 439, 440, 442. On an application for guardianship, the court will respect the best interests of the child, concerning its temporal, mental, and moral welfare, particularly where both parents of the minor are dead: *In re Dellow's Estate*, 1 Cal. App. 529; 82 Pac. Rep. 558, 559. A written request by the father of minor children, that a designated person be appointed their guardian, does not have the effect, after his death, of changing their domicile, or of empowering any probate court, foreign to their domicile, to appoint a guardian for them: *Modern Woodmen v. Hester*, 66 Kan. 129; 71 Pac. Rep. 279. For circumstances under which it is proper for the court to refuse to appoint an intemperate father of the child as its guardian, and to appoint the child's grandmother, see *Russner v. McMillan*, 37 Wash. 416; 79 Pac. Rep. 988. The right of a mother or grandmother to be appointed as guardian of a minor child, in case of the father's decease, is divested by a decree of adoption consented to by the natural mother of the child: *In re Master-son's Estate* (Wash.), 87 Pac. Rep. 1047.

(5) **Bond. Estoppel.** One who has been appointed, by order of court, a guardian of the property of minor children does not become a guardian until he gives the bond required by law: *Murphy v. Superior Court*, 84 Cal. 592, 597; 24 Pac. Rep. 310. One who has applied for letters of guardianship, and has acted as guardian for

minor children, is not estopped to deny that he is such guardian, because of his neglect to give a bond required by the statute, where he has not received any property belonging to the minors, as their guardian, or by virtue of his appointment: *Murphy v. Superior Court*, 84 Cal. 592, 597; 24 Pac. Rep. 310.

REFERENCES.

Necessity of bond by guardian to make his acts valid: See note 33 L. R. A. 759-765. Power of surety company to act as guardian without bond: See note 48 L. R. A. 589. Bond of guardian, and liability thereon: See subd. 19, post.

(6) **Appointment here, notwithstanding foreign guardian.** The claim of a petitioner for the custody of a child cannot rest on a supposed rightful authority to control his person in this state by virtue of his appointment as guardian in another state. He cannot assert his tutorial power *de jure* in our courts, or within our territory. Hence a guardian, appointed by virtue of the statutes of another state, cannot exercise here any authority, either over the person or property of his ward. His rights and powers are strictly local, and are circumscribed by the jurisdiction of the government which clothed him with the office: *Jones v. Bowman*, 13 Wyo. 79; 77 Pac. Rep. 439, 442. Hence the appointment of a guardian for a minor child, by the probate court of another state, wherein the parent was domiciled at the time of his death, and who had custody of such child at the time of his death, will not prevent the courts of this state, if the child has been subsequently brought here, from appointing a guardian for it: *Jones v. Bowman*, 13 Wyo. 79; 77 Pac. Rep. 439, 442.

(7) **Validity of appointment.** Although an order appointing a guardian may be dual, in that it also appoints the guardian administrator of an estate, it is not for that reason void as to the guardianship. Nor is it void because it is entitled "In the Matter of the Estate" of the deceased, and directing that letters of guardianship of the heirs be granted, without naming them, if they are known, as that is certain which can be made certain: *Reed v. Ring*, 93 Cal. 96, 105; 28 Pac. Rep. 851. As a minor must be an inhabitant or resident of the county in which the appointment of a guardian is made, to give the court jurisdiction to make the appointment, it follows that the appointment of the minor's sister as guardian is improper if made in the county of the sister's residence, and not in the county of the minor's residence, after proceedings for the adoption of such child had before the superior court of another county by persons residing in such county: *In re Taylor's Estate*, 131 Cal. 180; 63 Pac. Rep. 345. It is error to appoint a temporary guardian, where the permanent guardian is a proper and suitable person to perform all of the

duties required of such temporary guardian: *In re Barns*, 36 Wash. 130; 78 Pac. Rep. 783, 784. If the appointment of a guardian is void, all subsequent proceedings in the guardianship matter, including sales of real property, are also void: *Seaverns v. Gerke*, 3 Saw. 353; Fed. Cas., No. 12,595; and see *Walker v. Goldsmith*, 14 Or. 125; 12 Pac. Rep. 537. As the main consideration, in determining the custody of a child, is its welfare, and as its relatives have no legal right to its custody, letters of guardianship over it will be awarded to a worthy person with whom the child has lived, and to whom it has become attached, by reason of having had the privileges of a home, school, church, and society, as against an application for letters of guardianship made by the child's aunt, who is a non-resident of the state: *Willet v. Warren*, 34 Wash. 647; 76 Pac. Rep. 273, 274. Where guardianship proceedings have been instituted and carried to a conclusion without notice to the mother, who was living apart from her husband, although her place of residence was known, and without her knowledge, and while they were probably taken with the belief, on the part of the father's relatives, that it would be for the best interests of the child that it should remain with them, it is manifest that such proceedings were taken for the purpose of depriving the mother, without her knowledge, of the control and custody of her child, and, under a statute providing that the court may release a party from a judgment taken against him by surprise or excusable neglect, a mother may have the guardian's appointment in such a case set aside: *In re Van Loan*, 142 Cal. 429; 76 Pac. Rep. 39, 41.

2. Guardianship of Indians.

(1) **In general.** The Pueblo Indians of New Mexico are not wards of the government, and the title to their lands is not held in trust by the government. Nor are they under the charge of any Indian superintendent or agent. They are not Indians over whom the government, through its department, exercises guardianship: *United States v. Mares* (N. M.), 88 Pac. Rep. 1128, 1129. The Puyallup Indians hold lands under certain patents of the United States, have all the rights, privileges, and immunities of other citizens, and they are not under the guardianship of the United States government, nor under the charge of any Indian superintendent or agent: *United States v. Kopp* (D. C.), 110 Fed. Rep. 160. Land allotted to an Ottawa Indian cannot be alienated by a guardian's sale and deed while he is a minor: *Wiggin v. King*, 35 Kan. 410; 11 Pac. Rep. 140. The guardian of an infant Indian, on a final accounting, is entitled to credit for an amount paid by him in compromise of litigation against the ward's estate, where such payment was made under order of court, because, in view of the escape from litigation, the court cannot say that the best interests of the estate were not conserved: *Terry v. Sicade*, 37 Wash. 249; 79 Pac. Rep. 789.

3. Control of property, support, maintenance, and custody of ward.

(1) **Control of property.** Guardianship by nature extends only to the custody of the person of the ward, and not to his property. To entitle a guardian to manage the property of his ward, he must be duly appointed by some competent authority: *Kendall v. Miller*, 9 Cal. 591, 592. The property of the ward is in custody of the law, and is not subject to attachment or execution. His estate is administered under the direction of the county court; the powers and duties of the guardian in the management of the estate and the payment of debts being specified by the statute: *Sturgis v. Sturgis (Or.)*, 93 Pac. Rep. 696, 700. Neither a guardian nor his grantee can set up possession to, or title in, land adverse to the ward: *Lono v. Phillips*, 5 Haw. 357, 358.

(2) **Support and maintenance.** An allowance may be made to the mother of minor children for their maintenance during the time when there were no letters of guardianship upon their estates. But she is chargeable, in equity, as a quasi guardian or trustee of their estates, and the accounting must be deemed in the nature of an accounting in equity, and be determined upon equitable principles. The rule in equity is, that, where an infant has property of his own, and his father is dead, or is not able to support him, he may be maintained and educated out of the income of property absolutely his own, by the person in whose hands the property is held; and a court of equity will allow all payments made for this purpose, which appear upon investigation to have been reasonable and proper. Where the income is insufficient for the maintenance and education of a child, equity will break into the principal. A mother will be allowed, in equity, for the past maintenance of her children after the death of the father, out of the estate of the children, though she has a separate estate. The criterion for determining whether a past maintenance should be allowed is, whether a court of chancery would have authorized it in advance: *Estate of Beisel*, 110 Cal. 267; 40 Pac. Rep. 961; 42 Pac. Rep. 819. A family of children, under ordinary circumstances, should be kept under the care and nurture of their mother, if possible. But when this is done, it is exceedingly difficult to have accurate accounts kept, showing the precise expense on account of each child; and it is customary to apply to the court for an order fixing a lump sum by the week, month, or by the year, which is to be allowed and paid to the mother for such maintenance. This is perhaps the better method, as it serves as a protection to the guardian against a subsequent revision of his conduct, and also, to some extent, as a protection to the children against excessive payments. It also avoids the great expense that would be involved in the keeping of separate accounts of supplies furnished to each child. To do this, a previous order of the court is not necessary: *Estate of Boyes (Cal.)*, 90 Pac. Rep. 454, 459. It is the duty of a guardian to see to it that his ward

is suitably maintained, and, upon proper application therefor, the county court may, and will, authorize the use of the principal of his ward's funds, as well as the income thereof, if necessary, for that purpose. The usual, and no doubt better, practice is to obtain an order authorizing the expenditure, and, as a general rule, the guardian cannot encroach upon the principal without such order. But it is believed this rule is not inflexible, so that, if the income is not sufficient, and the ward's welfare requires it, the court may resort to the principal, and if he has in fact used a part of it for the support and maintenance of his ward without authority of the court, it may, and will in a proper case, ratify such expenditure. If, however, he has taken this responsibility, he is required to make out as clear a case to obtain the order ratifying the expenditure as if he had applied for authority in advance. The true criterion in such case would seem to be whether the court would have antecedently authorized the expenditure: *Cutting v. Scherzinger*, 40 Or. 353; 68 Pac. Rep. 393, 395. A reasonable amount should be allowed to a guardian for the maintenance of his ward, but if he, without the approval of the judge, spends more than the income on the maintenance of his ward, he does so at his peril: *Guardianship of Kaiu*, 17 Haw. 517, 518. After payment of the ward's debts, the balance is the principal, which must be invested by the guardian, and the income and profits accruing from it are all that the guardian may expend for the maintenance of his ward. He cannot break into the principal, for such purpose, without authority of the court: *Guardianship of Duncan*, 3 Haw. 543, 544. If there is no proof of a regular allowance made to a guardian for the maintenance of his ward, and it appears that payments were made at irregular intervals, as necessity required, the guardian's estate cannot, upon an accounting by the executor of the deceased guardian, be allowed a lump sum for further payments not shown to have been made: *Guardianship of Hoare*, 14 Haw. 443, 447. A probate judge has power to order a guardian to increase his ward's allowance: *Guardianship of Kapukini*, 12 Haw. 22, 27.

REFERENCES.

Maintenance of ward: See note 1 L. R. A. 304, 305.

(3) **Contract for support.** The guardian may make a contract for the support of his wards without the sanction of the court; and if it is for a reasonable amount, the court should allow him credit therefor in his account. Guardians are not always men of great efficiency in the matter of book-keeping, and the estates are not always of sufficient amount to justify an elaborate system of accounts. In cases where such a contract is made without the order of the court, it is a sufficient itemization to state, in the report accompanying the account, or elsewhere in the account, the particulars of the contract or agreement made to secure due maintenance of the ward, and to

state in the account proper the sums paid in pursuance thereof; though it would be the duty of the court to scrutinize the contract or arrangement whereby the money was applied to maintenance, and to see to it that it was just and fair, and that the sum for which credit was claimed did not exceed the sum paid in pursuance of the agreement. If the guardian acted in good faith, and the contract was fair and just, the fact that the precise expense for each child was not separately provided for by the arrangement made, or was not shown in the account, would not, of itself, deprive the guardian of the right to credit for money actually paid or applied to the support of the ward: *Estate of Boyes*, 151 Cal. 143; 90 Pac. Rep. 454, 459.

(4) **Support of abandoned child.** While a father, who has abandoned a child, may be deprived of its custody by a summary proceeding in guardianship, he cannot be compelled to compensate the guardian for the support of such child. A parent who has been deprived of the custody of his child by such a summary proceeding is no longer liable for its support, and, aside from the cases of divorce, and actions between the parents in regard to the custody of children, there is no other case in which the court has power to deprive the parent of his authority, and yet hold him liable for the support of his child, except under a statute providing that a civil action may be brought by a child, or certain relatives, against the parent for abuse of parental authority, in which the duty of support may be enforced: *In re Ross* (Cal. App.), 92 Pac. Rep. 671, 672.

(5) **Custody of ward. Access.** When a court of competent jurisdiction appoints a guardian of the person of a minor, such minor becomes a ward of the court, and the guardian is, in effect, an arm of the court, and is subject to the control of the court in the discharge of his duties as such guardian. Such court has authority to control and direct the guardian in the performance of his trust so as to insure the proper care of the infant. Hence, although a guardian has been appointed for an infant abandoned by its father, it is not an abuse of discretion for the court to allow the father access to the child, where he is a fit and proper person: *In re Ross* (Cal. App.), 92 Pac. Rep. 671, 672.

4. Duties and powers of guardians.

(1) **In general.** It is a recognized principle that statutory guardians have an authority coupled with an interest, not a bare authority; and it is not within the power of the legislature to take the estate of minors out of the hands of their guardian, and to withdraw it from the control of the probate court, by authorizing another party to dispose thereof. Such an act would be judicial and not legislative in its character, and for that reason would be unconstitutional: *Lincoln v. Alexander*, 52 Cal. 482, 486. If the court does not specially

appoint a guardian ad litem for a particular action, it is the duty of the general guardian to appear for his ward: *Gronfier v. Puymiroi*, 19 Cal. 629, 632. Under statutes, as well as at common law, the guardian has the right to the custody and control of his ward's estate, and the court has no power to interfere with a guardian's custody and general management of his ward's property, except, of course, for conduct authorizing suspension or removal: *De Greayer v. Superior Court*, 117 Cal. 640; 49 Pac. Rep. 983, 984. A statute which provides a mode of determining the abuse of parental authority is not a limitation upon the authority of the superior court to appoint a guardian on petition to that court: *Ex parte Miller*, 109 Cal. 643; 42 Pac. Rep. 428. A guardian is not remiss in his duty by failing to apply for a family allowance from the estate of the wards' deceased father for their support; and where the entire estate of the wards in the hands of the guardian consisted of a certain sum of money due each ward, derived from the life-insurance policy on the life of the father, the fact that the guardian failed to procure an order for family allowance will not prevent him, as guardian, from being allowed credit for payment out of the insurance-money for the support of his wards: *Estate of Boyes*, 151 Cal. 143; 90 Pac. Rep. 454, 456. A guardian should follow the directions of the statute, and make the accounts and reports therein required of him. His own safety, the requirements of business prudence, and the welfare of the ward and his estate, demand this. The statute, however, does not require annual accounts of guardians, but it would be better for all concerned if so made. At the same time, it cannot be said that a failure to comply strictly with the statute, or neglect to render accounts with some regularity and promptness, necessarily imposes punitive responsibility upon the guardian. If there be loss to the estate, the question of the guardian's liability therefor depends much upon the circumstances under which the loss occurred: *Curtis v. Devoe*, 121 Cal. 468; 53 Pac. Rep. 936, 938. The guardian of an infant appointed by the probate court is not a trustee of an express trust: *Fox v. Minor*, 32 Cal. 111, 117; 91 Am. Dec. 566. One who accepts an appointment as guardian, and takes charge of the ward's estate, places himself within the jurisdiction of the court, becomes an officer of the court, is answerable to it for the faithful performance of his trust, and is forever afterward estopped by the record from denying his accountability: *Fox v. Minor*, 32 Cal. 111, 119; 91 Am. Dec. 566.

REFERENCES.

Common-law powers of guardians: See note 89 Am. St. Rep. 257-316. Right of guardian to remove incompetent or infant from the state: See note 58 L. R. A. 931-937.

(2) **Power of guardian as to contracts.** A guardian, in making contracts relating to the estates of his wards, can bind himself only,

and can bind neither his wards personally nor their estates: *Shepard v. Hanson*, 9 N. D. 249; 83 N. W. Rep. 20. The guardian of minor heirs has no power to bind them by a contract that they shall pay a certain portion of the indebtedness of the estate: *Luck v. Patterson*, 2 Col. App. 306; 30 Pac. Rep. 253, 254.

REFERENCES.

Power of guardian to compromise or settle claims of ward: See note 1 L. R. A. 305.

(3) **Power of guardian to assign appropriation made for ward by probate court.** Where an estate is in the hands of a probate court, which makes an appropriation of a part thereof to the immediate use of infant wards, by an order directing the executors to pay to the mother of such wards, as guardian, a said sum of money, such order is an appropriation, which the guardian may assign, without leave of the probate court, and the assignee may maintain an action against the executor to recover the money: *Schmidt v. Wieland*, 35 Cal. 343.

5. Rights and powers of guardians.

(1) **Guardian may do what.** A guardian of the person and estate of minors should personally administer his trust, and not permit the business affairs of his ward to be transacted by others, but, under peculiar circumstances, he may be excused for allowing this to be done. Thus the guardian of an old man may permit the business affairs of his ward to be managed by others than himself, where such other persons are relatives, and are not only conversant with his affairs, but the children and heirs at law request such different management, and no creditor appears to contest the account: *Racouillat v. Requeña*, 36 Cal. 651, 656. A guardian may pay claims against his ward without prior approval by the probate court or judge: *Racouillat v. Requeña*, 36 Cal. 651, 657. Expenditures by a guardian for repairs on his ward's property are upheld on the ground of protection to the capital and property of the ward. The right, and even the duty, of a guardian to protect the land and premises of his ward by reasonable and proper repairs cannot be seriously questioned, although it is, no doubt, better that he first obtain the sanction of the court. So a disbursement for the protection of the capital of the ward, invested in property other than lands, should be upheld upon the same principle, if the same be reasonable, and necessary and beneficial to the estate. It follows that the guardian may purchase certain capital stock of a corporation, to save the other shares of his ward therein from depreciation, if not destruction, in value; and such a purchase, reasonably made for the protection of such other shares of corporate stock, is not within the constitutional inhibition against the investment of trust funds in shares of stock of private corpora-

tions. To deny such right of purchase, by way of protection, by reason of the constitutional restriction, would be to deny the right to buy one share, even if that alone would be the means of saving a much larger investment from total loss: *Nagle v. Robins*, 9 Wyo. 211; 62 Pac. Rep. 154, 158. In the absence of fraud or collusion, a minor, properly represented, is bound as fully as if he had been a major and personally cited. The guardian of a minor, therefore, is justified in admitting in his answer that a homestead, involved in certain partition proceedings, was community property: *Kromer v. Friday*, 10 Wash. 621; 39 Pac. Rep. 229, 234. If a guardian acts with judicial authority, he binds his ward, and where the ward, for many years after attaining majority, assents to a partition made by his guardian, he is bound thereby. A parol partition which has been actually consummated by possession and dominion in severalty, and which has been confirmed upon long-continued acquiescence, and by many changes of title, ought not to be, and will not be, distributed in equity: *Brazee v. Schofield*, 2 Wash. Ter. 209; 3 Pac. Rep. 265, 268. Under a statute authorizing any person interested in the estate of a deceased person to appear and file his exceptions, in writing, to an administrator's account, and to contest the same, the guardian of the estate of minors is interested as such guardian, and has a right to appear and contest such account in an estate where his wards are interested; and the appointment of an attorney by the court for the minors cannot take from the guardian the right to be heard: *Estate of Rose*, 66 Cal. 241; 5 Pac. Rep. 220.

(2) **Guardian cannot do what.** A guardian has no power to make a contract binding upon the ward or upon his estate, however proper and beneficial the contract may be. Contracts made by him affecting his ward or his estate impose a personal liability upon himself, and his protection from loss lies in his right to charge the expenditure to the ward's estate in his account: *Andrus v. Blazzard*, 23 Utah, 233; 63 Pac. Rep. 888, 890. The guardian cannot therefore mortgage the real property of his ward for the purpose of paying debts, where there is no provision of the statute allowing him to do so: *Andrus v. Blazzard*, 23 Utah, 233; 63 Pac. Rep. 888. So a contract made by him without order of court, for legal services to be rendered in establishing the ward's right to an estate, payment to be made out of the proceeds of such estate, is unauthorized: *Morse v. Hinckley*, 124 Cal. 154; 56 Pac. Rep. 896, 898. Nor has he any right to bind his wards by contract that each shall pay one half of all "claims against the estate," where such claims against the estate were not the debts of the estate, but debts contracted in administering the estate. The debts against an estate are, and of necessity can only be, those contracted by the parties before death, before the property becomes an estate to be administered. A debt contracted by the administrator, many years after the death, is not a debt due by the estate, but one contracted

in course of administration. To allow any debt contracted in administering an estate as the debt of an estate would be error, where the allowance was made solely upon the authorization of the administrator, who had contracted it; and it makes no difference that the services for which the debt was contracted were beneficial to the administrator and to his children as heirs. Such fact would not make the claim for such services a legal demand against the estate. There is a wide distinction between debts due by an estate and those contracted in the course of an administration, and in the manner of their allowance: *Lusk v. Patterson*, 2 Col. App. 306; 30 Pac. Rep. 253, 254. A guardian, who has not obtained an order of court authorizing him to perform work on the property of his ward, cannot subject the property of his ward to a mechanic's lien for work done thereon by a mechanic under a contract with the guardian: *Fish v. McCarthy*, 96 Cal. 484; 31 Pac. Rep. 529. If the guardian of a minor's estate makes his individual mortgage to his ward to secure a debt due from him to the estate, the guardian cannot satisfy such mortgage without authority of the court, and without payment of the debt: *Jennings v. Jennings*, 104 Cal. 150; 37 Pac. Rep. 794, 796. If a guardian makes application for a substitution of attorneys, an order for such substitution does not authorize a contract with the new attorney affecting the ward's property: *McKee v. Hunt*, 142 Cal. 526; 77 Pac. Rep. 1103. The executors of a deceased guardian have no authority to present his account for settlement to a probate court, nor has such court jurisdiction over the matter: *In re Allgier*, 65 Cal. 228, 230; 3 Pac. Rep. 849. The general guardian of a minor, as such, has no right to the custody and management of trust property. It is for the trustees to manage the trust fund, under the directions of the court, paying for the maintenance and support of the minor such sums as may be necessary, paying them, indeed, to the general guardian of the minor, if the court should hold such to be the advisable course, and being protected in their payments by the order of the court. But, on the other hand, if the execution of the trust be arrested for lack of a trustee, it is proper for the guardian to apply to the court to fill the vacant trusteeship, and the court, in the exercise of its powers, may appoint any fit and proper person, whether the guardian or another, to the vacancy. But, if the guardian should be appointed, he would not take the trust property as guardian, but as trustee: *Hallinan v. Hearst*, 133 Cal. 645; 66 Pac. Rep. 17, 19. The last will and testament of the ward is not an asset of his estate, nor is it any evidence of the ward's title to property. Neither is it an instrument which the guardian can use in the recovery of an asset. It cannot in any way relate to any matter within his power or duties, nor in any manner affect his action as a guardian, because it cannot take effect until after his authority has ceased. He certainly cannot annul, revoke, destroy, or in any way dispose of it, nor can the court authorize him to do so, and he is not entitled to its possession or to a knowledge

of its contents. If it were in his hands, of course it would be his duty to preserve it. But a person, if competent to make a will, has a right to select its custodian, and the subsequent incompetency of the maker of the will does not entitle the guardian to the possession of the instrument: *Mastick v. Superior Court*, 94 Cal. 347, 349; 29 Pac. Rep. 869. So far as general uses are concerned, it is not necessarily incompatible to unite in the same person the capacities of administrator and guardian. But, in a special proceeding set on foot by such person, as administrator, against his ward, and for the distinctive purpose of divesting the ward of his title as heir, such person cannot represent the ward: *Townsend v. Tallant*, 33 Cal. 45, 52; 91 Am. Dec. 617.

(3) **Actions by guardian.** A guardian is not permitted to bring suit in his own name, and in his individual capacity, for money or property belonging to the ward; but must bring suit as guardian: *Dennison v. Willcut*, 3 Ida. 793; 35 Pac. Rep. 698. If, pending a suit by a guardian, the ward becomes of age, he is entitled to be substituted as plaintiff, where the guardian has been discharged, and revivor is neither necessary nor proper: *Shattuck v. Wolf*, 72 Kan. 366; 83 Pac. Rep. 1093. An averment, in a petition, that a guardian was appointed is put in issue by a verified answer denying generally the averments of the petition, where the affiant states that the denials or contents of the answer are true: *Caple v. Drew*, 70 Kan. 136; 78 Pac. Rep. 427. If an action is brought in behalf of minors by their guardian, it is incumbent upon the guardian to set out facts in an issuable form, in his complaint, which show his representative capacity and the character in which he sues; and a complaint, in such a case, which does not do so is demurrable. But such demurrer must be special, and upon the ground of want of capacity to sue, and, unless so made, such objection is waived: *Dalrymple v. Security L. & T. Co.*, 9 N. D. 306; 83 N. W. Rep. 245. In an action by a guardian of the estate of minors, upon a promissory note which is, in terms, payable neither to such guardian nor to his wards, but to another person, and is not indorsed either generally or by special indorsement, the ownership of which is challenged by an express denial in the answer, it is held, under the evidence referred to in the opinion, showing that said note was delivered to the county court by the payee, who formerly had been guardian of the estate of said minors, to cover a shortage arising from his unlawful use of the trust funds, and that the same was accepted by said court, that title thereto is established in the wards: *Shepard v. Hanson*, 10 N. D. 194; 86 N. W. Rep. 704.

(4) **Actions against guardians.** It is well established that a settlement of an administrator's account by the decree of a probate court does not conclude as to property accidentally or fraudulently withheld from the account. If the property be omitted by mistake, or be subse-

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quently discovered, a court of equity may exercise its jurisdiction in the premises, and take such action as justice to the heirs of the deceased, or to the creditors of the estate, may require, even if the probate court might, in such case, open its decree, and administer upon the omitted property; and a fraudulent concealment of property, or a fraudulent disposition of it, is a general and always existing ground for the interposition of equity: *Lataillade v. Oreña*, 91 Cal. 565; 27 Pac. Rep. 924, 926. In an action against a guardian for an accounting as to moneys received by the defendant, and in part held by him in trust for the plaintiff, the money received constitutes, in defendant's hands, a single fund, though derived from sales of real and personal property, and received at different times: *Lataillade v. Oreña*, 91 Cal. 565; 27 Pac. Rep. 924. If a plaintiff had no knowledge, and no reason to suspect, that a fraud was being practised upon him, there was nothing to put him upon inquiry, and, under such circumstances, it cannot be said that he failed to use due diligence to detect the fraud, and he cannot be presumed to have known anything concerning it. Hence, if the complaint states when the discovery of fraud was made, and what it was, and how it was made, and why it was not made sooner, it is sufficient in this respect: *Lataillade v. Oreña*, 91 Cal. 565; 27 Pac. Rep. 924, 927. In partition proceedings, where the guardian of infants having an interest in the property was personally served with process, and he answered, and was represented by counsel throughout the proceedings, the minors are bound by the acts of their representative: *Kromer v. Friday*, 10 Wash. 621; 39 Pac. Rep. 229, 234. An action cannot be maintained against a guardian upon the liability of a ward, but only against the ward, and the guardian being a proper party, he may appear and defend the action in the interest of the ward, but is not a party for the purpose of establishing a personal liability against him: *Sturgis v. Sturgis (Or.)*, 93 Pac. Rep. 696, 699.

REFERENCES.

Service of process on guardian: See *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1722.

6. **Investments by guardian.** The guardian of a minor has power to invest moneys of his ward without an order of court; but if he does so, it is generally at his own risk. If an opportunity for an investment presents itself to a guardian, he should protect himself by making an application to the court for authority to invest the ward's money. An order for investment or other management of the funds, thus obtained, will protect the guardian, although misfortune follows. But where the guardian acts upon his own judgment, he is held to a more strict accountability: *Guardianship of Cardwell*, 55 Cal. 137, 141. An order of court directing the guardian to lend funds of his ward on the terms and security therein stated will protect the

guardian from all liability by reason of such loan, if it is made on insufficient security. There could be no purpose in securing such order, or any reason for the enactment of the statute authorizing it, if it did not afford protection: *In re Schandoney's Estate*, 133 Cal. 387; 65 Pac. Rep. 877, 878. If a guardian lends twenty thousand dollars of the estate of his ward, taking therefor, as security, sixty thousand dollars of dividend-paying stock, worth par, the ward cannot except to such investment, where the guardian, before making it, examined the books of the corporations issuing the stock, and was convinced that such corporations were sound and the stock worth par, and did not make the investment until after he had taken the advice of his counsel and of the judge having control of the estate: *Nagle v. Robins*, 9 Wyo. 211; 62 Pac. Rep. 154, 161. It must be observed, however, that conversations between the guardian and the judge of the court having control of the ward's estate, preceding investments by the guardian, and verbal advice of the judge to make such investments, are not such orders and directions as the statute authorizes the court to make in the premises. They may show the guardian's good faith and the knowledge of the judge at the time of entering the orders of approval; but the advice of a judge, given verbally, under such circumstances, is not to be regarded as tantamount to an order contemplated by the statute: *Nagle v. Robins*, 9 Wyo. 211; 62 Pac. Rep. 154, 157. Furthermore, an intermediate order of approval of the report of a guardian does not protect him to the same extent as an original order directing such investments as the guardian may have made: *Nagle v. Robins*, 9 Wyo. 211; 62 Pac. Rep. 154, 156. The guardian has power to make investments by loan, and to spend money for repairs and for the protection of the estate in his hands generally, and ordinarily without an order of court. But in doing so he runs the risk of having his acts disapproved by the court. The difference between an investment made with and one made without a previous order affects only the rights of the ward, and the liability and risk of the guardian. Where the investment is made without an order of court, it is subject to attack by the ward upon the final settlement; but where the investment is made by an order of court, it is not subject to attack by the ward upon final settlement. The absence of an order of court, directing a loan of the ward's money, is not alone sufficient to entitle the ward to refuse to accept the investment: *Nagle v. Robins*, 9 Wyo. 211; 62 Pac. Rep. 154, 156, 157. If the guardian has authority to make the investment without an order previously obtained, the subsequent intermediate approval thereof stands upon the same footing as approvals of current accounts, or annual settlements of accounts, pending the continuance of the guardianship. It is generally held that such approvals and settlements, while prima facie evidence of correctness, are not conclusive upon the ward: *Nagle v. Robins*, 9 Wyo. 211; 62 Pac. Rep. 154, 157. In the territory of Hawaii the investment of the funds of a

ward by his guardian is not restricted to public securities and real estate mortgages. Such funds may be invested in the bonds of private industrial corporations, if such bonds are amply secured by a mortgage deed of trust and are regarded with favor by prudent investors. But the purchase of such bonds, by the guardian of a minor, from a corporation of which he is the treasurer and one of the directors, is voidable at the election of the cestui que trust: *Guardianship of Parker*, 14 Haw. 347, 358.

7. Sales of land.

(1) *In general.* The sale of real estate is not one of the general duties of a guardian; and a ward cannot, therefore, on obtaining his majority, maintain a suit against the guardian and the surety on his general bond to recover moneys received by the guardian on a sale of the ward's realty, and not accounted for, where the statute does not, in direct terms, require a condition in the general bond to account for the proceeds of such sales: *Henderson v. Coover*, 4 Nev. 429, 433, 434. A guardian cannot sell his ward's property without an order of court, and this includes personal property: *Kendall v. Miller*, 9 Cal. 591; *De la Montagnie v. Union Ins. Co.*, 42 Cal. 290, 293. Every alienation of the property of the ward, if made by the guardian without order of court, is void: *De la Montagnie v. Union Ins. Co.*, 42 Cal. 290, 293. If a guardian, however, is authorized by an act of the legislature to sell his ward's real estate, subject to approval by the court, his sale thereof, under such authority, is valid; but he has no authority to accept anything but money in payment of the purchase price: *Brenham v. Davidson*, 51 Cal. 352, 356. To make a valid sale in pursuance of such authority, the person making it must first have received an appointment as guardian by the probate court in accordance with the general statutes upon that subject; otherwise the sale is void: *Paty v. Smith*, 50 Cal. 153, 158. A proceeding for the sale of land by a guardian is in the nature of a proceeding in rem: *Gager v. Henry*, 5 Saw. 237; *Fed. Cas.*, No. 5,172. The parent of a minor has no authority, as his natural guardian, to transfer his real property: *McNeil v. First Cong. Soc.*, 66 Cal. 105; 4 Pac. Rep. 1096, 1099. A guardian may, upon order of the court, sell his ward's real estate for the purpose of paying the debts and expenses of the guardianship: *Andrus v. Blazzard*, 23 Utah, 233; 63 Pac. Rep. 888, 890. The power to sell the real estate of a minor is statutory, and a substantial compliance with the requirements of the statute is necessary to divest the minor of his title, and this must be affirmatively shown by the record: *Orman v. Bowles*, 18 Col. 463; 33 Pac. Rep. 109, 111. Title to a ward's land passes by the guardian's deed therefor, and not by the confirmation of the sale: *Scarf v. Aldrich*, 97 Cal. 360; 32 Pac. Rep. 324, 327. In determining whether the real or personal estate should be sold, the court should ordinarily be governed by the same reasons which would influence a competent

adult in disposing of his own property. A determination of what is for the best interest of the ward must control. A probate homestead which has been set aside to a surviving wife and children, under order of court, may be sold, and a good title to the interest of the minors passed, where the adult heirs have all concurred in the sale, if such sale is deemed by the court to be advantageous to the estate of the minors: *Estate of Hamilton*, 120 Cal. 421; 52 Pac. Rep. 708, 709, 710. The probate courts of New Mexico have jurisdiction to make an order appointing a special guardian to sell the undivided interest of minor heirs in certain lands owned by their deceased father, for the benefit of said heirs, and a conveyance by the special guardian, made under authority of such order, is not void: *Hagerman v. Meeks* (N. M.), 86 Pac. Rep. 801, 802. An agent of the guardian of an infant owner of real estate has no power to make an executory contract for the sale of the infant's real estate. Such a sale can only be made upon an order of the probate court, and subject to the court's approval: *Gault Lumber Co. v. Pyles* (Okl.), 92 Pac. Rep. 175. The guardian of a minor ward has, in general, no authority to sell the ward's estate, unless authorized by a competent court; nor has he authority to sell at will the personal estate of his ward: *Washabaugh v. Hall*, 4 S. D. 168; 56 N. W. Rep. 82. There is a distinction to be observed between sales by guardians and sales by executors or administrators. A sale by a guardian is authorized, either when necessary to maintain or educate the ward, or when expedient for the purpose of a profitable investment of the proceeds, but no sale of a decedent's estate by an executor or administrator is authorized except when it is "necessary" to pay: 1. Family allowances; 2. Debts of the decedent; 3. Expense of administration; 4. Legacies: *Smith v. Biscailuz*, 83 Cal. 344, 349; 21 Pac. Rep. 15; 23 Pac. Rep. 314.

(2) *Petition for.* In order to render a guardian's sale effectual to confer a valid title, the probate court must have acquired jurisdiction of the case by the presentation of a proper petition by the guardian. What shall be the contents of such a petition is prescribed by the statute, and the petition should be in substantial conformity with its requirements: *Fitch v. Miller*, 20 Cal. 352, 381. The petition must set forth the condition of the estate of the ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of the sale, and the petition must be verified by the oath of the petitioner: *Fitch v. Miller*, 20 Cal. 352, 381. The necessity or expediency of the sale must arise from one or more of these circumstances: 1. The evidence of debts due from the ward, which cannot be paid out of his personal estate and the income of his real estate. 2. The insufficiency of the income of the estate of the ward to maintain the ward and his family, or to educate his family, or to educate him when a minor. 3. That it would be for the benefit of the ward that his real estate, or a part thereof, should be

sold, and the proceeds put out on interest, or invested in some productive stock. In order to enable the court to judge of this necessity or expediency, the first requisite of the petition is that it shall set forth the condition of the estate, but the statute does not require that it shall designate the value of the several items and parcels of property of which the estate consists; it is necessary only to state the condition in such manner as to enable the court to judge of the existence of one or more of the circumstances above specified, rendering a sale necessary or expedient: *Fitch v. Miller*, 20 Cal. 352, 382. If the sale is asked upon the ground that it is "necessary," there is the same reason for requiring a statement of the condition of the ward's whole estate as exists in the ordinary case of a sale by an executor or administrator; namely, to enable the court to decide what particular part it is best to sell. But if the sale is asked upon the ground that it is for the "interest" of the ward that some portion of his lands should be sold and the proceeds invested, it is manifest that the condition of the property to be sold is the only matter to be inquired into, and that the policy or expediency of selling it is in no wise affected by the condition of other portions of his estate. The beginning and the end of inquiry in such case is, whether the price of the land to be sold can be invested to better advantage in something else; and a petition which fairly presents this question ought to be sufficient to give the court jurisdiction to make the order of sale, as it is by express enactment in the case of mining claims belonging to the estates of decedents: *Smith v. Biscailuz*, 83 Cal. 344, 350; 21 Pac. Rep. 15; 23 Pac. Rep. 314. A petition by guardian to sell his ward's realty is not a proceeding adverse to the ward, or to his relatives, but is in rem: *Gager v. Henry*, 5 Saw. 237; Fed. Cas., No. 5,172; *Holmes v. Oregon etc. R. R. Co.*, 7 Saw. 380; 9 Fed. Rep. 229. A guardian's petition for the sale of his ward's estate is sufficient to give the court jurisdiction, if it states "any cause" which, under the law, would have authorized the court to make a sale: *Walker v. Goldsmith*, 14 Or. 125; 12 Pac. Rep. 537, 554. Although the petition and order to show cause may contain a defective description of the lands to be sold, this does not affect the jurisdiction of the court or the validity of the sale, where the order of sale contains a specific and correct description of the land: *Scarf v. Aldrich*, 97 Cal. 360; 32 Pac. Rep. 324, 327. It is not a condition precedent to the exercise of the power to sell the ward's real estate for the purpose of reinvesting the proceeds of unproductive land, which is depreciating in value, in more desirable property, that the guardian shall have "faithfully applied all the personal estate." The want of such an allegation constitutes no defect in the petition: *Orman v. Bowles*, 18 Col. 463; 33 Pac. Rep. 109, 111. Whether the real or personal estate of the ward shall be sold is in the discretion of the court. A determination of what is for the best interest of the ward must control; and it is not required that the petition should show the

amount of personal estate and how much remains undisposed of, as such a provision relates to sales by executors or administrators, and not to sales by guardians: *Estate of Hamilton*, 120 Cal. 421, 424; 52 Pac. Rep. 708.

REFERENCES.

Sale of property of minors, and disposition of the proceeds: See *Kerr's Cal. Cyc. Code Civ. Proc.*, §§ 777-792. What petition for sale of ward's real estate must contain: See *Sprigg v. Stump*, 7 Saw. 280; 8 Fed. Rep. 207.

(3) **Notice. Publication.** A probate sale of real estate is not valid unless notice was properly given: *Gager v. Henry*, 5 Saw. 237; Fed. Cas., No. 5,172. A guardian's sale of his ward's realty is void, unless it appears that the same was made after due notice of the time and place thereof: *Hobart v. Upton*, 2 Saw. 302; Fed. Cas., No. 6,548. The notice required by the statute to be given to a ward of the hearing of his guardian's application for leave to sell his real estate is jurisdictional, and a deed made without such notice having been given is void, and subject to collateral attack: *Beachy v. Shomber*, 73 Kan. 62; 84 Pac. Rep. 547. But a failure to give the three weeks' notice by publication required by statute is held, in Colorado, not to be a jurisdictional defect such as to render the judgment subject to collateral attack: *Mortgage Trust Co. v. Redd (Col.)*, 88 Pac. Rep. 473, 475. In the matter of the sale of the land of minors upon the application of a guardian, it is competent for the probate court to determine from the evidence submitted whether due and legal notice has been given to the minors: *Bradford v. Larkin*, 57 Kan. 90; 45 Pac. Rep. 69, 70, holding, in the case involved, that the notice was sufficient to confer jurisdiction upon the probate court, and that the proceedings were not void. Where the petition and the notice for the sale by a guardian of his ward's real estate are each signed by the guardian and served upon the minor by an individual who is not an officer, and the proof of the service is shown by the affidavit of the person who served the same, and all were filed in the probate judge's office, and the probate judge, as well as the district court, found that the service was sufficient, the supreme court must also consider it sufficient, especially where the service is attacked only in a collateral proceeding: *Howbert v. Heyle*, 47 Kan. 58; 27 Pac. Rep. 116, 117. Under a statute which requires a publication of the notice of sale of real property "for four weeks successively," it is not necessary that proof of notice should show that the notice was given for four weeks "next preceding the sale": *Walker v. Goldsmith*, 14 Or. 125; 12 Pac. Rep. 537, 555. An order of sale by a guardian on May 11th, notice to be first published at least once a week for three consecutive weeks in a newspaper, is complied with by publishing the notice in each issue of a daily paper commencing on April 21st and including May 11th, a period of twenty days. It

was not essential that the notice should have been published for the full period of three weeks before the sale: *Orman v. Bowles*, 18 Col. 463; 33 Pac. Rep. 109, 112; following *Calvert v. Calvert*, 15 Col. 390; 24 Pac. Rep. 1043. If an order to show cause why an order of sale of certain personal and real property of a minor should not be granted is published three weeks, in precise accordance with the statute, such publication is sufficient: *Estate of Hamilton*, 120 Cal. 421, 425; 52 Pac. Rep. 708.

(4) **Additional bond.** Though the statute requires a bond of the guardian before making a sale of his ward's estate, the fact that the bond was not filed until after a sale was made is not a valid objection to the validity of the sale, where it appears, by recital in the decree of sale, that, before making it, the guardian, as required in and by the order of sale, duly executed an additional bond to the state. Such bond could not have been "duly executed" unless it had been delivered to the judge, and all other acts performed which the statute required; and if delivered to the judge and approved, that was a sufficient filing: *Smith v. Biscailuz*, 83 Cal. 344, 358; 21 Pac. Rep. 15; 23 Pac. Rep. 314. If the court's order did not, in terms, require the guardian to give a bond, or to take an oath of office, and neither is found, but the record does not show that they were not given, the presumption, in support of a judgment adjudging a sale of the infant's property, is, that the guardian qualified as such: *Brady v. Reese*, 51 Cal. 447. See *Goldsmith v. Gilliland*, 10 Saw. 606; 23 Fed. Rep. 645. The fact that a guardian did not give a bond for the faithful application of the proceeds of the sale is without merit, where it appears that the terms of the sale were complied with: *Orman v. Bowles*, 18 Col. 463; 33 Pac. Rep. 109, 113. The omission of the court to require, and of the guardian to give, a special sale bond is a mere irregularity which does not affect or impair the jurisdiction of the court which ordered and affirmed the sale, where the statute does not declare that if a special bond be not given, a guardian's sale shall not be made, or that, if made, it shall be void, and where it does not provide that the order of sale shall become effective only when such special bond is given. The general bond of the guardian stands as security for the proper application of the proceeds of the sale: *Hughes v. Goodale*, 26 Mont. 93; 66 Pac. Rep. 702, 705. The sureties on a guardian's bond, conditioned that he shall "faithfully execute the duties of his trust according to law" in selling the real estate of his ward, are liable on such special bond, though they might not be liable on the bond given for the general administration of his ward's estate: *Botkin v. Kleinschmidt*, 21 Mont. 1; 52 Pac. Rep. 563, 564.

(5) **Order for.** Where the statute provides that the order of sale must describe the lands to be sold, the order of sale must be, in itself,

sufficient; and, to make it so, the description of the land to be sold must be sufficiently definite and certain, without referring to any extraneous matter, and the order cannot be helped out by referring to a doctrine not found in it: *Hill v. Wall*, 66 Cal. 130, 132; 4 Pac. Rep. 1139. But the order of sale need not state the conclusions of the court as to the advisability of the sale: *Gager v. Henry*, 5 Saw. 237; Fed. Cas., No. 5,172. When the statute with reference to what the decree must contain in order to validate the sale by a guardian (notwithstanding the failure of the petition to state the condition of the estate, and the facts and circumstances going to show a sale to be necessary or expedient), provides that a failure to set out those facts and circumstances in the petition shall not invalidate the sale, if the decree contains a recital of "general facts" showing such necessity, it means to declare that neither the failure to set out the special facts and circumstances which, taken together, show the necessity or expediency of the sale, nor the failure to state the condition (which appears of necessity from, and is a part of, the special facts and circumstances showing the necessity or expediency of a sale), shall invalidate the sale if the decree shall recite the "general facts" above stated. Such "general facts" mean those ultimate facts showing one or more of the contingencies under which the real estate of the minor may be sold by the guardian, and which must appear in some form in the petition therefor to give the court jurisdiction: *Smith v. Biscailuz*, 83 Cal. 344; 21 Pac. Rep. 15, 17; 23 Pac. Rep. 344, 356. Under a statute concerning the sale of a ward's real estate, and which requires a copy of the order to show cause to be personally served on the next of kin of the ward, or that it must be published, etc., it is not necessary that the order shall be served on the ward, because the minor is in court by the filing of the petition, and submits his property to the jurisdiction and order of the court: *Scarf v. Aldrich*, 97 Cal. 360; 32 Pac. Rep. 324, 326. Proceedings pertaining to a guardian's sale of the real estate of his ward contemplate a case where there is a living ward,—a living ward not only when the proceedings are inaugurated, but up to and including the moment the deed is made. Hence if the ward dies before his guardian has filed an account, and the probate court decrees that the ward's estate is indebted to the guardian, an order authorizing the guardian to sell his ward's real estate for such debt is invalid, because the guardian's authority expired on the death of the ward: *Estate of Livermore*, 132 Cal. 99; 64 Pac. Rep. 113. An order directing the sale of certain personal and real property of a minor "for cash" sufficiently fixes the terms of the sale: *Estate of Hamilton*, 120 Cal. 421, 425; 52 Pac. Rep. 708. It is the duty of a guardian to pay all just debts of the ward out of his personal estate and the income of his real estate; and when a sale of the property of the ward is necessary to pay the debts and expenses of guardianship, the guardian may, upon an order of the court, sell the ward's real estate for that

purpose: *Andrus v. Blazzard*, 23 Utah, 233; 63 Pac. Rep. 88. Where a probate homestead has been set apart for the use of the widow and minor children, the guardian may, under proper proceedings had in the probate court, in the matter of the estate of such minors, obtain an order for the sale of their interests in such homestead during their minority: *Estate of Hamilton*, 120 Cal. 421, 428; 52 Pac. Rep. 708.

REFERENCES.

Order of sale must contain what: See *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1544.

(6) **Validity of.** Where a proceeding by a guardian for the purpose of selling his ward's estate is not adverse to the latter's interest, and where there is no statute making the appointment of a guardian *ad litem* a requisite to the validity of the sale, no such appointment is necessary: *Orman v. Bowles*, 18 Col. 463; 33 Pac. Rep. 109, 112. Where it is apparent that an appraisal of real estate was filed in court before the confirmation of sale, the marking of it "filed," by the clerk, is not essential to its validity: *Smith v. Biscailuz*, 83 Cal. 344; 21 Pac. Rep. 15, 18. And an ambiguous report of appraisers, made in the course of proceedings upon which a guardian's deed is based, will, if possible, be given a construction that will uphold the deeds: *Beachy v. Shomber*, 73 Kan. 62; 84 Pac. Rep. 547. The title to land of the ward passes by his guardian's deed therefor, and not by the confirmation of the sale: *Scarf v. Aldrich*, 97 Cal. 360; 32 Pac. Rep. 324, 327. A guardian's sale of his ward's land is valid, though the order of sale was erroneous, as having been made twenty-three days after the order to show cause, while there should not have been less than four weeks or twenty-eight days intervening. Such an order is clearly erroneous; but if the court acquired jurisdiction when the petition was presented, and if the proceeding is not adverse to the ward, such error or irregularity does not vitiate the sale: *Scarf v. Aldrich*, 97 Cal. 360; 32 Pac. Rep. 324, 325. Where there is a matter of substance upon which jurisdiction can hinge, mere errors or defects in a guardian's sale of his ward's land, although material in some respects, but which might have been avoided upon appeal, cannot avail to condemn the proceeding, when, by lapse of time, an appeal is barred, and which proceeding has become the foundation of title to property: *Walker v. Goldsmith*, 14 Or. 125; 12 Pac. Rep. 537, 555. Where a sale of the land of minors was duly made by a guardian for the actual value of the same, the sale approved, the money paid, and expended for the support and education of the minor, and the purchaser takes possession thereunder, and holds the same for a long time, he acquires the full, equitable title, and is entitled to a conveyance of the legal title; and the mere fact that a deed which contains a full recital of the preliminary proceedings omits the name of one of the minors will not invalidate the sale,

and in such case the purchaser or his grantee is entitled to have his estate, interest, and possession of the land quieted as against the claim of any of the minors: *Bradford v. Larkin*, 57 Kan. 90; 45 Pac. Rep. 69. So where it appears by the record that the notice describing the land sold was published the required length of time, the fact that the petition presented to the court included other tracts described in another notice not so published, which were not sold, does not affect the validity of the sale of the land properly advertised. Even under an order of sale valid as to all the land described therein, we apprehend that a failure from any cause to sell the entire property would not vitiate the sale of a portion, much less should a failure to sell that illegally ordered sold have such an effect: *Orman v. Bowles*, 18 Col. 463; 33 Pac. Rep. 109, 112. And the failure of the guardian to give security required by the statute relating to guardians and wards will not render void a sale regularly made and approved: *Howbert v. Heyle*, 47 Kan. 58; 27 Pac. Rep. 116. The conveyance of a ward's land, by the guardian, for the furtherance of a public use, as where it has been conveyed to a railroad, is valid, where the deed is in proper form to convey the estate, and the probate judge has found that it was a case within the statute, and has approved the sale, and where the only limitation upon the sale is that it shall be approved and confirmed by the probate judge: *Hodgdon v. Southern Pac. R. R. Co.*, 75 Cal. 642; 17 Pac. Rep. 928, 931. Mere irregularities of proceedings in a guardian's sale, though of so grave a character as to render the sale inoperative, may be deprived of their evil consequences by subsequent legislation: *McCulloch v. Estes*, 20 Or. 349; 25 Pac. Rep. 724, 725. It is a well-recognized rule of law that the legislature may, unless prohibited by the constitution, validate or legalize, retrospectively, judicial or execution sales, even though the defects or irregularities therein are of so grave a character as to render them inoperative, so long as it does not undertake to infuse life into proceedings utterly void for want of jurisdiction. Thus the selection of the time and place of sale by a guardian, in advance of taking the prescribed oath, is, under the decisions, fatal to the purchaser's title; but the defect or irregularity may be cured, and the sale validated, by subsequent curative act of the legislature: *Fuller v. Hager*, 47 Or. 242; 83 Pac. Rep. 782, 783. If shares of stock in an insurance company belong to an infant, but are issued to his guardian, who afterwards, without any order of court, sells and assigns the same, such sale is void, and gives no title to the purchaser: *De la Montagnie v. Union Ins. Co.*, 42 Cal. 290. A guardian's sale is presumed to have been regular and according to law, though the record does not show the particular proceedings taken, except as to the particulars mentioned in the statute. The statutory proceedings for the sale of property by guardians must, however, appear of record, or the sale is invalid and void: *Hobart v. Upton*, 2 Saw. 302; *Fed. Cas.*, No. 6,548; *Gager v. Henry*, 5 Saw. 237; *Fed. Cas.*,

No. 5,172; Walker v. Goldsmith, 14 Or. 125; 12 Pac. Rep. 537, 540. A guardian's sale of his ward's real estate is valid if notice was properly given: Gager v. Henry, 5 Saw. 237; Fed. Cas., No. 5,172. But such sale is void unless it appears that it was made at public auction, after due notice of the time and place thereof, when a sale at public auction is required by the statute: Hobart v. Upton, 2 Saw. 302; Fed. Cas., No. 6,548. Where the probate court of Elk County, in Kansas, issued letters of guardianship appointing a guardian of the person and estate of a minor whose domicile was in Greenwood County, and, upon application, made its order directing a sale of the minor's interest in real estate situated in said county of Elk, it was held, in an action of partition in the district court of Elk County, by the guardian of said minor, subsequently appointed by the probate court of Greenwood County, that the proceedings in the Elk County probate court and the guardian's deed were void as against the purchaser at such guardian's sale, and also void as against his grantee, claiming under said guardian's deed: Connell v. Moore, 70 Kan. 88; 78 Pac. Rep. 164. An administrator or guardian is prohibited from purchasing trust property at his own sale, and a sale by him to another, who does not pay any consideration, and who immediately transfers the property to the administrator or guardian, is void, and as much a violation of the fiduciary relation, and as great a fraud in the eye of the law, as if the sale had been made directly to himself: Webb v. Branner, 59 Kan. 190; 52 Pac. Rep. 429.

(7) **Purchaser and his rights.** A guardian, like an administrator, is prohibited from purchasing trust property at his own sale: Webb v. Branner, 59 Kan. 190; 52 Pac. Rep. 429. Since, under the law of this state, the wife's interest during marriage in the real estate of her husband, while a contingent one, is unquestionably property, the statutory incapacity of a guardian to become a purchaser at the sale of his ward's property is held to exclude the husband of a guardian from becoming such a purchaser: Frazier v. Jeakins, 10 Kan. App. 558; 63 Pac. Rep. 459. If a guardian, or the husband or wife of such guardian, wishes to buy at the guardian's sale, the proper practice is to obtain leave of court to do so, on a showing of reasons therefor: Frazier v. Jeakins, 64 Kan. App. 615; 68 Pac. Rep. 24. Where a probate homestead has been set apart by the court from community property, for the use of the surviving wife and minor children, it belongs, one half to the widow, and the remainder, in equal shares, to the children. The widow, and children upon attaining majority, may dispose of their respective interests in such homestead, and during their minority the children's interests may be sold by the guardian, but the purchaser, where he was not misled, and did not misunderstand the terms of the sale of the property, cannot complain that it was sold "in one lump," and that the interest of

one of the minors, an undivided eighth, was not offered separately, unless he can show that, because of the mode in which the interest of the minor was sold, he did not acquire a good title to that interest: *Estate of Hamilton*, 120 Cal. 421, 425; 52 Pac. Rep. 708. Purchasers at a guardian's sale, who close their eyes to facts, facts which were open to investigation by the exercise of that diligence which the law imposes, are not protected. "Whatever is notice enough to excite the attention of a man of ordinary prudence and call for further inquiry is, in equity, notice of all facts to the knowledge of which an inquiry suggested by such notice and prosecuted with due and reasonable diligence would have led": *Dormitzer v. German Sav. & L. Soc.*, 23 Wash. 132; 62 Pac. Rep. 862, 890; citing *Kerr on Fraud and Mistake*. A statute providing that a guardian's sale shall not be void by reason of any "irregularity in the proceedings" when the guardian made a sale, and the premises are held by "one who purchased them in good faith," does not protect one who purchased property at a guardian's sale, with notice of fraud in the proceedings, or of facts which would place him on inquiry, from an action to set aside the sale for fraud: *Dormitzer v. German Sav. & L. Soc.*, 23 Wash. 132; 62 Pac. Rep. 862, 882, 883. An order of court, confirming a guardian's sale, which fails to direct the investment of the proceeds, goes to a matter subsequent to the consummation of the sale, and does not affect the purchaser's rights. He is not required to see that such proceeds are properly invested, and a failure to invest them at all could not defeat a sale properly made: *Orman v. Bowles*, 18 Col. 463; 33 Pac. Rep. 109, 113. Where a minor's interest in land, incapable of partition, is sold as a whole, at public auction, and it appears that the purchaser bid for the whole property, and knew what he was bidding for; that it was announced, at the time the property was offered, that bids would be received for the whole, and treated as pro rata bids for the several interests; that the court found that such pro rata bid for the interest of the minor was not disproportionate to its value; that an offer of ten per cent more, exclusive of the costs of the new sale, could not be had; and that the proceedings at the sale were fair,—such purchaser cannot object to a confirmation of the sale of such minor's undivided interest: *Estate of Hamilton*, 120 Cal. 421, 425; 52 Pac. Rep. 708.

(8) **Setting aside.** The judgment of a county court, when acting as a court of probate, in a proceeding by a guardian to sell the land of a ward, cannot be questioned, except in the manner provided by statute: *Gager v. Henry*, 5 Saw. 237; Fed. Cas., No. 5,172. As to what evidence is sufficient to set aside a guardian's sale for fraud, where the allegations of the complaint attack certain probate proceedings and acts of the guardian, and the sale of the property made by him as fraudulent, see *Dormitzer v. German Sav. & L. Soc.*, 23 Wash. 132; 62 Pac. Rep. 862, 891. Proceedings for the sale of property

by guardians are the same as those prescribed for the sale of property of decedents by executors or administrators. Hence if the court is satisfied from the evidence as to the value of the property, and that the amount bid for it by the purchaser, including an increased bid in the court, is disproportionate to the value of the property, it may, in its discretion, refuse confirmation of the sale, and set it aside, and order a new sale: *In re Jack*, 11 Cal. 203, 206; 46 Pac. Rep. 1057. Where probate proceedings were had for the purpose of vesting title to an entire piece of property in the father of certain minors, so that he might mortgage it to get money for the purpose of finishing buildings in the course of construction on part of the property; where the children were to get a second mortgage, instead of having their interest sold for cash; where a form of bidding had been agreed upon, in advance, by the probate court, on testimony taken as to the fair value of the children's interest; and where the guardian was used as an instrument by the father to accomplish this end, with full knowledge of the probate court,—the sale will be set aside as fraudulent: *Dormitzer v. German Sav. & L. Soc.*, 23 Wash. 132; 62 Pac. Rep. 862, 890. As a general rule, a party occupying a relation of trust or confidence to another is, in equity, bound to abstain from doing everything which can place him in a position inconsistent with the duty or trust such relation imposes on him, or which has a tendency to interfere with the discharge of such duty. Upon this principle, no one placed in a situation of trust or confidence in reference to the subject of a sale can be the purchaser, on his own account, of the property sold. If such a one purchases the property, the option of the person interested in the property, and to whom the relation of trust or confidence was sustained, has the option to set aside the sale within a reasonable time, however innocent the purchaser may be: *Dormitzer v. German Sav. & L. Soc.*, 23 Wash. 132; 62 Pac. Rep. 862, 891. The doctrine as to purchases by trustees, guardians, administrators, and persons having a confidential character arises from the relation between the parties, and not from the circumstance that they have power to control the sale. The right to set aside the sale does not depend on its fairness or unfairness. To set aside the purchase, it is not necessary to show that it was actually fraudulent or advantageous. If the trustee, or other person having a confidential character, can buy in an honest case, he may in a case having that appearance, but which may be grossly otherwise; and yet the power of the court, because of the infirmity of human testimony, would not be equal to detect the deception. It is to guard against this uncertainty and the hazard of abuse, and to remove the trustee, and other persons having confidential relations, from temptation, that the rule does and will permit the cestui que trust or other person to come, at his option, and, without showing actual injury or fraud, have the sale set aside: *Dormitzer v. German Sav. & L. Soc.*, 23 Wash. 132; 62 Pac. Rep. 862, 891. Where certain shares

of stock of a decedent's estate have been sold, and, by the terms of the will of the testator, a minor child is entitled to one half of his estate, and a sale has been confirmed, the guardian of such minor child may be relieved from such order of confirmation, on the ground that the price received for the property was disproportionate to its value, and that the sale thereof, at such price, was a fraud upon the estate and upon such minor child. Such relief may be granted under section 473 of the Code of Civil Procedure of California, which provides that the court may, in its discretion, relieve a party, if application be made within a reasonable time, from a judgment taken against him, "through his mistake, inadvertence, surprise, or excusable neglect." In applications for relief under this section, made within a reasonable time, no distinction is to be made between extrinsic or other fraud. Fraud, or its equivalent, whether upon the court, or upon a party, or one so situated as to be held in law an adversary, is sufficient to warrant relief: *In re Johnson* (Cal. App.), 94 Pac. Rep. 592, 594.

(9) **Collateral attack.** If the question as to a guardian's sale of lands of his ward arises collaterally, and the pleadings do not attack the proceeding for want of jurisdiction, and the record discloses jurisdiction, both of the parties and of the subject-matter, the sale will be sustained: *McCulloch v. Estes*, 20 Or. 349; 25 Pac. Rep. 724. The attack is "direct," and not "collateral," when the validity of the record attacked is directly put in issue by the pleadings of the parties attacking it, by proper averments; and the converse is true, that, when there are no proper averments attacking the record, the attack is then "collateral," and not "direct." If the record contains a recital of the facts requisite to confer jurisdiction, it is conclusive when attacked collaterally: *Walker v. Goldsmith*, 14 Or. 125; 12 Pac. Rep. 537, 553. Irregularities in such proceedings, occurring after the court has acquired jurisdiction, do not affect the validity of the sale upon collateral attack: *Scarf v. Aldrich*, 97 Cal. 360; 32 Pac. Rep. 324, 327. Neither irregularities alone, nor mere omissions from the record, are sufficient to destroy the validity of judicial proceedings, where such errors could have been corrected on appeal or other direct proceedings. Collateral attacks of this kind are never favored; and it devolves on those making the attack to show clearly and conclusively that the court had no jurisdiction, before the proceeding will be held void: *Bradford v. Larkin*, 57 Kan. 90; 45 Pac. Rep. 69, 70. Where a petition, by a guardian, to sell certain land belonging to his ward states, among other things, that the ward had no money or personal property, and that it was to his interest, and necessary for his support and education, that the land should be sold, and describes the land without stating specifically in what county or state it is situated, or in what range or township, but land answering to such description was in fact situated in a certain

county, where all the parties interested resided, and where all the proceedings were had, it was held that the petition would be sufficient, where the sale under it was attacked collaterally, many years afterwards: *Howbert v. Heyle*, 47 Kan. 58; 27 Pac. Rep. 116. Where the validity of the appointment of a guardian, and a sale of his ward's land, are attacked collaterally, the rules of law hedging about the validity of such sales are to be invoked against the plaintiff. The order of sale is presumed to have been a valid one, and it behooves the plaintiff to show the contrary. The burden is upon him to show a void sale. The absence of evidence in the record showing the jurisdictional facts may be taken as evidence against him. If the posting of notices was not performed according to the requirements of the statute, it is for him to show that fact. If the evidence does not show how it was done and when it was done, it will be presumed that it was done in the proper manner and at the proper time: *Asher v. Yorba*, 125 Cal. 513; 58 Pac. Rep. 137, 138. Whatever may be the law in other states, it is settled, under the statute of Kansas, that the order of a court confirming a guardian's sale becomes *res judicata* as to irregularities only, and cures nothing of substance; certainly not unless the matter of substance is exhibited on the face of the sale proceeding: *Frazier v. Jeakins*, 64 Kan. 615; 68 Pac. Rep. 24, 27. It follows that a guardian's sale, if a nullity under the law, is subject to collateral attack, although the probate court has confirmed the sale, as where an action of ejectment was brought to recover a title claimed under a trustee's sale to himself, or, in effect, to himself. In order to characterize a guardian's sale and deed as "void," in the sense in which that word is most frequently used in the law, it is not necessary to regard them nonexistent. They have a form of existence, and, under certain circumstances, they may be allowed, or may acquire the substance of existence. A plaintiff may ratify them by express act or deed. He might estop himself by some course of conduct to question the validity, or he might allow lapse of time to bar his right to recover on the score of their invalidity. But until by ratification, estoppel, or limitation he has given effect to them, he is believed to treat them as void and of no effect. As to him, they are void and of no effect, because they failed to pass the title to his land. In order to characterize an act or transaction as void, it is not necessary that it should be a nullity as to everybody, and for all time, and under all circumstances. If the act or transaction fails to deprive interested persons of their rights or titles, fails to confer them on some one else, the act or transaction is void as to such persons. If the act or transaction requires ratification, estoppel, or limitation to transfer the right or title, it is void until the ratification has been made, the estoppel has occurred, or the time has elapsed; and even then the right or title does not pass by virtue of the original act or transaction, but passes by virtue of the ratification, or is founded on the estoppel, or is set at rest by the lapse of

time: *Frazier v. Jeakins*, 64 Kan. 615; 68 Pac. Rep. 24, 28. The question as to whether an appraisal gave sufficient information to the court to enable it to exercise its judgment in confirming a sale is a matter which cannot be attacked collaterally, if the court had jurisdiction to determine the sufficiency of the evidence upon the matter in hand: *Smith v. Biscailuz*, 83 Cal. 344, 359; 21 Pac. Rep. 15; 23 Pac. Rep. 314. A guardian's deed will not be held void upon a collateral attack, merely because the petition of the guardian for leave to sell his ward's real estate does not affirmatively show the circumstances of a condition which, under the statute, authorizes such sale: *Beachy v. Shomber*, 73 Kan. 62; 84 Pac. Rep. 547. The judgment of a probate court, regular upon its face, appointing a guardian for a minor, cannot be attacked collaterally upon the ground of fraud, collusion, or other matter aliunde: *Hodgdon v. Southern Pac. R. R. Co.*, 75 Cal. 642; 17 Pac. Rep. 928, 931. So a judgment permitting a guardian to sell the real estate of his wards cannot be collaterally attacked on the ground that the required statutory notice by publication was not given, as this is not a jurisdictional defect. One has a right to attack a judgment in a collateral proceeding for a jurisdictional infirmity, — that is, error in assuming jurisdiction; but, on the other hand, a judgment cannot be questioned collaterally for an error committed in the exercise of its jurisdiction: *Mortgage Trust Co. v. Redd* (Col.), 88 Pac. Rep. 473, 475. Where the court has jurisdiction to enter an order and judgment appointing a special guardian, and for the sale of the lands of certain minor heirs, and no appeal is taken from the same, such order and judgment cannot be attacked collaterally in a civil action in the nature of ejectment: *Hagerman v. Meeks* (N. M.), 86 Pac. Rep. 801. The appointment of a guardian cannot be attacked collaterally: *Walker v. Goldsmith*, 14 Or. 125; 12 Pac. Rep. 537, 540. If certain probate proceedings, and the acts of the guardian for minors, and a sale of their property made by him, are attacked as fraudulent, in a complaint which seeks the foreclosure of mortgages on the property, but such complaint, in apt and specific allegations, directly attacks the probate proceedings, and the guardian's deeds thereunder, and issues are joined on these allegations, the plaintiff, by presenting his complaint so drawn with a double aspect, cannot be said to have waived the fraud in the guardian's sales, and the attack thereon is not collateral. Such a complaint, where it contains a prayer for relief generally, as well as one for the foreclosure of the mortgages, will justify a decree restoring mortgages wrongfully canceled, and their foreclosure, or a decree adjudging the guardian's sales and deeds void, and giving to the children an unencumbered interest in the property: *Dormitzer v. German Sav. & L. Soc.*, 23 Wash. 132; 62 Pac. Rep. 862, 881.

8. Lease and demise of ward's property. If a guardian is appointed for the estate of a minor, and such guardian's bond is presented and

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approved, a lease afterwards made by him of the ward's property is valid, though no letters of guardianship have been issued to the guardian, and no oath of office has been taken by him: *Whyler v. Van Tiger* (Cal.), 14 Pac. Rep. 846. Where a guardian makes a lease of the premises of his ward, without complying with all the requirements of the law, and the party to whom the lease is made, without warranty, conveys the same to a third party, who enters upon the premises and enjoys the peaceable and uninterrupted possession thereof, and reaps the fruits of the lease, he cannot be heard to question the validity of the lease, or of the assignment, in defense of a note given in consideration of such assignment. It would be a gross inequity and injustice to allow the assignees to take the benefits of the lease, and then avoid payment of the note given in consideration of the same: *Norton v. Stroud State Bank* (Okla.), 87 Pac. Rep. 848, 849, 851. If a lease has been made by an infant lessor, the guardian of such infant lessor, after the expiration of the lease, has no power, unless expressly authorized by the court, to consent to a lien upon the leased premises for improvements made thereon by the lessee: *Hughes v. Hershow* (Col.), 93 Pac. Rep. 1116, 1118. While it is true that a guardian cannot lease the land of his ward for a period beyond the latter's minority, so as to bind the ward, yet the lease is binding on the lessee after that time, unless the ward terminates it, and it may be ratified or disaffirmed by the ward, at his option: *Nawahi v. Hakalau Plantation Co.*, 14 Haw. 460, 462.

REFERENCES.

Mortgages and leases of real estate by guardians: See *Kerr's Cal. Cyc. Code Civ. Proc.*, §§ 1577-1579.

9. Mortgage of ward's property.

(1) **Petition as foundation of jurisdiction.** To obtain an order of the court authorizing the guardian to mortgage the real estate of his ward, the foundation of jurisdiction is the petition filed by the guardian for leave to mortgage, and the petition for such order is not sufficient, unless it appears that all of the requirements of the statute have been complied with in procuring the order empowering the guardian to execute the mortgage: *Howard v. Bryan*, 133 Cal. 257, 260; 65 Pac. Rep. 462; *Howard v. Bryan* (Cal.), 62 Pac. Rep. 459.

(2) **Authority to mortgage.** A county court in Oregon cannot authorize a guardian to mortgage the real estate of his ward: *Trutch v. Bunnell*, 11 Or. 58; 4 Pac. Rep. 588. A guardian has no power to make a contract binding upon the ward or upon his estate, however proper and beneficial the contract may be. Contracts made by him impose a personal liability upon himself, and his protection from

loss lies in his right to charge the expenditure to the ward's estate in his account. If the guardian is authorized to mortgage the real estate of his ward only for the purpose of providing suitable maintenance of the ward and his family, that is the only instance in which he may mortgage such real estate, and even in such case it is necessary for him to obtain an order of court therefor: *Andrus v. Blazard*, 23 Utah, 233; 63 Pac. Rep. 888, 890. Though there is no direct authority in the statute to mortgage the ward's real estate, still, where the statute declares that the guardian must safely keep the property of his ward; that he must maintain the same with its buildings and appurtenances; and that he shall deliver it to the ward at the close of his guardianship in as good condition as he received it, a district court, in Montana, may allow the guardian to mortgage such estate for an amount sufficient to pay off a mortgage thereon, which is overdue, and on which foreclosure proceedings are threatened. The interest of the infant in such case manifestly requires that the lien or encumbrance upon the estate should be discharged; and the general doctrine refusing a guardian the privilege of mortgaging his ward's estate is not applicable in such a case, where the opportunity seemed to present itself to save the infant's estate, not by creating a debt, or by borrowing money, but by simply transferring an already existing debt from one creditor to another: *Northwestern Guaranty L. Co. v. Smith*, 15 Mont. 101; 38 Pac. Rep. 224, 226. The law cannot be construed to authorize the mortgage of a minor's estate to pay any debt but his own. It must be such a mortgage as he can discharge by paying what he is individually bound for, and such as will admit of a redemption of the payment of that which is due from him on his own account. Hence a court has no jurisdiction to authorize a joint mortgage of the property of several minor wards to pay an aggregate sum, which includes a large private indebtedness of the guardian, for which the estate is not liable, and which encumbers the property of each minor with aggregate charges made against the property of all the other minors. Such a joint mortgage would be void: *Howard v. Bryan*, 133 Cal. 257, 260, 261, 267; 65 Pac. Rep. 462. Under a statute which confers power upon a guardian to sell his ward's estate for the purpose of raising funds to pay debts or to maintain the ward, the guardian cannot be authorized, by order of court, to mortgage his ward's land to secure a debt contracted for the improvement of the estate: *Davidson v. Wampler*, 29 Mont. 61; 74 Pac. Rep. 82, 84. In the territory of Hawaii, a guardian does not now have the power he formerly possessed of mortgaging the real estate of his ward, without authority from any court: *Hoare v. Allen*, 13 Haw. 257, 262.

REFERENCES.

Mortgages and leases of real estate by guardians: See *Kerr's Cal. Cyc. Code Civ. Proc.*, §§ 1577-1579.

(3) **Validity of order and mortgage.** If a fair and reasonable construction of an order authorizing the guardian to mortgage the estate of his ward may be made, which will make it valid, the court is bound to make that construction: *Howard v. Bryan* (Cal.), 62 Pac. Rep. 459. Non-compliance with a statute which authorizes and directs a guardian to give the mortgagee a promissory note for the amount of money loaned, though it may be a substantial departure from the statute, is not to be deemed a jurisdictional departure; and where the attack upon the mortgage is collateral, no mere error or irregularity in the proceeding, however important or substantial, will invalidate the mortgage, particularly where the statute declares that no mere error or irregularity in mortgaging the property of minor heirs under order of court shall invalidate the mortgage: *Howard v. Bryan* (Cal.), 62 Pac. Rep. 459, 460. In Montana it is held that a law which authorizes the court to disregard certain irregularities in sales by guardians does not apply to proceedings which were wholly void under the law at the time at which they took place. Thus such a statute does not apply to a mortgage by a guardian, given to secure debts contracted for the improvement of the estate; because a guardian has no power to encumber the estate of his ward, or to bind the ward personally on any undertaking entered into on the ward's behalf: *Davidson v. Wampler*, 29 Mont. 61; 74 Pac. Rep. 82. A mortgage given by a guardian is not made void by the fact that he failed to give a bond. It is the established law of this state, that a purchaser or mortgagee need not inquire whether a bond has been given prior to a guardian's sale of real estate: *Hunt v. Insley*, 56 Kan. 213; 42 Pac. Rep. 709, 710.

(4) **Revival and foreclosure of former mortgage.** One who, through mistake of law, lends money with which a mortgage, executed by and existing upon the real property of a person since deceased, is satisfied, and takes therefor the promissory note of the guardian of the minor heirs of such deceased person, such guardian being also the owner of an undivided one-third interest in the premises, and by whom a mortgage upon said real property is executed to secure said promissory note, is not entitled to a decree in equity reviving and foreclosing the former mortgage, unless it appears from the complaint and evidence that said guardian and maker of the last-mentioned obligation is insolvent, or that his mortgaged interest in the land will be insufficient to secure the payment of the note when the same matures: *Kelsey v. Welch*, 8 S. D. 255; 66 N. W. Rep. 390.

10. Non-resident guardians and wards. Except as a matter of comity, and in exceptional cases, the guardian of a minor appointed in one state is not recognized as such in another state. And a statute providing that letters of administration shall issue to the guardian of a minor, instead of to the minor himself, refers to a

guardian appointed in this state, and not to one appointed in some other state: *In re Nickals*, 21 Nev. 462; 34 Pac. Rep. 250. Jurisdiction to appoint a guardian for minor children is in the probate court of their domicile, even though they may not be within the jurisdiction of the state at the time; and the probate court of another state, where the children may be merely sojourning, has no such jurisdiction: *Modern Woodmen v. Hester*, 66 Kan. 129; 71 Pac. Rep. 279. A beneficiary certificate issued by a fraternal beneficiary society, suable in another state, in favor of minor children domiciled in that state, has its legal situs at their domicile, and is an asset in the hands of the guardian appointed there, and the presence of the paper in another state does not authorize the appointment of a guardian for the minors in such other state: *Modern Woodmen v. Hester*, 66 Kan. 129; 71 Pac. Rep. 279. Where foreign guardians of non-resident wards are authorized by local statutes to receive and remove from the state personal property of their wards in the hands of local guardians and others, they have been authorized to maintain suits within the state, to recover for debts due their wards. Even in the absence of such statutes, it seems to be competent for a court possessing chancery powers to order funds belonging to the ward, in the hands of a resident guardian, to be transmitted and paid over to the domiciliary guardian. It is discretionary, however, with the local courts, even under such statutes, to refuse permission to the foreign guardian to remove the property from the state if it is for the best interests of the ward that the property should be administered within the state. When the non-resident guardian of a non-resident ward applies for permission to remove the property of his ward from the state, he must produce a transcript from the records of a court of competent jurisdiction, certified according to the laws of this state showing his appointment as guardian of the ward in the state or territory in which he and his ward reside; that he has qualified as such according to the laws thereof, and given bond with sureties for the performance of his trust; and must also give notice for the required time to the resident executor, administrator, guardian, agent, or trustee, if there be such, of his application. Thereupon, if no objection be made, or if no good cause be shown to the contrary, the judge of the court shall make an order granting such guardian leave to remove the property of said ward to the state or territory in which he or she may reside; which order shall be full and complete authority to said guardian to sue for and receive the same in his own name, for the use and benefit of said ward: *In re Crosby*, 42 Wash. 366; 85 Pac. Rep. 1, 2. The guardian of a minor appointed by a probate court of another state is not authorized, as such, to sell lands of his ward situated in this state: *McNeil v. First Congregational Society etc.*, 66 Cal. 105; 4 Pac. Rep. 1096. A non-resident guardian, by consenting to a probate sale of the land of his ward in this state, cannot give the court any jurisdiction to make an

order for such sale: *Wilson v. Hastings*, 66 Cal. 243, 247; 5 Pac. Rep. 217. On the application of a party to be appointed guardian of a minor, who resides out of the state, the notice to be given to all persons interested is a matter for the exclusive judgment of the probate judge; and third persons cannot question the validity of an order upon any allegation that insufficient notice was given to the heir of the application for the appointment: *Gronfier v. Puymirol*, 19 Cal. 629, 631. A foreign guardian has no authority to bind the real estate of his ward situated in this state, and his consent that such estate be sold does not confer jurisdiction upon the court to make an order of sale therefor: *Wilson v. Hastings*, 66 Cal. 243, 247; 5 Pac. Rep. 217. Third persons cannot question the validity of an order appointing a guardian for a non-resident minor on the ground that insufficient notice was given of the hearing of the application for the appointment: *Gronfier v. Puymirol*, 19 Cal. 629, 632.

REFERENCES.

Non-resident guardian and ward: See *Kerr's Cal. Cyc. Code Civ. Proc.*, §§ 1793-1799, and notes.

11. Accounting and settlement.

(1) *In general.* In a petition for the settlement and allowance of a guardian's account, it is not necessary to allege the steps taken in procuring his appointment, since probate courts are, in such matters, courts of general jurisdiction, and every intendment is in favor of the regularity of their judgments and orders: *In re Brady*, 10 Ida. 366; 79 Pac. Rep. 75. When the final account of a guardian is to be settled, notice for the statutory period must be given of the time and place of the hearing thereof; and in a case where the ward has deceased, the proceeding for the settlement of the account must be had with the legal representatives. His interests are adverse to those of the guardian, and he is a necessary party to the proceeding, although he may be brought in by constructive notice only. There is a proceeding of a special nature in which the only process required by law is the posting of a general notice for a statutory period. In all cases where, by statute, a substituted service of notice is authorized in place of actual service, a strict compliance with the statute is essential to a valid service. A publication of posting for less than the required time is ineffectual to give jurisdiction, and renders the subsequent proceeding under such notice void: *Livermore v. Ratti*, 150 Cal. 458; 89 Pac. Rep. 327, 328, 330. When findings are filed on a contest of the settlement of a guardian's account, they may be considered for the purpose of determining the issues upon which such findings were made; but it is not necessary to have findings in such a case: *Estate of Schandoney*, 133 Cal. 387, 394; 65 Pac. Rep. 877; *Estate of Levinson*, 148 Cal. 450, 455; 41 Pac. Rep. 483; 42 Pac. Rep. 479. As the law respects form less than substance, it is

the duty of the court to disregard any error or defect in a guardian's account which does not affect the substantial rights of the parties. Hence where it appears that the account of the guardian was his "final" account, it may be settled, although it was miscalled an "annual" account: *In re Dow*, 133 Cal. 449; 65 Pac. Rep. 890, 892. The statute making it the duty of the guardian to file his account upon the expiration of one year from the time of his appointment does not prohibit him from filing and presenting it sooner: *Estate of Hayden*, 146 Cal. 73; 79 Pac. Rep. 588. In a guardian's account, charges for medical attention are sufficiently itemized, within the meaning of the statute, where they show the date of payment, the amount, the person to whom paid, and the nature of the services. It is not necessary that the bill of a physician or of a lawyer should contain each item that goes to make up the charge. If the amount of the claim is disputed, or if it is denied that the services were rendered, the court, on the hearing, may go into the particulars: *Estate of Hayden*, 146 Cal. 73; 79 Pac. Rep. 588, 589. Where the wards consist of a family of children, it is seldom possible to have accurate accounts kept, showing the exact expense on account of each child; but where the guardian has acted in good faith in expending money for the benefit of the wards, and the expenses thus incurred have not been unreasonable or excessive, he should be given the proper credit for the money actually so expended, although he may not be able to trace every item to the particular child. It is the duty of the court, if possible, to adjust the credits between the respective wards, if the evidence enables it to do so; but it is not justified in rejecting all of the credits because some of them are improper: *Estate of Boyes*, 151 Cal. 143; 90 Pac. Rep. 454, 460. If the account of the guardian is sworn to by another person, who has transacted the business of the guardian, and also by the guardian, who swears that he believes that such person's statements are true, the verification is sufficient: *Racouillat v. Requeña*, 36 Cal. 651, 652, 655. The settlement of a guardian's account is a "proceeding," within the meaning of a statute which prescribes the time within which an action or proceeding is deemed to be pending: *Cook v. Ceas*, 143 Cal. 221, 226; 77 Pac. Rep. 65.

REFERENCES.

Method of compelling settlement of accounts with deceased guardian: See note 8 Am. St. Rep. 684.

(2) **Duty to account.** Under a statute authorizing the court to compel the guardian to render an account upon the application of "any person," it is not necessary that the person making such application shall have an interest in the estate. The court may therefore order the guardian to present his account on the application of a brother of the ward: *Trumpler v. Cotton*, 109 Cal. 250, 254;

41 Pac. Rep. 1033. A ward may maintain a suit against the executor of his guardian: *Ong v. Whipple*, 3 Wash. Ter. 233; 3 Pac. Rep. 898. When a ward attains the age of majority, the office of guardian comes to an end, and it is then the duty of the guardian, and one of the obligations of his bond, to exhibit a final account of his guardianship to the probate court, make a settlement with the probate judge or with the ward, and deliver up all the property in his hands belonging to the ward. Failure to do this constitutes a breach of his bond, for which he and his sureties are liable after settlement of the guardianship. Settlement of the final account of the guardian includes only transactions during the minority of the ward; it does not include transactions occurring after the ward has attained his majority. When that event happens, the court is *sui juris*; and the legal liability which attaches to him for any services rendered to him by his guardian arises, not out of the relation of former guardian and ward, but out of the contractual relation established by the transactions between them as contracting parties. Such a liability is not enforceable within the jurisdiction of a probate court; the remedy upon it lies, not in a probate proceeding, but in an action at law: *In re Allgier*, 65 Cal. 228; 3 Pac. Rep. 849, 850. Where a guardian has collected the moneys of his ward, used them, and does not attempt to account for them until forced to do so by the court many years later, he is not entitled to anything more than the strict letter of the law allows him: *In re Eschrich*, 85 Cal. 98, 102; 24 Pac. Rep. 634. It is the duty of a guardian to account for the funds of his ward received from a foreign jurisdiction, and there is no presumption that he has already accounted for them: *In re Secchi*, Myr. Prob. 225. Where the court not only has jurisdiction of the subject-matter, but the statute designates specifically all the means by which it shall obtain jurisdiction of the person of the guardian, and such means have been observed, the guardian cannot thwart the object of the law by failing or refusing to present his account. Hence if he has left the state, service may be made upon him by publication, and if, upon such service being made, he fails to file his account, the court may order it made up, audited, and settled from the evidence at hand; and a settlement so made will bind the sureties of the guardian: *Trumpler v. Cotton*, 109 Cal. 255, 256; 41 Pac. Rep. 1033. A guardian is derelict in not accounting annually: *Guardianship of Kainu*, 17 Haw. 517.

(3) **Jurisdiction of courts.** A final accounting presented by a guardian is properly addressed to the probate court that has jurisdiction of the estate of the ward: *In re Allgier*, 65 Cal. 228, 229; 3 Pac. Rep. 849. The probate judge has exclusive jurisdiction to determine the state of accounts between guardian and ward: *Allen v. Tiffany*, 53 Cal. 16. A probate court has authority to settle the accounts of a guardian of an infant after his letters are revoked: *Graff v.*

Mesmer, 52 Cal. 636, 637. In Oregon, the county court has jurisdiction to settle the accounts of a removed guardian, upon the petition of his bondsmen and that of the subsequently appointed guardian. Where the purpose of such a proceeding is merely to determine whether additional credits should be allowed, the removed guardian is not a necessary party, and it is not necessary to resort to a court of general equity jurisdiction for the purpose of determining whether such additional credit should be allowed: *Cutting v. Scherzinger*, 40 Or. 353; 68 Pac. Rep. 393, 395. Under a statute which gives to a county court jurisdiction, in the first instance, to direct and control the conduct, and to settle the accounts, of executors, administrators, and guardians, such court has power to inquire into a case of devastavit, and to charge the amount thereof to the delinquent: *Steel v. Holladay*, 20 Or. 70; 25 Pac. Rep. 69, 71. If, however, a ward, on attaining her majority, and after her marriage, has executed a release to her guardian, the county court has no jurisdiction thereafter to compel the guardian to account. In such a case, the ward must resort to equity to have the settlement set aside, if the county court is not a court of general equitable jurisdiction: *Butterick v. Richardson*, 39 Or. 246; 64 Pac. Rep. 390, 392.

(4) **Exceptions to account.** In a statute which provides that, upon the hearing of an account, any person interested may appear and file his exceptions, in writing, to the account, and contest the same, the word "exceptions" is probably used with reference to the equity practice of filing exceptions to the report of a master in chancery. But, in the practice that has grown up in this state, the office of such exceptions has been much enlarged, and the word has come to include not only a statement in writing of the points or matters wherein the credits or charges in an account are claimed to be deficient, defective, or erroneous in law, but also a statement of any affirmative matters of fact not appearing on the face of the account, which, it may be claimed, requires additional charges in favor of the estate, or the rejection of credits claimed against it: *Estate of Boyes*, 151 Cal. 143; 90 Pac. Rep. 454, 456. If a person interested in an estate wishes to contest an account presented by an executor, administrator, or guardian, he must file his exceptions, in writing, to the account, setting out specifically the grounds of his objection; and at the hearing he should be held limited to the exceptions so presented; but, without any objections, it is the duty of the court to carefully examine the account and to reject all unjust or illegal claims. Regardless of the filing of exceptions, the court has power, and it is its duty, to scrutinize the account, reject all errors therein, reject all items of credit which appear to be illegal or excessive, and generally to inquire into the truthfulness and accuracy of the items of charges and credits, and of the facts set forth in the accompanying report. And, in the course of such investigation,

it may require and receive evidence to prove or disprove the several items and facts under inquiry, although no contest is made: *Estate of Boyes*, 151 Cal. 143; 90 Pac. Rep. 454, 456. A ward cannot except to an investment made by his guardian, on the mere ground that it consists of a loan or personal security, where the statute authorizes the guardian to make the investment in any manner to the ward's interest: *Nagle v. Robins*, 9 Wyo. 211; 62 Pac. Rep. 154, 156. Where the report of a guardian is excepted to by his ward, and costs expended, outside of counsel fees, are awarded to the guardian in resisting the exceptions to a certain investment, and the guardian, on appeal, is surcharged with such investment, he should be allowed such costs; and if an exception to a certain investment is sustained, and other exceptions are dismissed, the ward should be allowed his costs, outside of counsel fees, in respect to the investment as to which the exception was sustained: *Nagle v. Robins*, 9 Wyo. 211; 62 Pac. Rep. 154, 164. It is no objection to a guardian's first account, that one year had not elapsed from the day of the appointment of the guardian: *Estate of Hayden*, 146 Cal. 73; 79 Pac. Rep. 588. Where, on the final accounting of a guardian of an Indian allottee, an exception is taken to allowing him credit for the payment of a certain sum of money in compromise of litigation, under an agreement with the ward, the validity of such contract will not be determined, where it was involved in a suit for specific performance: *Terry v. Sicade*, 37 Wash. 249; 79 Pac. Rep. 789. If an executor is the duly appointed, qualified, and acting guardian of a minor heir, his two positions of trust are in direct antagonism, upon the question of property rights, where a legatee under the will objects to the executor's account upon the ground that he had a large sum of money and also personal property in his possession which was the property of the estate and for which he had not accounted; and if it were not for the prospective personal liability against him in one or the other of the estates, he should not be heard at all in such a proceeding, for, in representing both trusts, he would most likely misrepresent one: *In re Haas*, 97 Cal. 232, 234; 31 Pac. Rep. 893.

(5) **Admissibility of evidence.** If a ward files exceptions to the final report of his guardian, concerning certain loans or investments, verbal advice of the district judge at the time of the transaction, and the advice of the guardian's counsel, are admissible in evidence to show the good faith of the guardian. Evidence of previous loans by the ward's father to the same person, on like security, is also admissible as showing prudence and good faith on the part of the guardian: *Nagle v. Robins*, 9 Wyo. 211; 62 Pac. Rep. 154, 158, 160, 161. In proceedings for the allowance of a guardian's account, the admission of evidence which is substantially injurious to the guardian must necessitate a reversal: *Estate of Boyes*, 151 Cal. 143; 90 Pac. Rep. 454, 457.

(6) **Proper charges against guardian.** Interest. If a guardian allows himself to make a loan of his ward's money on lands in the neighborhood of his city, the value of which is largely speculative, based upon the proposition that it may become, in time, city property, and desirable and sought for as a site for city homes or factories, and takes as security for such loan a mortgage on such lands, he should be charged with the amount of the loan, and any interest received, but should be permitted to retain the securities as his own, and the judgment, by appropriate provision, should secure them to him: *Nagle v. Robins*, 9 Wyo. 211; 62 Pac. Rep. 154, 162, 163. When the guardian is required to make annual inventories and reports, interest may properly be computed annually for sums not reported: *Scheib v. Thompson*, 23 Utah, 564; 65 Pac. Rep. 499, 500. Where a guardian acts in good faith, does not make any use for himself of the funds of his ward, and makes no profit for himself, he can be charged with no more than the statutory rate of interest: *Guardianship of Cardwell*, 55 Cal. 137, 142. A guardian is chargeable with compound interest where he has collected money of his ward, used it, and has made no attempt to account for it until forced to do so by the court: *In re Eschrich*, 85 Cal. 98, 102; 24 Pac. Rep. 634. If a guardian, in good faith, and for the benefit of his ward, purchases property, but the ward afterwards refuses to ratify, and disaffirms the purchase, the guardian is not answerable for compound interest. It is only where there has been intentional or wilful dereliction of duty on the part of the guardian that compound interest can be allowed: *Estate of Cousins*, 111 Cal. 441, 452; 44 Pac. Rep. 182. Insurance-money collected by a guardian is no part of the estate. This money goes direct to the heirs. The executors of the estate should have nothing to do with it, and it is the duty of the guardian into whose possession it comes to deliver it to the heirs as they become of age, with interest upon the same from the date of its receipt by the guardian; and if the report of the guardian shows that he has allowed such a fund to become commingled and confused with the funds of the estate, and his accounts as guardian to become commingled and confused with the accounts of the executors, so that it is impossible for the court to determine out of what funds the expense of supporting the children were paid, the court is justified in concluding that the minor heirs had been supported from the funds of the estate, and that the insurance-money had been kept intact for the use of the beneficiaries: *Hill v. Smith*, 8 Wash. 330; 35 Pac. Rep. 1070. If the guardian receives money of his wards, which he keeps for many years, and uses for his own purpose, and renders no account until cited to appear and account on the petition of his wards, he is properly chargeable with interest upon the money received, compounded annually, although he was guilty of no fraud in the use of his ward's money: *In re Eschrich*, 85 Cal. 98, 101; *Estate of Hamilton*, 139 Cal. 671; 73 Pac. Rep. 578; *Glassell v. Glassell*, 147

Cal. 510; 82 Pac. Rep. 42; Scheib v. Thompson, 23 Utah, 564; 65 Pac. Rep. 499, 500. So if he has invested such money in stocks and bonds, which he has appropriated to his own use, he should not be credited with such stocks and bonds, but should be charged with the trust funds appropriated, at compound interest: *In re Dow*, 133 Cal. 449; 65 Pac. Rep. 890, 892. The general rule now thoroughly well established in this state as to the limit of the liability of a trustee for mingling the trust funds with his own, and their use in his own business, where it is not shown that a larger profit was realized therefrom, is, the return of the principal, with legal interest thereon, compounded annually. This rule is applicable alike to guardians and executors as to other trust relations: *In re Dow*, 133 Cal. 449; 65 Pac. Rep. 890, 892. If the settlement of the final account of the guardian is delayed after the ward arrives at age, there can be no valid objection to the guardian's voluntarily charging himself with legal interest on the balance in his hands, in the absence of evidence that he has received anything more: *Estate of Boyes*, 151 Cal. 143; 90 Pac. Rep. 454. Where there is unreasonable delay by the guardian in making a final settlement after the ward is of age, the court, in settling the account, should charge the guardian at least the legal rate of interest annually on any balance he may have had on hand when the ward arrived at age, unless there are circumstances absolving him from such charge: *Estate of Boyes*, 151 Cal. 143; 90 Pac. Rep. 454, 457. A guardian is chargeable not only with rents actually received, but also with such additional rents as he would have obtained had he faithfully and diligently discharged his duties: *Guardianship of Hoare*, 14 Haw. 443, 445. Where a guardian mixes the funds of his ward with his own, and does not keep any separate account, which is complete, reliable, and satisfactory, he is chargeable with interest upon the ward's money in his hands, which he has retained for a long period of years without investment: *Guardianship of Hoare*, 14 Haw. 443, 444. A guardian will be surcharged with expenditures the necessity of which has not been shown: *Guardianship of Kaiu*, 17 Haw. 517, 519.

(7) **Credits allowable to guardian.** An attorney's fee for services rendered to the guardian of a minor, in pursuance of a written contract, is an expense incurred by the guardian in the performance of his duties, for which he is primarily liable; though if the probate court shall deem the expenditure reasonable and necessary to protect the interest of the ward, it may be allowed from the ward's estate: *Hunt v. Maldonado*, 89 Cal. 636, 637; 27 Pac. Rep. 56. The money actually paid out by the guardian for court costs, attorneys' fees, and for recording deeds is properly allowed to him upon the settlement of his account: *Scheib v. Thompson*, 23 Utah, 564; 65 Pac. Rep. 499, 500. A stepfather, who, as guardian, supports and maintains his stepchildren, is entitled to be credited, in the settlement of his

accounts, as their guardian, with expenditures from the moneys of his wards for such purpose, where there is no doubt of the expenditures having been made, and the evidence shows that the guardianship funds were properly used for the support of the children: *Cutting v. Scherzinger*, 40 Or. 353; 68 Pac. Rep. 393, 395. As a general rule, full items, with vouchers for all expenditures, should be required, and credits should not be allowed without them; but this is not indispensable, and, in a clear case, where there is no doubt of the expenditures having been made, or of the guardian's good faith, vouchers may be dispensed with. Each case must necessarily depend upon its own particular facts, and on the equities thereof: *Cutting v. Scherzinger*, 40 Or. 353; 68 Pac. Rep. 393, 395. It is no objection to a guardian's account, that household expenses for the benefit of several wards, constituting one family, were apportioned numerically among the wards, without reference to differences of actual consumption. The slight inequalities that would occur between the different children with respect to food furnished, as well as many other things consumed in the household, would be more than compensated by the advantages of having the children reared as one family: *Estate of Boyes*, 151 Cal. 143; 90 Pac. Rep. 454, 460. If the guardian, after the ward becomes of age, has continued, as before, with the ward's knowledge and consent, to support him, or to pay out money for him out of the estate, received by the guardian during the minority of the ward, and there is nothing unfair or unjust to the ward in the transactions, the guardian should be allowed credit in his account, out of the estate, for the moneys thus applied to the ward's use. If he has overpaid the money in his hands, and other estate remains, he may be allowed a lien upon the estate for the overpayment, but he cannot be given a personal claim against the ward for such overpayment in any case: *Estate of Boyes*, 151 Cal. 143; 90 Pac. Rep. 454, 458. If a guardian is compelled to pay a debt which he has contracted for the benefit of his ward, and it is one properly made on behalf of his ward, the county court will allow it out of the ward's estate; but the liability of the estate, in such a case, is one to be settled in the county court: *Sturgis v. Sturgis* (Or.), 93 Pac. Rep. 696, 699. If the guardian of a minor makes a valid contract with an attorney concerning the latter's fee, the guardian is liable, and if he pays it, and the probate court deems the expenditure reasonable, and necessary to protect the interests of the ward, it may be allowed from the ward's estate: *Hunt v. Maldonado*, 89 Cal. 636, 637; 27 Pac. Rep. 56.

(8) What is not to be allowed. Compensation. The ordinary rule is, that a guardian will not be allowed for permanent improvements placed by him on a minor's property without authority: *Gerber v. Bauerline*, 17 Or. 115; 19 Pac. Rep. 849. Where the guardian had agreed that, if appointed, he would maintain and educate the ward,

which agreement was embodied in the order appointing him, items for maintenance of the ward should be disallowed: *In re Barg*, Myr. Prob. 69. So items in a guardian's account, for the payment of board of his wards while living with their elder brother, many years before the presentation of the account, are properly disallowed, where there is no evidence that any fixed amount was agreed upon to be paid in the beginning, nor any evidence as to what the keeping of the wards was worth, or that it was worth anything over and above the value of their services: *In re Eschrich*, 85 Cal. 98; 24 Pac. Rep. 634. And where a guardian, the father, has collected certain moneys of his ward, and has misappropriated them to his own use, he cannot claim credit for expenses paid by him for the maintenance of the ward after such misappropriation: *Guardianship of Ceas*, 134 Cal. 114; 66 Pac. Rep. 187. If the guardian has invested his ward's money in stocks and bonds, which he has appropriated to his own use, no credit should be given to him for the securities: *In re Dow*, 133 Cal. 449; 65 Pac. Rep. 890. Where it appears from a statement in the guardian's account that his ward was not at home during a certain year, and did not receive the support claimed, the guardian should not be allowed a credit claimed for the ward's support during that year, as a member of the family, consisting of the ward's mother and brothers and sisters: *Estate of Boyes*, 151 Cal. 143; 90 Pac. Rep. 454, 458. A guardian is not entitled to any compensation, where he has been negligent in the management of his ward's estate: *Scheib v. Thompson*, 23 Utah, 564; 65 Pac. Rep. 499. The court may reduce the commissions of a guardian for his neglect of duty: *Guardianship of Kaiu*, 17 Haw. 517, 519. If he has been guilty of gross negligence in the performance of his duties, he is not entitled to any commissions: *Guardianship of Hoare*, 14 Haw. 443, 448. As to post-majority transactions, it may be said that the guardian is not entitled to any allowance for the support of the ward after the latter becomes of age, particularly where it is impossible to segregate the expenses for support which are contracted before the ward became of age, and afterwards: *Hill v. Smith*, 8 Wash. 330; 65 Pac. Rep. 1070. As the authority of the guardian ceases with the majority of the ward, he has no authority, after the ward's majority, to proceed with the foreclosure of a mortgage, without the ward's consent, and to bid in the property for the ward, and the fact that he does so, and compromises a deficiency judgment, does not raise the presumption that he continued so to act without the consent and approval of his ward: *Estate of Curtis*, 121 Cal. 468; 53 Pac. Rep. 936, 938. There is some difference, however, as to the extent to which courts will consider post-majority transactions in the settlement of the accounts of a former guardian. This difference probably originated from the fact that the accounts were generally settled by courts of equity, whose jurisdiction was not so limited. It is clear, however, that a guardian contracts that, at the termination of

his trust, he will account for the property, estate, and moneys of the ward in his hands, and will pay over and deliver such property as remains to the person entitled thereto. This is the account which the probate court has jurisdiction to determine. No jurisdiction is given to ascertain a balance against a former ward, except as it will tend to show what the guardian must pay or deliver to his former ward. It is in the nature of a proceeding in rem, and the estate in the res, and, after majority, the only matter of which the court has jurisdiction: *Estate of Kincaid*, 120 Cal. 203; 52 Pac. Rep. 492, 493. If a guardian is an attorney at law, and performs professional services for his ward, he may be allowed extra compensation therefor: *Guardianship of Humeku*, 15 Haw. 394, 395. A guardian who brings suit for the ward's estate must look to the probate court for the allowance of attorneys' fees: *Magoon v. Brash*, 11 Haw. 204, 206.

(9) **Death of ward before settlement.** If the ward dies before settlement of the guardian's account, such settlement must be made with the ward's legal representative. It is always in the power of the guardian to procure the appointment of an administrator with whom he may settle the account, and who will then be in existence to receive constructive notice; and the full statutory period of posting must run while the person against whom the notice is directed is in legal existence and capable of receiving such knowledge; otherwise there will not be the full statutory notice to him, and jurisdiction of the proceedings will be lacking. The existence of the legal representatives during the entire period required to make that form of service valid is necessary to raise the statutory presumption that he has obtained from such notice a knowledge of the pendency of the proceeding. Neither is the record, nor is the recital of the giving of the notice, nor are the presumptions in favor of the jurisdiction of the court, conclusive of the fact of the existence of the administrator, as such, during the whole or any part of the prescribed time for notice; and where the actual effective time of the notice to the administrator was only seven days, where the law required ten days to constitute legal service, jurisdiction to hear the settlement of the guardian's account was wanting, and an order settling such account was therefore void: *Livermore v. Ratti*, 150 Cal. 458; 89 Pac. Rep. 327.

(10) **Conclusiveness. Attacking settlement.** If the statute does not provide that the settlement of a guardian's intermediate account shall be conclusive, such settlement is merely prima facie evidence of its correctness, and it is afterwards open to inquiry: *Guardianship of Cardwell*, 55 Cal. 137, 142. But a decree settling the final account of a guardian is conclusive not only against the guardian himself, but also against his sureties, until it is reversed or modified by some proceeding directly impeaching it: *Brodrib v. Brodrib*, 56 Cal. 563,

565. Items contained in the settled accounts of a guardian, and the order settling them, cannot be reconsidered in a suit in equity to set aside the order settling the account of a guardian for fraud and to compel a proper accounting: *Guardianship of Wells*, 140 Cal. 349, 353; 73 Pac. Rep. 1065. In a suit in equity to set aside the order settling the account of a guardian for fraud and to compel a proper accounting, and where the gist of the petition is as to fraud upon the part of the guardian in failing to account to the court, or to his ward, for rent-moneys belonging to the ward's estate, the allegations of the petition are insufficient, where they are of the most general character, and do not allege the particulars, or the facts, or circumstances constituting the alleged fraud: *Guardianship of Wells*, 140 Cal. 349; 73 Pac. Rep. 1065. If a petition in the nature of a suit in equity is filed to set aside an order settling the account of a guardian for fraud, and to compel a proper accounting, and no objection is raised to the form of the petition, and the guardian waives an objection to the jurisdiction of his person by answering such petition, the court obtains jurisdiction of the person, and has jurisdiction of the subject-matter, and the petition will be deemed a bill in equity invoking the equitable powers of the court, notwithstanding the form in which it is entitled. It is true that the probate and the equity jurisdictions of the superior court are separate and distinct, yet the same tribunal exercises them both: *Guardianship of Wells*, 140 Cal. 349, 352; 73 Pac. Rep. 1065. Where a guardian omits, by mistake or inadvertence, from his account filed in the probate court, a small amount which he has collected for his ward, but it appears that such omission was not done with the intention of defrauding or injuring his ward, and the guardian gains no pecuniary advantage thereby, as proved by the fact that the sum omitted is shown to have been used for the benefit of the ward, such omission establishes no actual or constructive fraud: *Purslow v. Brune*, 43 Kan. 175; 23 Pac. Rep. 105. A guardian's final settlement made in the probate court cannot be collaterally attacked: *Davis v. Hagler*, 40 Kan. 187; 19 Pac. Rep. 628.

REFERENCES.

Relief in equity from orders settling accounts of guardian: See note 106 Am. St. Rep. 641.

(11) **Discharge of guardian.** If a receipt is given by a ward, after he has reached his majority, to his guardian, on a settlement, as a release of all indebtedness, it will not be set aside when it appears that the settlement was made with the full knowledge of all the facts involved therein: *Davis v. Hagler*, 40 Kan. 187; 19 Pac. Rep. 628. A petition of the ward, filed in the district court, asking relief of the guardian, which avers that with such receipt the guardian fraudulently obtained a release in the probate court, does not state a cause

of action. A final settlement, so made in the probate court, cannot be attacked collaterally: *Davis v. Hagler*, 40 Kan. 187; 19 Pac. Rep. 628. It is error for the court to discharge an accounting guardian upon payment of the balance to another person, designated as guardian of the wards, if it does not appear that any order was made removing the accounting guardian, or appointing such designated guardian in his place, or as an associate with him: *Estate of Boyes*, 151 Cal. 143; 90 Pac. Rep. 454, 460. A guardian may settle with his ward the day after he comes of age, and obtain his release, but he cannot have a decree of court confirming the settlement and release until the ward has had a year to consider whether he will affirm or repudiate it: *Cook v. Ceas*, 143 Cal. 221, 229; 77 Pac. Rep. 65. The marriage of a female ward, under guardianship as a minor, terminates the guardianship, and operates, by force of the statute, as a legal discharge of her guardian. After such event the probate court retains jurisdiction over the guardian merely for the purpose of compelling him to account, and of settling his administration as guardian: *Ex parte Pahia*, 13 Haw. 575, 579.

12. **Collateral attack.** It is a well-settled rule that a judgment, regular on its face, and rendered by a court having jurisdiction to render it, cannot be attacked collaterally on the ground of fraud, collusion, or other matter aliunde. And the appointment of a guardian by a probate court is a judgment to which such rule applies; and the rule applies to infants, as well as to adults: *Hodgdon v. Southern Pac. R. Co.*, 75 Cal. 642; 17 Pac. Rep. 928, 931. But the judgment of a probate court appointing a guardian, which is void for want of jurisdiction, may be attacked collaterally in an action brought by a person claiming under such appointment: *Modern Woodmen v. Hester*, 66 Kan. 129; 71 Pac. Rep. 279. A guardian of the person of a minor duly appointed by a superior court is legally entitled to the custody of the minor, and the guardian's right to such custody can be attacked collaterally only upon the ground of want of jurisdiction in the superior court to make the order of appointment; and when, upon proceedings in habeas corpus, the guardian justifies his custody of the minor by such an order, an impeachment thereof is a collateral attack: *In re Lundberg*, 143 Cal. 402; 77 Pac. Rep. 156, 157. If letters of guardianship have been issued and recorded in the probate judge's office, and the guardian has given a bond and duly qualified and entered upon the discharge of his duties as guardian, with the approval of the probate judge, and all this is of record, the guardian's acts will be held valid when attacked collaterally, although there may not be any further record in the probate judge's office of his appointment: *Howbert v. Hyle*, 47 Kan. 58; 27 Pac. Rep. 116. Thus in a suit to foreclose a mortgage, a collateral attack cannot be made upon the validity of a petition to mortgage the property of minor heirs to raise a certain sum of money, on the ground that

the petition which sets forth the items for which the money is wanted contains some items not chargeable against the estate. In such a case the petition is not void on its face, but is merely irregular: *Howard v. Bryan* (Cal.), 62 Pac. Rep. 459. There can be no collateral attack on a judgment directing the sale of a ward's property where such judgment is founded upon a proper petition: *Walker v. Goldsmith*, 14 Or. 125; 12 Pac. Rep. 537. The act of a guardian is ratified by his ward, unless the latter expressly disaffirms it within reasonable time after attaining his majority: *Brazee v. Schofield*, 2 Wash. Ter. 209; 3 Pac. Rep. 265.

13. Jurisdiction of courts. The old district courts of this state, corresponding with the present superior courts, had the same control over the persons of minors, as well as their estates, that the courts of chancery in England possess. This jurisdiction was conferred by the constitution, and could not be divested by any legislative enactment: *Wilson v. Roach*, 4 Cal. 362, 366. The present superior courts have general jurisdiction of the matter of appointment of guardians, and, as an incident to this jurisdiction, they must have the power to hear and determine the fact whether a testamentary guardian has been legally appointed or not. If it should appear, however, that a guardian has been legally appointed by a will or deed, such courts would have no jurisdiction to appoint a guardian, as the court provides that the superior court may appoint guardians of minors who have no guardians legally appointed by will or deed: *Murphy v. Superior Court*, 84 Cal. 592, 596; 24 Pac. Rep. 310. A superior court has jurisdiction to deprive a parent of the custody of his child, by the appointment of a guardian therefor, under proper circumstances, and the authority of the parent ceases upon the appointment of such guardian: *In re Lundberg*, 143 Cal. 402; 77 Pac. Rep. 156. The probate court of the county of a minor's domicile is the court having jurisdiction to appoint a guardian of the person or estate of the minor. To permit a probate court, other than the probate court of the county of the minor's domicile, to take jurisdiction of his person and estate would be legislation discriminating against the minor: *Connell v. Moore*, 70 Kan. 88; 78 Pac. Rep. 164, 166. If one of two guardians appointed by will dies, and the other resigns and is discharged, the court has jurisdiction to appoint a guardian as if no appointment had been made by will: *In re Henning's Estate*, 128 Cal. 214; 60 Pac. Rep. 762, 763. A superior court has jurisdiction of a proceeding for the appointment of a guardian for the persons and estates of certain minor children after their mother's death, though their father may still be alive: *Russner v. McMillan*, 37 Wash. 416; 79 Pac. Rep. 988. Where the superior court of one county has acquired jurisdiction to hear and determine the question of the residence of a minor, the need of a guardian, and the propriety of appointing the petitioner, it cannot be deprived of this jurisdiction

by subsequent proceedings in another county of the state for the issuance of letters of guardianship: Guardianship of Banneker, 67 Cal. 643, 645; 8 Pac. Rep. 514. Probate courts have jurisdiction to appoint a guardian for minors domiciled in this state, and, after having made such appointment, they retain jurisdiction for all purposes connected therewith until the guardian's accounts are rendered and he is legally discharged. Hence the unauthorized removal of the wards from the jurisdiction of the domicile to another state, or the appointment of a guardian by a court of foreign jurisdiction, does not oust such probate courts of the jurisdiction which they have once acquired. So if the wards are domiciled within this state, and their only property, consisting of certain insurance policies, is within the state, the probate court has jurisdiction to appoint a general guardian, and to direct and control his conduct as such guardian: In re Brady, 10 Ida. 366; 79 Pac. Rep. 75, 76. If a guardian of wards domiciled in this state obtains an order of court permitting him to remove them to another state, "there to remain until the further order of the court," and subsequently he is discharged without being required to return the wards to this state, the domicile of the wards continues to be in this state, as they are incapable of changing their domicile, and such order indicates no intention to surrender jurisdiction of their persons: In re Henning's Estate, 128 Cal. 214; 60 Pac. Rep. 762, 764. It is made by statute the duty of the court to appoint the father or mother of the minor, "if found by the court competent to discharge the duties of guardianship"; but, under this provision, and under the general law, the *prima facie* presumption is that the parent is competent. Hence the court is not authorized to appoint another as guardian, unless it finds that the parent is not competent. The fact of the competency or incompetency of the parent is the controlling question in the case, and the court is to be guided by what appears to be for the best interests of the child in making the appointment. If the parent is found to be competent, the court has no discretionary power to appoint another as guardian: Campbell v. Wright, 130 Cal. 380; 62 Pac. Rep. 613, 614. In California a court has no jurisdiction to appoint a guardian for minors who are absent from the state, although their domicile may be within it: De la Montanya v. De la Montanya, 112 Cal. 131; 44 Pac. Rep. 354. It is the guardian, and not the court, who is made responsible for the proper administration of his trust. He it is to whose custody the property of the ward is intrusted, and to him the law and the ward alike look for its safe return. In the performance of his duties, he is, it is true, in certain respects, under the control and supervision of the court appointing him; but this right of supervision does not carry the power to interfere with the custody and general management of the property of the ward, except, of course, for conduct authorizing suspension or removal. The court, therefore, has no authority to direct the guardian to deposit assets of the ward's estate in a certain

institution, from which they shall be withdrawn only upon the order of court. Such an order practically places the custody and control of such assets in the hands of the court, exclusive of the guardian; and it is therefore in excess of the power of the court and void: *De Greayer v. Superior Court*, 117 Cal. 640; 49 Pac. Rep. 983, 985. Nor is such an order authorized by a statute which provides that the court, on application of the guardian, may authorize and require the guardian to invest the ward's money, and which authorizes the court to make such other orders and to give such directions as are needful for the management, investment, and disposition of the estate and effects as circumstances require: *De Greayer v. Superior Court*, 117 Cal. 640; 49 Pac. Rep. 983, 985. Nor does a probate court have jurisdiction to settle accounts of the guardian and to render judgment against the ward for advances made by the guardian after the ward attains his majority, although there was an agreement between them that the guardianship should continue, and that the advances should be made as guardian, where it is conceded that at the time the ward reached his majority there was no estate belonging to him in the hands of the guardian: *Estate of Kincaid*, 120 Cal. 203; 52 Pac. Rep. 492, 493. Nor does a probate court have authority to entertain an application by the creditor of a guardian of minor children for the allowance, against the estate of the wards, of a judgment of the district court, rendered against the guardian, on a contract made by him in carrying on a general mercantile business with the ward's money, nor authority to order the payment of such a judgment in such a proceeding; and the violation of such an order does not constitute a breach of the guardian's official bond: *Harter v. Miller*, 67 Kan. 468; 73 Pac. Rep. 74. Neither is a probate court authorized to entertain a petition for an order to compel the guardian of the estate of a minor to refund moneys advanced, even by the guardian of the person of the minor, for his support and education. Nor is the court authorized to make an order, on the application of the minor himself, to compel the guardian to advance out of the estate of the minor the necessary sums for his support: *Swift v. Swift*, 40 Cal. 456, 458.

14. Jurisdiction of equity. One who wrongfully intermeddles with the property of an infant is sometimes held in equity to be a guardian, but only (as in the case of an administrator *de son tort*) for the purpose of an accounting; he acquires none of the rights of a guardian: *Aldrich v. Willis*, 55 Cal. 81, 85. Every alienation of the property of the ward, if made by the guardian without order of court, is void. Hence a guardian cannot subject the estate and property of his ward to a lien for legal services, without first obtaining an order of court authorizing him to do so. If a ward cannot enter into a valid contract, without first obtaining an order of the probate court, for repairs and improvements of buildings on property belong-

ing to him, surely a guardian without such authority cannot enter into a contract for the employment of legal services, so as to bind the ward, or in any way affect his property. The power of guardians over the estate of the ward, the same as the powers of executors and administrators, cannot be exercised, except according to the provisions of law and under the orders of the court which has jurisdiction of the estate: *Morse v. Hinckley*, 124 Cal. 154; 56 Pac. Rep. 896, 898. It is undoubtedly true that the probate court has, as a general rule, exclusive jurisdiction to compel a defendant to account as guardian, and that its decree settling his accounts and discharging him from his trust is final and conclusive; but this rule does not apply in cases of fraud, for the reason that the matters in controversy may not have been passed upon in the settlement, particularly where the guardian is charged with having intentionally and fraudulently concealed from the court and his ward the fact that the latter had then, or ever had, any interest in the property in question. The settlement of a guardian's account in the probate court cannot shield him from afterwards being called upon in a court of equity to account for property concealed by him: *Lataillade v. Orefia*, 91 Cal. 565, 576; 25 Am. St. Rep. 219; 27 Pac. Rep. 924. Although property, which was under the control of a testator, as guardian, may have come into the hands of executors, yet the guardianship was a personal trust, which would not pass to them on the death of the testator, and the property held by him as guardian does not become assets in their hands to be administered. They merely hold it for its preservation until the persons whose estate it is, and for whose benefit it is held, can obtain a settlement of the trust, terminated by the death of the trustee, in the proper forum, where the rights of all parties to the trust may be definitely determined. This settlement can only be had in a court of equity, by a proceeding against the executors of the deceased guardian and other necessary parties: *In re Allgier*, 65 Cal. 228, 230; 3 Pac. Rep. 849. Settlement of the final account of the guardian includes only those transactions had during the minority of the ward. It does not include transactions occurring after the ward has attained his majority. When that event happens, the ward is *sui juris*; and the legal liability which attaches to him, for any services rendered to him by his guardian, arises, not out of the relation of former guardian and ward, but out of the contractual relation established by the transactions between them as contracting parties. Such a liability is not enforceable in probate courts; the remedy upon it lies, not in a probate proceeding, but in an action at law: *In re Allgier*, 65 Cal. 228, 229; 3 Pac. Rep. 849.

REFERENCES.

Relief in equity from orders and decrees of probate and other courts having exclusive jurisdiction over the estates of decedents and of minors and other incompetent persons: See note 106 Am. St. Rep. 639-647.

15. Liability of guardians.

(1) For investments made without order of court. Where a guardian, in good faith, and for the benefit of the ward, loaned a portion of his ward's funds on mortgage securities taken in his own name, but a portion of the loan was unavoidably lost by depreciation in value of the property, the guardian, if chargeable at all with the part of the principal sum lost by the loan, is not chargeable with any interest thereon, where he is not found guilty of negligence, and no facts are found from which negligence must necessarily be inferred: *Estate of Cousins*, 111 Cal. 441, 450; 44 Pac. Rep. 182. If the guardian makes an investment with the exercise of reasonable care, diligence, and business prudence, in the form, manner, and securities approved of by the rules of equity, he will not be liable for losses which may occur through the destruction or subsequent depreciation in value of the property: *Estate of Cousins*, 111 Cal. 441, 449; 44 Pac. Rep. 182. So where a guardian, at the request of the mother and stepfather of the minor, with whom the ward resided during his minority, purchased certain land for the ward, with the ward's money, and this was done because both the parents and the guardian believed that it was a good investment for the ward, and the investment was made without order or authority of the court, and the title was taken in the name of the guardian, so that the parents of the ward and the guardian might sell the land without an order of the court, and the guardian retained the title for the benefit of the ward, but the ward disaffirmed and refused to ratify the purchase of the land, the guardian is liable only for the sum invested, with simple interest, where there did not appear to have been any intentional or wilful dereliction of duty on the part of the guardian: *Estate of Cousins*, 111 Cal. 441, 451; 44 Pac. Rep. 182. But when the guardian acts upon his own judgment in making an investment, independently of an order of the court, or otherwise converts the proceeds of the estate to his own use, he takes upon himself responsibilities which the law does not permit, and is held not only to a strict accountability for the money used, but to such actual or punitive damages as may be lawfully imposed for an official neglect of his duty. Hence if he, without authority of court, purchases real estate with the money of his ward, and it appears that the guardian made, or could have made, a profit of ten per cent per annum out of money which he improperly used, and mingled it with his own, the guardian is chargeable with ten per cent interest, compounded annually, because of the rule that he will not be permitted to speculate or make a profit out of the funds in his hands as guardian: *Scheib v. Thompson*, 23 Utah, 564; 65 Pac. Rep. 499, 500. A guardian, who wilfully and unnecessarily mingles the funds of his ward with his own, so as to constitute himself, in appearance, its absolute owner, is liable for its safety in all events; and this rule applies where a guardian lends the funds of his ward, and takes a mortgage and note in his individual name: *In re Bane*,

120 Cal. 533, 538; 65 Am. St. Rep. 197; 52 Pac. Rep. 852. If a guardian invests a large portion of the ward's estate in loans secured by mortgage upon realty, but such loans are made without the advice and consent of the court, and the security is inadequate, and not such as a prudent business man would take, an order, made at the hearing of the guardian's account rejecting such loans as assets of the estate, will be affirmed: *In re Carver's Estate*, 118 Cal. 73; 50 Pac. Rep. 22. A guardian is answerable for his act in lending the money of his ward without any security, without even taking any evidence of indebtedness: *Estate of Post*, 57 Cal. 273.

(2) **Protection of order of court.** There is no legal obligation or duty resting upon a guardian to give notice to any one, unless directed to do so by the court, of an application by him for an order authorizing him to invest the money of his ward in a particular manner. An order from the court for investment or other management of the ward's funds will protect the guardian, even if misfortune were to follow: *Estate of Schandoney*, 133 Cal. 387, 390; 65 Pac. Rep. 877. If a guardian, in pursuance of an order of court, has invested the money of his ward in a mortgage of real estate, he is not answerable for a loss resulting from the investment, by reason simply of the fact that he failed to foreclose the mortgage. His liability, in such a case, depends upon the question of his negligence: *Estate of Schandoney*, 133 Cal. 387; 65 Pac. Rep. 877. If a guardian, under order of court, sells his ward's property, and pays the proceeds into court, he is not chargeable with the sum so paid in, where it has been lost through official misconduct of the judge: *Estate of Sniffin*, 3 Haw. 382.

(3) **Liability of guardian in general.** The statute does not require annual accounts of a guardian, but it would be better for all concerned if so made. At the same time, we cannot say that a failure to comply strictly with the statute, or neglect to render accounts with some regularity and promptness, necessarily imposes punitive responsibility upon the guardian. If there is loss to the estate, the question of the guardian's liability therefor depends much upon the circumstances under which the loss occurred: *Curtis v. De Voe*, 121 Cal. 468; 53 Pac. Rep. 936, 938. A guardian is liable for unauthorized acts done by him after his ward attains majority, as where he proceeds with the foreclosure of a mortgage, and compromises a deficiency judgment. Jurisdiction remains in the probate court, after the minor's majority, over the estate in the hands of the guardian for the purposes of an accounting as to transactions during the minority of the ward, but not as to any occurring after the ward has attained his majority: *Curtis v. De Voe*, 121 Cal. 468; 53 Pac. Rep. 936, 939. A contract with an attorney for professional services is an expense incurred by the guardian in the performance of his duties for which

he is primarily liable. Hence no action can be maintained against the minor upon such a contract: *Hunt v. Maldonado*, 89 Cal. 636; 27 Pac. Rep. 56. If a guardian makes a valid contract with an attorney for services to be rendered to the guardian of a minor in pursuance of such contract, and the guardian pays the attorney's fee, and the probate court deems the expenditure reasonable, and necessary to protect the interests of the ward, it may be allowed from the ward's estate. But it is an expense incurred by the guardian in the performance of his duties, for which he is primarily liable. No action can be maintained against the minor therefor: *Hunt v. Maldonado*, 89 Cal. 636, 637; 27 Pac. Rep. 56. A guardian is not liable for the default of his collection agent. Thus a guardian, who, in good faith, and using reasonable care to select a proper agent, does select one of good repute to make collection of a claim of his ward, and such agent collected the money due thereon, and kept it, is not liable to his ward for the loss: *Beach v. Moser*, 4 Kan. App. 66; 46 Pac. Rep. 202. The general rule as to the limit of liability of a trustee for mingling trust funds with his own, and their use in his own business, where it is not shown that a larger profit was realized therefrom, is the return of the principal, with legal interest thereon, compounded annually. This rule is applicable alike to guardians and executors, as well as to other trust relations: *Estate of Cousins*, 111 Cal. 441, 445; 44 Pac. Rep. 182. A guardian's liability upon his own contracts for the benefit of the ward is personal, and the judgment of a court, rendered for such a debt, is against him personally, and not against the ward's estate: *Sturgis v. Sturgis* (Or.), 93 Pac. Rep. 696, 699. Taxes should be assessed to the guardian, not to the ward. The guardian is not liable for taxes assessed to his ward's estate: *Brown v. Smith*, 8 Haw. 677, 679.

16. Embezzlement by guardian. It is not necessary, in an indictment against a guardian for embezzlement, to allege the particulars of the guardianship; such as the date of defendant's appointment as guardian, and in what court appointed, as well as the issue of letters of guardianship to him, and the fact of his taking possession of certain moneys of his ward; the fact of his filing his account, and a settlement thereof; the fact that he was incapable of discharging his trust or was unsuitable therefor; or had wasted or mismanaged the estate; and that the court, upon due notice given, had removed him, and had demanded that he should surrender the estate of his ward to the person found to be legally entitled thereto. It is sufficient to meet the requirements of the statute, to allege, after stating the jurisdictional facts, that, at a designated date, the defendant, "being then and there intrusted with and having in his control" a certain sum of money, "as guardian, trustee, and agent" of the person named, and "for the use and benefit" of said person, and being his "property," did, at a time and place named, "wilfully, feloniously,

and fraudulently embezzle, convert, and appropriate the same to his own use": *People v. Page*, 116 Cal. 386, 391; 48 Pac. Rep. 326.

17. **Removal of guardians.** If the guardian of a ward is an unsuitable person, he should be removed. Thus a father, who, as guardian of his minor children, is in receipt of an annual income of two thousand dollars from their property, and who persistently refuses, through a period of several years, to provide for their support and education, is not a suitable person to have the management of their estate, and should be removed from his guardianship: *Guardianship of the Swifts*, 47 Cal. 629, 631. The court has jurisdiction, in a proceeding to compel a guardian to account, to remove him for his failure to account, after being cited to do so: *Deegan v. Deegan*, 22 Nev. 185; 37 Pac. Rep. 360, 361. The order of removal, however, must be upon one of the grounds specified in the statute, or such order will be reversed on appeal: *In re Raynor*, 74 Cal. 421; 16 Pac. Rep. 229. And it is error to revoke letters of guardianship without notice to the guardian, or giving him an opportunity to be heard: *Estate of Rose*, 66 Cal. 241; 5 Pac. Rep. 220. The record must show that the removal was based on statutory grounds. If no cause for removal appears in the record on appeal, the court cannot assume that the guardian was removed upon a cause not appearing in it: *In re Raynor*, 74 Cal. 421; 16 Pac. Rep. 229. It is error to remove the guardian where the petition for his removal presents no fact showing that the guardian has become incapable of discharging his trust concerning the estate of his ward, or that he is unsuitable therefor, or that he has wasted or mismanaged the same, or that he has failed to render an account or to make a return: *Estate of Rose*, 66 Cal. 240; 5 Pac. Rep. 219. If the guardian of an estate is removed by the probate court, and another guardian is appointed in his place, and an appeal is taken by the guardian removed, the newly appointed guardian is a necessary party: *Estate of Medbury*, 48 Cal. 83. Before appointing a guardian, it is mandatory that the person having the custody of the minor should have notice of the hearing. Such notice is absolutely necessary to give the court jurisdiction of the proceeding, and power to make the order of appointment. But where the record does not disclose anything showing that the order of appointment was void, or beyond the jurisdiction of the court, a court will not, after the expiration of six months from the issuance of letters of guardianship, direct such letters to be set aside for want of notice, where such application is made under a statute providing that all applications to set aside orders or judgments not void upon their face must be made within six months after the entry of such order or judgment: *In re Eickerenkotter's Estate*, 126 Cal. 54; 58 Pac. Rep. 370. Judgment removing a guardian is conclusive, not only against the guardian himself, but also against the sureties upon his official bond. Whatever binds and concludes the guardian, equally

binds and concludes his sureties: *Deegan v. Deegan*, 22 Nev. 185; 37 Pac. Rep. 360, 361. A probate judge at chambers has power to discharge a guardian: *Warder v. Elkins*, 38 Cal. 439, 441. If a guardian has been cited to appear and render an account, but neglects and refuses to do so, the court is authorized to remove him for his failure to account: *Deegan v. Deegan*, 22 Nev. 185; 37 Pac. Rep. 360, 361. The act of a probate court in removing a former guardian and appointing his successor must be presumed to have been correct: *Brodrib v. Tibbits*, 63 Cal. 80.

18. Rights and liabilities of ward.

(1) *In general.* After wards reach majority, they may disaffirm the acts of their guardian, but they are not absolutely obliged to reject what their guardians have done; they have an election, and if, within a reasonable time, they do not disaffirm such acts, they thereby become affirmed, and the wards are bound thereby: *Brazee v. Schofield*, 2 Wash. Ter. 209; 3 Pac. Rep. 265, 268. If a new guardian gives a note for money borrowed for the support and maintenance of the ward by a previous guardian, such note cannot bind the ward, where it has not been approved by the court having jurisdiction of the estate, and if no consideration for the note was ever received by the new guardian, he cannot be held personally liable therefor: *Wright v. Byrne*, 129 Cal. 614; 62 Pac. Rep. 176.

(2) *Actions by ward.* If a ward fails for over ten years to bring suit against his guardian to recover moneys received by him, which suit he might have brought, and there is no proof to show non-payment, the inference is that payment was made: *Love v. Love*, 72 Kan. 658; 83 Pac. Rep. 201. For facts under which it was held that a ward was not entitled to foreclose against the guardian's vendees a mortgage executed to him by his guardian, where there had never been any settlement of guardianship accounts, and it had never been determined whether the guardian was indebted to his ward, or whether, on the other hand, the ward's estate was liable to him, see *Cummings v. Strobridge L. Syndicate (Cal.)*, 88 Pac. Rep. 901, 902. In an action to terminate a trust, minor defendants are not bound by admissions of their guardian to their prejudice: *Kidwell v. Ketler*, 136 Cal. 12; 79 Pac. Rep. 514. If a guardian deposits some of his own money, and some of the money of his wards, with a person who sustains toward such guardian a relation of personal confidence, and the guardian afterwards gives to such depository a receipt in full of the moneys of the wards, and release of all demands, the depository cannot rely upon such receipt and release as an estoppel against the wards, without pleading such estoppel, where the wards bring an action to recover the moneys so deposited. And where it appears that the settlement was not fair, that the signature of the guardian was procured through mistake, misrepresentation, and fraud, and that there was a large amount of the minor's money

still in the depository's possession, the wards have a right to go behind the settlement, and show the facts. They have their election to pursue either the guardian, his sureties, or the person with whom the settlement was made; and this is their right, independently of any statute requiring a guardian to obtain the consent of the court to such a settlement: *Montgomery v. Rauer*, 125 Cal. 227; 57 Pac. Rep. 894. If a depository receives money belonging to minors, from their guardian, with whom he has a relation of personal confidence and trust, and with knowledge of the origin and character as to the trust funds of the minors, he becomes a trustee of the minors in relation to such moneys, and cannot justify his retention of the money upon the ground that he has applied it to a personal debt due to him from the guardian: *Montgomery v. Rauer*, 125 Cal. 227; 57 Pac. Rep. 894, 896. Although a final settlement is made by an administrator or guardian, the owner of the land and beneficiary of the trust will ordinarily not be estopped from asserting a title to the land wrongfully obtained by the trustee, unless the beneficiary had full knowledge of the wrong practised by the trustee, and of the facts upon which the rights of the beneficiary are founded: *Webb v. Branner*, 59 Kan. 190; 52 Pac. Rep. 429, 431. Nor can the fact that the trustee made improvements on the land wrongfully obtained by him during the infancy of the beneficiary, and with the beneficiary's knowledge, prevent such beneficiary from claiming the land after attaining majority: *Webb v. Branner*, 59 Kan. 190; 52 Pac. Rep. 429, 432. A ward cannot maintain a suit against his guardian for a supposed balance until after an account and settlement is had in the probate court: *Allen v. Tiffany*, 53 Cal. 16. If the probate court enters an order or decree settling a guardian's account, the ward's action against the sureties on the guardian's bond is premature, where such action is commenced before the expiration of the time allowed by law for the taking of an appeal from such order: *Cook v. Ceas*, 143 Cal. 221, 223; 77 Pac. Rep. 65. In an action by a ward against the executors of a deceased guardian's estate to recover a balance claimed to be due to the plaintiff, the executors cannot urge the statute of limitations, where the testator's will contained a clause waiving and repudiating the statute of limitations and directly directing his executors to pay all obligations, notwithstanding such statute, as this waiver is a part of the testamentary disposition of his property which he had the right to make, and which his executors should enforce: *Glassell v. Glassell*, 147 Cal. 510, 512; 82 Pac. Rep. 42. In an action by a ward to recover money alleged to be due from the deceased as guardian of the person and estate of the plaintiff, the allowance of compound interest is not erroneous, although no fraud is charged or found against the estate touching his conduct as guardian, where the evidence was that such guardian commingled the funds of his ward with his own, and that the deceased never filed an inventory or appraisement, and never rendered any account in the matter of such guardianship, and never

kept any account upon his books from which a proper accounting could be rendered to the court; and where it further appears that he never obtained any order from the court authorizing him to use any of the funds of the plaintiff: *Glassell v. Glassell*, 147 Cal. 510, 512; 82 Pac. Rep. 42. Though an attempt to obtain the revocation of an order of guardianship is unsuccessful, counsel fees may be awarded to counsel who represented the ward, where the application was made in good faith: *Magoon v. Fitch*, 16 Haw. 13, 15.

REFERENCES.

Interested witness, or party to suit involving ward's estate or rights, guardian or next friend as: See note 4 Am. & Eng. Ann. Cas. 1068.

(3) **Actions against ward.** It is settled law of this state that an action will not lie against a minor or his estate for the value of services rendered to the guardian of such minor to assist him in the execution of his trust. The possession of a guardian, in this respect, is the same as that of the administrator of the estate of a deceased person; both the administrator and the guardian are primarily liable to those whom they employ to aid them in the care, management, and protection of the estate; and the question of reimbursement of the administrator or guardian from the estate, for such necessary expenses as he may incur, is one solely between the administrator or guardian and the estate which he represents, and one which the court having jurisdiction of the estate has the sole power to determine. The person rendering services to the administrator or guardian cannot maintain an action for the value thereof against the estate or against the ward: *McKee v. Hunt*, 142 Cal. 526; 77 Pac. Rep. 1103. And an order made on the application of a guardian for the substitution of a new attorney for the guardian does not authorize a contract affecting the property of the estate of the minor, nor require the performance of any legal services, and there is no provision of law authorizing the court having jurisdiction of the guardianship proceedings to require or direct an attorney to perform legal services for the guardian: *McKee v. Hunt*, 142 Cal. 526; 77 Pac. Rep. 1103, 1104. The personal or real estate of the ward can be converted into cash only by proceedings under the direction of the county court. This is the policy of our whole probate law with reference to estates of deceased persons, as well as to those under guardianship. Therefore the enforcement of a judgment against the ward can be accomplished only through the county court, and not by process, either against the ward's estate or the guardian: *Sturgis v. Sturgis* (Or.), 93 Pac. Rep. 696, 699. The judge of the court may order a guardian to pay counsel fees to his ward's wife to enable her to defend in proceedings brought to deprive her of the custody of her infant: *Guardianship of McGrew*, 9 Haw. 426, 427. There is no abuse of discretion in appointing a guardian ad litem, and permitting him to

file an answer after the evidence is introduced, and before the case is finally decided: *Earl v. Cotton* (Kan.), 96 Pac. Rep. 348.

REFERENCES.

Interested witness, or party to suit involving ward's estate or rights, guardian or next friend as: See note 4 Am. & Eng. Ann. Cas. 1068.

(4) **No disaffirmance of parol partition when.** A parol partition, carried out and followed by actual possession in severalty of the several parcels is valid, and will be enforced, notwithstanding the statute of frauds, on the theory that it has been removed from its operation by part performance. Hence if co-heirs, upon reaching majority, and knowing the circumstances of such partition, retain possession of the land theretofore set apart to them by such partition, claim it as their own, asserting no claim whatever to the other land occupied by the persons who have been their co-tenants, enjoying the fruits thereof, and exercising dominion over the same, such oral partition is binding upon them. They cannot be heard in disaffirmance of the partition. They are conclusively presumed to have ratified the partition; and the rights of the various parties to the partition, and their title to the land, would relate back and attach as of the date of the partition: *Whitemore v. Cope*, 11 Utah, 344; 40 Pac. Rep. 256, 258.

19. Bond of guardian, and liability thereon.

(1) **Failure to give a bond.** In California, a person cannot become guardian of the property of minor children, though appointed by the court as such, until he gives the bond required by statute: *Murphy v. Superior Court*, 84 Cal. 592; 24 Pac. Rep. 310. But he is not estopped to deny the fact of guardianship by reason of his neglect to give the bond required by law, where he has received no property belonging to the minors, as their guardian, or by virtue of his appointment: *Murphy v. Superior Court*, 84 Cal. 592, 597; 24 Pac. Rep. 310. The validity of guardianship proceedings must be upheld on a collateral attack, though there was a failure to require a bond on the appointment of the guardian, such failure being merely an error, and not in excess of jurisdiction in such proceedings: *In re Chin Mee Ho*, 140 Cal. 263; 73 Pac. Rep. 1002, 1003. In Kansas, the appointment of a guardian, who duly takes the oath required, and receives letters of guardianship in due form, issued by the probate court, is not rendered absolutely void by his failure to give the bond required by statute: *Hunt v. Insley*, 56 Kan. 213; 42 Pac. Rep. 709.

REFERENCES.

A corporation may become surety on a guardian's bond: See *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1056. Concerning bond on appointment, see subd. 1 (2), ante.

(2) **Purpose of bond.** A guardian's bond, executed as security only for the proper use of the personal estate of the ward, and the rents and profits of his real estate, under one section of the statute, is not intended as a security for the proper use of the purchase-money received by the guardian on the sale of the ward's real estate, under another section of the statute, as a separate bond is required for that purpose: *Morris v. Cooper*, 35 Kan. 156; 10 Pac. Rep. 588.

(3) **Breach of bond.** The probate court has no authority to entertain an application by the creditor of a guardian of minor children for the allowance, against the estate of the wards, of a judgment of the district court rendered against the guardian on a contract made by him in carrying on a general merchandise business with the ward's money, nor to order the payment of such a judgment, for such a proceeding, and the violation of such an order does not constitute a breach of the guardian's official bond: *Harter v. Miller*, 67 Kan. 468; 73 Pac. Rep. 74. When a ward attains the age of majority, the office of guardian comes to an end, and it is then the duty of the guardian, and one of the obligations of his bond, to exhibit a final account of his guardianship to the probate court, make a settlement with the probate judge or with the ward, and deliver all the property in his hands belonging to the ward. Failure to do this constitutes a breach of his bond, for which he and his sureties are liable after settlement of the guardianship: *In re Allgier*, 65 Cal. 228, 229; 3 Pac. Rep. 849.

(4) **New bond.** A probate court has power to take a new bond from the guardian of a minor's estate in place of a former bond. When this is done, the new bond is given as a substitute for the old one, and the legal effect of it is, that the sureties on the old bond are not answerable for any defaults of the guardian occurring after the filing of such substituted bond: *Spencer v. Houghton*, 68 Cal. 82; 8 Pac. Rep. 679, 681.

(5) **Action on bond.** The sureties on a guardian's bond may be sued without first recovering judgment against the guardian, and without making him a party: *Gehbard v. Smith*, 1 Col. App. 342; 29 Pac. Rep. 303, 305. Where the condition of the obligation of a guardian's bond is in the language of the statute, and is to the effect that he shall faithfully discharge the office and trust of such guardian according to law, etc., he is bound to discharge faithfully the obligation imposed upon him by the statute, regardless of any orders, or any demands for an accounting, or any proceedings by the heirs or their representatives against him; and it is sufficient for the complaint to allege that, after entering upon the duties of such guardian, he filed an inventory, and subsequently filed an account; that he did not faithfully discharge the office and trust of such guardian according to law; that he did not render fair and just accounts of his guardian-

ship; that he failed to account for the rent of real property belonging to the estate; that he failed to take proper care of said property; and that he failed to obtain sufficient rent for the same for a designated period: *Gebhard v. Smith*, 1 Col. App. 342; 29 Pac. Rep. 303, 305. Where a guardian's bond is made payable to the people of the state, a suit thereon is properly brought in the name of the people to their use: *McDonald v. People*, 12 Col. App. 98; 54 Pac. Rep. 863. The only orders of the court which can be evidence against the sureties in a suit on a guardian's bond are orders made upon the guardian personally, in relation to his guardianship accounts, or in relation to the property of his wards in his possession; and such orders must be made in the guardianship proceeding. However regular an order may be, if it is not an order contemplated by the bond, or in relation to which the sureties entered into an undertaking, it is not evidence against them, but is utterly incompetent and inadmissible: *McDonald v. People*, 12 Col. App. 863; 54 Pac. Rep. 863, 864. In an action against the administrator of a deceased guardian and his sureties, a complaint alleging that there came into the possession and control of the deceased guardian a specified sum, which, at the time of his death, he held and retained, and mingled the same with his own funds, and appropriated it to his own use, and that he had refused and neglected to account for the same to plaintiff at the time of his death, states a cause of action, though it does not aver non-payment; and the judgment is sufficient, where it shows a settlement of the account as against the administrator. Where there is an administrator of the deceased guardian, the account must be settled and allowed as a basis for the liability of the surety. The status of the account must be fixed and determined. It is not necessary that there should be a separate suit in equity to settle and determine the liability of a deceased guardian, where all the parties in interest are before the court. Equity has jurisdiction to determine the whole controversy in a single suit. It may settle and state the account against the estate of the deceased guardian, and render judgment for the amount found due from such estate against the surety: *Zurfluh v. Smith*, 135 Cal. 644, 647; 67 Pac. Rep. 1089. No action on a guardian's bond can be commenced in advance of the order of settlement; but the settlement of a guardian's account is a proceeding in which an appeal from the probate court to the supreme court may be taken at any time within sixty days after the entry of the order. During this time the proceeding is pending, and cannot be made the basis of any new action. An action commenced before an appeal is taken, but within the sixty days allowed for an appeal, is premature: *Cook v. Ceas*, 143 Cal. 221; 65 Pac. Rep. 65, 67. No action can be maintained against the sureties of an executor, or administrator, or guardian for breach of his bond until the amount of indebtedness has been determined by an order of the probate court: *Nickals v. Stanley*, 146 Cal. 724, 726; 81 Pac. Rep. 117. A suit on a guardian's bond cannot be commenced before there

is any breach of the bond. It is not the bond that constitutes the cause of action, but some breach of the bond; and if a guardian is not in default until he fails, or refuses on demand, to pay over the amount found due on settlement of his accounts, then a final order of settlement is an essential element of the cause of action against his sureties: *Cook v. Ceas*, 143 Cal. 221, 226; 77 Pac. Rep. 65. The probate court has only a limited jurisdiction, and its proceedings are regulated and governed entirely by statute. It can settle accounts of administrators or guardians only in the manner prescribed by the code. Where an administrator or guardian dies or absconds, or is beyond the jurisdiction of the court, the proper method, in order to ascertain whether he is liable, and to what extent, so as to bind the sureties on his official bond, is by a proceeding in the nature of a civil action, wherein the sureties are made parties and have an opportunity to be heard: *Reither v. Murdock*, 135 Cal. 197; 67 Pac. Rep. 784. No action will lie against the sureties on a guardian's bond to recover a balance shown to be due by the guardian's account, until it has been settled in the probate court: *Graff v. Mesmer*, 52 Cal. 636, 637.

(6) **Liability of sureties.** The sureties on a guardian's bond are prima facie bound by a recovery against their principal, although they were not parties to the suit, and they can relieve themselves only by showing that the amount recovered was in excess of the amount to which the plaintiff was entitled, or that he was not entitled to recover at all: *Botkin v. Kleinschmidt*, 21 Mont. 1; 52 Pac. Rep. 563, 564. An order of the probate court adjusting the amount due by a guardian does not bind the sureties, where the guardian never had notice of the proceeding: *Spencer v. Houghton*, 68 Cal. 82; 8 Pac. Rep. 679, 682. The failure of a guardian's final account to show the amount of money actually invested in certain stocks and bonds, referred to in the findings, is not prejudicial to his bondsmen, where the money so paid, whatever the amount may have been, was received by the bondsmen of said guardian: *In re Dow*, 133 Cal. 449; 65 Pac. Rep. 890, 892. In an action on the bond of a guardian of several minors, the surety cannot escape liability on the ground that the bond is joint, instead of several, as to the obligees, nor on the ground that only one of the obligees is a party to the action. The fact that a guardian's bond is not in strict conformity with the statute does not vitiate it. The omission of the word "severally" does not weaken the bond, release the surety, nor deprive the individual ward from maintaining an action either against the guardian or his sureties. The nature of the guardian's duties is several, and would require a several inventory, and a several accounting and payment over to the wards, as they severally arrive at full age. A guardian's bond, though inartificially drawn or slightly defective, is sufficient to bind the obligors: *Deegan v. Deegan*, 22 Nev. 185; 37 Pac. Rep. 360, 362, 363; 22 Nev. 202; 37 Pac. Rep. 363.

The general rule is, that the liability of a surety on an administrator's or guardian's bond depends upon the liability of the principal, and does not attach until that has been ascertained and determined by the judgment of a court of competent jurisdiction: *Reither v. Murdock*, 135 Cal. 197, 198; 67 Pac. Rep. 784.

REFERENCES.

Bonds of guardians, additional and substituted, liability of sureties on, for past defaults: See note 4 Am. & Eng. Ann. Cas. 345.

(7) **Defense to action.** In an action against a guardian for the conversion of funds belonging to minors, a plea that the guardian had expended money for the benefit of his wards, had paid out moneys for necessities for the minors, and was entitled to compensation out of the trust funds, does not constitute an affirmative defense. It is based on nothing more than a denial of the averments of the complaint: *McDonald v. People*, 29 Col. 503; 69 Pac. Rep. 703. Laches, like the statute of limitations, is a defense which must be alleged and proved by the defendant, unless the facts constituting it appear on the face of the complaint, in which case, as in the case of the statute of limitations, it must be urged by the defendant, by means of a demurrer, or in some other legal manner; otherwise it is waived. Hence if nothing appears on the face of the complaint, in an action on the guardian's bond, to indicate that the defendant, or any person other than plaintiff, had suffered, or could have suffered, any loss or prejudice by plaintiff's delay in proceedings to compel an accounting by the guardian, the defense of laches must be alleged and proved. In order to constitute laches, there must be something more than mere lapse of time that would bar the statute of limitations. In order to bar a remedy because of laches, there must appear, in addition to mere lapse of time, some circumstances from which the defendant, or some other person, may be prejudiced, or there must be such lapse of time that it may be reasonably supposed that such prejudice would occur if the remedy was allowed: *Cook v. Ceas*, 147 Cal. 614; 82 Pac. Rep. 370, 372. A delay of only three years and a little less than two months, under a statute which allows the period of four years in which to bring an action, is not, of itself, sufficient to raise any presumption or inference that the sureties on the bond of the guardian would be prejudiced thereby: *Cook v. Ceas*, 147 Cal. 614; 82 Pac. Rep. 370, 372.

(8) **Limitation of actions.** A guardian and his sureties may be released by the probate court from all liabilities incurred, or from future liabilities, except as to persons laboring under some legal disability, and as to those persons, their rights are preserved for the statutory period after their disability ceases, whatever may be the form of the decree of the court: *Racouillat v. Requena*, 36 Cal. 651,

655. In California there is one rule which prohibits an action on the bond of a guardian's surety until there is a final order settling the guardian's account, and another rule barring the action in three years after the removal or discharge of the guardian; and the latter rule must, no doubt, be enforced, even where, without the fault of the ward, a final settlement of the account has not been obtained within three years after the removal or discharge; but the sureties on guardians' bonds have an ample measure of protection against their claims by taking advantage of the general statute of limitations. Such last-named rule applies to an action after a final order of the court removing or discharging the guardian. It does not apply to the termination of a guardianship by the ward after attaining majority: *Cook v. Ceas*, 143 Cal. 221; 77 Pac. Rep. 65, 69. When a ward arrives at the age of majority, the authority of the guardian comes to an end; but, although his authority is at an end when his ward becomes of age, it cannot be said that, in any ordinary, or usual, or statutory sense of the terms, he has been removed or discharged. The statute of limitations therefore does not, in terms, apply to such a case: *Cook v. Ceas*, 143 Cal. 221, 230; 77 Pac. Rep. 65. An action against the sureties of a guardian is not barred until three years after a final order of court removing or discharging the guardian: *Cook v. Ceas*, 143 Cal. 221, 230; 77 Pac. Rep. 65.

20. **Limitations of actions.** A California statute prescribing three years next after the termination of the guardianship of a minor for a recovery, by the minor, or his grantee, of real estate sold by the guardian has no application to a case where there was no guardian, and no sale by a guardian, appointed by a probate court in this state. Neither does a statute prescribing three years next after the sale of an estate by an executor or administrator, under the provisions of the probate law, for the recovery of the real estate sold, have any application, where the premises in controversy were not subject to sale, and were not sold under its provisions: *McNeil v. First Congressional Soc.*, 66 Cal. 105, 111; 4 Pac. Rep. 1096. So under a statute providing that "no action for the recovery of any estate sold by a guardian can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship; or, when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years after the removal thereof," and where a patent from the government has been issued to certain land sold by an administrator and guardian, an action of ejectment brought to recover such land, although the sale was void, is barred, where more than twenty years were allowed to pass after the minors, and each of them, became of age, and after the termination of the guardianship, and more than three years after the issuance of the patent, before such action was commenced: *Reed v. Ring*, 93 Cal. 96; 28 Pac.

Rep. 851, 853. A complaint in a suit to obtain a decree adjudging a mortgage, executed by a guardian, to be a valid lien on the interest of his wards in the property covered thereby, and directing a sale thereof to pay the note for which the mortgage was given, is not a complaint in an action for relief upon the ground of mistake, where both the guardian and plaintiff believed originally that the mortgage was good and valid, but their mistake in that respect was not discovered until within three years prior to the commencement of such action, and where the discovery by the plaintiff, as to the invalidity of his mortgage, was not made until after the statute would have barred it, had it been a valid mortgage. Plaintiff could not be placed in any better position by reason of his mistake as to the validity of his mortgage than he would have been in had his mortgage been valid and there had been no mistake: *Banks v. Stockton* (Cal.), 87 Pac. Rep. 83, 84. In case of fraud, the statute of limitations, in an action against a guardian to obtain an accounting in equity, does not commence to run until three years after the discovery, by the aggrieved party, of the facts constituting such fraud: *Lataillade v. Oreña*, 91 Cal. 565, 577; 25 Am. St. Rep. 219; 27 Pac. Rep. 924.

21. Appeal.

(1) **In general.** The remedy for one aggrieved by an order or judgment of a probate court, in the matter of the appointment of guardians, is in the court where such proceedings are had, by proper motion or by appeal. Such order or decree cannot be attacked collaterally: *Clark v. Rossier*, 10 Ida. 348; 78 Pac. Rep. 358. An appeal, and not certiorari, is the proper remedy to review an order appointing a guardian for an aged person, without notice to him, or inquisition of any kind: *State v. Denney*, 34 Wash. 56; 74 Pac. Rep. 1021. An appellate court has no authority "to make" an accounting, and an original allowance for counsel fees, incurred by a guardian in defense of his accounts in proceedings in error: *Nagle v. Robins*, 9 Wyo. 211; 62 Pac. Rep. 796. A guardian removed by order of the county court is authorized to appeal, in connection with the heirs, from such order to the circuit court: *In re Olson*, 10 S. D. 648; 75 N. W. Rep. 203. Where the ward files a petition to set aside former orders made settling the accounts of his guardian, and to reopen them on the ground of fraud, and the guardian appeals, such appeal will be considered as an appeal from a decree in equity, and where it is taken upon the judgment roll alone, documents inserted in the record, which are not authenticated by any bill of exceptions, cannot be considered for any purpose: *Guardianship of Wells*, 140 Cal. 349, 351; 73 Pac. Rep. 1065.

(2) **Appealable orders.** If a county court has lost jurisdiction of the subject-matter, by reason of a settlement between a guardian and his ward, and there has been a release of the guardian by the ward

after the latter has attained majority, the ward has no power to require the guardian to account, and the order of the court, in such a case, would, in effect, be a judgment, without power, in a new proceeding. Such order is therefore appealable: *Richardson's Guardianship*, 39 Or. 246; 64 Pac. Rep. 390, 392. In such a case, jurisdiction is not conferred upon the county court by the guardian's appearance therein for the purpose of pleading a settlement of his accounts with the ward; for, while jurisdiction of the person may be conferred in this manner, jurisdiction of the subject-matter cannot be waived by the parties, and may be raised at any time. If the guardian settled with the ward after the latter attained his majority, the jurisdiction of the county court to cancel a settlement must necessarily be extinguished, for the guardian, in effecting such settlement, complied with the condition of his bond; and the rule is well settled that transactions between the guardian and ward after the latter becomes of age, or has attained majority upon being married, are beyond the jurisdiction of the county court: *Richardson's Guardianship*, 39 Or. 246; 64 Pac. Rep. 390, 392, 393. If an order permitting a foreign guardian to sue is vacated, he has no right to further maintain the action; and the order vacating and setting aside the former order is therefore appealable: *In re Crosby*, 42 Wash. 366; 85 Pac. Rep. 1, 2.

(3) *Findings.* While findings may not be necessary in settling accounts in probate, and are therefore not to be considered upon appeal, yet it is otherwise where the case was not strictly a settlement of account in probate, but was in the nature of an action in equity to set aside an order settling the account of the guardian for fraud and to compel a proper account. If the pleadings on both sides, in such a case, are drafted, in effect, as they would be in a suit directly in equity to set aside the order settling the account, and the findings and decree made and entered are such as would follow the trial of such an action, and no objection is raised to the form of the petition, and the guardian waives any objection to the jurisdiction of his person by answering the petition, the petition will be deemed a bill in equity, invoking the equitable powers of the court, notwithstanding it is entitled "*In the Matter of the Estate of Guardianship*," etc., of the minor named. It is true that the probate jurisdiction of the superior court is separate and distinct from its equity jurisdiction, yet the same tribunal exercises both: *In re Wells's Estate*, 140 Cal. 349; 73 Pac. Rep. 1065, 1066. A finding, on a contest of the settlement of a guardian's account, that all the items thereof, as presented, are true and correct, must be taken as conclusive, where the evidence is not brought up on appeal: *Guardianship of Dow*, 133 Cal. 446, 450; 65 Pac. Rep. 890.

(4) *Effect of, as stay.* If the guardian of a minor child has been removed, and the order of removal appealed from, the effect of such

appeal is to stay proceedings in the matter of the appointment of a general guardian of the person of the minor until the determination of the appeal. Hence a petition for letters of general guardianship to be issued to another, pending such an appeal, is properly refused: *Guardianship of Van Loan*, 142 Cal. 429, 433; 76 Pac. Rep. 39.

(5) **Record. Presumption.** Where the report of a guardian, and the exceptions thereto, constitute the pleadings in a case, they are an indispensable portion of the record, and should be incorporated therein. Unless this is done, on appeal from a decree entered in favor of a guardian, the court must fall back on the presumption that the decree rendered below was justified by the facts and record before the court: *Lowe v. Smith*, 20 Col. App. 273; 78 Pac. Rep. 310, 311. Where the record shows the giving of a notice to a ward of the hearing of his guardian's application for leave to sell his real estate, and such notice is for any reason unavailing, it cannot be presumed from the fact that the sale was confirmed by the probate court that any other notice was given: *Beachy v. Shomber*, 73 Kan. 62; 84 Pac. Rep. 547.

(6) **Affirmance. Reversal.** When a decree allowing a final account is found by the appellate court to be erroneous as to any item or items, that court may direct the decree to be corrected, and, as corrected, affirm it: *Estate of Schandoney*, 133 Cal. 387, 394; 65 Pac. Rep. 877. Although a court sets aside and dismisses all proceedings in the matter of a guardianship, instead of allowing the petition to stand, and allowing it to be contested, that is not of sufficient importance to justify a reversal: *Guardianship of Van Loan*, 142 Cal. 423, 429; 76 Pac. Rep. 37.

(7) **Dismissal.** Under section 372 of the Code of Civil Procedure of California, it seems that a ward shall himself be a party to a suit which shall bind his estate; that an appeal must be taken in his name; and that an appeal taken in the name of the guardian should be dismissed: *Estate of Callaghan*, 119 Cal. 571, 576; 51 Pac. Rep. 860; 39 L. R. A. 689.

REFERENCES.

Guardian and ward in general: See *Kerr's Cal. Cyc. Code Civ. Proc.*, §§ 1747-1760, and notes.

CHAPTER VII.

GUARDIANS OF INSANE AND OTHER INCOMPETENT PERSONS.

- § 161. Notice of time and place of hearing.
- § 162. Same. Certificate of inability to attend.
- § 163. Appointment of guardian by court after hearing.
- § 164. Form. Petition for appointment of guardian of insane person.
- § 165. Form. Petition for appointment of guardian of incompetent person.
- § 166. Form. Order for notice of hearing of petition for guardianship. Incompetent person.
- § 167. Form. Order appointing guardian of incompetent person.
- § 168. Powers and duties of such guardians.
- § 169. Form. Notice of sale of real estate by guardian of incompetent person.
- § 170. Form. Notice of guardian's sale of incompetent's real estate at private sale.
- § 171. Form. Order to show cause why order of sale of insane person's real estate should not be granted.
- § 172. Form. Order to show cause why order of sale of incompetent's real estate should not be granted.
- § 173. Form. Order directing payment of monthly allowance for support of feeble-minded.
- § 174. Proceeding for restoration to capacity.
- § 175. Form. Petition for judgment of restoration to capacity.
- § 176. Form. Judgment of restoration to capacity.
- § 177. Definition of "incompetent."

GUARDIANSHIP OF INSANE PERSONS AND OTHER INCOMPETENTS.

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| 1. Sanity and disability. | (2) As to attorneys and their fees. |
| 2. Jurisdiction of probate courts. | (3) Conduct of ward's business. |
| 3. Appointment of general guardian. | (4) Actions by guardian. |
| (1) Petition for. Authority of court. | (5) What is no defense to action. |
| (2) Notice and personal presence. | 7. "Conservators." In Colorado. |
| (3) Validity of notice. | (1) Appointment. Notice. Jury. |
| (4) Notice by publication. | (2) Duties. Investment of funds. |
| (5) Collateral attack. | (3) Exceptions to report. Compensation. Removal. Discharge. |
| 4. Guardian ad litem. | 8. Report, account, and settlement of guardian. |
| 5. Support, maintenance, and custody. | 9. Contracts and rights of insane persons. |
| 6. Powers, duties, and liabilities of guardian. | |
| (1) In general. | |

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| <p>10. Adjudication of insanity, and its effect.</p> <p>(1) In general.</p> <p>(2) Presumption and evidence.</p> | <p>12. Proceedings against insane persons.</p> <p>(1) In general.</p> <p>(2) Judgment. Execution. Limitation of actions.</p> |
| <p>11. Restoration to capacity. Termination of guardianship.</p> | <p>13. Appeal and review.</p> |

§ 161. **Notice of time and place of hearing.** When it is represented to the superior court, upon verified petition of any relative or friend, that any person resident of the county is insane, or from any cause mentally incompetent to manage his property, such court must cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed; and such person, if able to attend, must be produced on the hearing. **Kerr's Cyc. Code Civ. Proc.** (**Kerr's Stats. and Amdts.**, p. 507), § 1763.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 896, p. 329.
- Arizona.** Rev. Stats. 1901, par. 1984.
- Colorado.** 3 Mills's Ann. Stats., secs. 4691, 4701.
- Idaho.** Code Civ. Proc. 1901, sec. 4353.
- Kansas.** Gen. Stats. 1905, §§ 4148, 4149.
- Montana.** Code Civ. Proc., sec. 2970.
- Nevada.** Comp. Laws, sec. 572.
- New Mexico.** Comp. Laws 1897, secs. 1458, 1896-1899.
- North Dakota.** Rev. Codes 1905, §§ 7892, 8248.
- Oklahoma.** Rev. Stats. 1903, sec. 1827.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5268.
- South Dakota.** Probate Code 1904, § 379.
- Utah.** Rev. Stats. 1898, sec. 4000.
- Washington.** Pierce's Code, §§ 2762, 2828.
- Wyoming.** Rev. Stats. 1899, sec. 4879.

§ 162. **Same. Certificate of inability to attend.** When it is represented to the superior court, or a judge thereof, upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, such court or judge must cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced on the hearing, provided that when such person is a patient at a state hospital in this state, the

certificate of the medical superintendent or acting medical superintendent of such state hospital, to the effect that such patient is unable to attend on the hearing shall be prima facie evidence of such fact. **Kerr's Cyc. Code Civ. Proc.** (new section; see **Kerr's Stats. and Amdts.**, p. 507), § 1763[a].

§ 163. Appointment of guardian by court after hearing. If, after a full hearing and examination upon such petition, it appear to the court that the person in question is incapable of taking care of himself and managing his property, such court must appoint a guardian of his person and estate, with the powers and duties in this chapter specified. **Kerr's Cyc. Code Civ. Proc.**, § 1764.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 896, p. 329.
- Arizona.*** Rev. Stats. 1901, par. 1985.
- Colorado.** 3 Mills's Ann. Stats., sec. 4701.
- Idaho.*** Code Civ. Proc. 1901, sec. 4354.
- Kansas.** Gen. Stats. 1905, § 4150.
- Montana.*** Code Civ. Proc., sec. 2971.
- Nevada.** Comp. Laws, sec. 573.
- New Mexico.** Comp. Laws 1897, sec. 1906.
- North Dakota.*** Rev. Codes 1905, § 8249.
- Oklahoma.*** Rev. Stats. 1903, sec. 1828.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5268.
- South Dakota.*** Probate Code 1904, § 380.
- Washington.** Pierce's Code, § 2763.
- Wyoming.** Rev. Stats. 1899, sec. 4881.

§ 164. Form. Petition for appointment of guardian of insane person.

[Title of court.]

[Title of guardianship.]

{ Department No. ____
 { [Title of form.]

To the Honorable the ____ Court ¹ of the County ² of ____,
 State of ____.

Your petitioner hereby respectfully represents: That he is a relative ³ of ____, ⁴ of the county ⁵ of ____, state of ____;

That the said ____ has property, both real and personal,⁶ in said county ⁷ and state, particularly described as follows, to wit: ____;⁸

That the said _____ is about _____ years of age, is now insane,⁹ and is incapable of taking care of himself or of managing his property.

Your petitioner therefore prays that he¹⁰ be appointed guardian of the person and estate of the _____.

_____, Attorney for Petitioner. _____, Petitioner.

[Add ordinary verification.]

Explanatory notes. 1. Or, to the judge of the court. 2. Or, City and County. 3. State relationship, or that he is a friend, etc. 4. Name of insane person. 5. Or, city and county. 6. Or as the case may be. 7. Or, city and county. 8. Describe the property. 9. Give brief statement of mental and physical condition of such person, for information of the court. 10. Or as the case may be.

§ 165. Form. Petition for appointment of guardian of incompetent person.

[Title of court.]

[Title of guardianship.]

{ Department No. _____
[Title of form.]

To the Honorable the _____ Court¹ of the County² of _____, State of _____.

Your petitioner hereby respectfully represents: That he is a relative³ of _____,⁴ of the county⁵ of _____, state of _____;

That the said _____ is about _____ years of age, and has property, both real and personal, in said county⁶ and state, which needs care and attention, the exact nature and description of which is to your petitioner unknown; and

That the said _____ has, by reason of _____,⁷ become mentally incompetent either to care for himself or to manage his property.

Your petitioner therefore asks that he be appointed guardian of the person and estate of said _____.

_____, Attorney for Petitioner. _____, Petitioner.

[Add ordinary verification.]

Explanatory notes. 1. Or to the judge of the court. 2. Or, City and County. 3. State relationship, or that he is a friend, etc. 4. Name of incompetent. 5, 6. Or, city and county. 7. State causes of incompetency.

§ 166. Form. Order for notice of hearing of petition for guardianship. Incompetent person.

[Title of court.]

[Title of matter.] { No. ____¹ Dept. No. ____
[Title of form.] }

It having been represented to the court by the verified petition of ____ and ____² of the above-named ____, that the said ____ is insane, and mentally incompetent to manage his property, —

It is ordered by the court, That a hearing of the said petition be had at the court-room of this court, Department No. ____ thereof, in the court-house,³ on the ____ day of ____, 19__, at ____ o'clock in the forenoon⁴ of said day, and that notice of the time and place of said hearing, and of the nature of said petition, be given to the said ____ not less than five days⁵ before the day appointed therefor, as aforesaid.

____, Judge of the ____ Court.

Dated ____, 19__.

Explanatory notes. 1. Give file number. 2. Relative or friend. 3. Name location of court-house. 4. Or, afternoon. 5. An order and notice is insufficient where it merely specifies a day for hearing, without any specification of hour or place; and if a hearing has been adjourned until "March 3d," it cannot be heard on March 2d. If so heard, and an order made, the order is premature and without authority, and may be collaterally attacked: *McGee v. Hayes*, 127 Cal. 336, 339; 78 Am. St. Rep. 57; 59 Pac. Rep. 767.

§ 167. Form. Order appointing guardian of incompetent person.

[Title of court.]

[Title of estate and guardianship.]¹ { No. ____² Dept. No. ____
[Title of form.] }

Now comes ____, the petitioner herein, by Mr. ____, his attorney, and proves to the satisfaction of the court that his petition was filed herein on the ____ day of ____, 19__; that thereupon the court made an order appointing the ____ day of ____, 19__, as the time for hearing the same, and directing that notice of the time and place of such hearing be given; that due notice of the time and place of the said hearing was personally served on the said ____ not less than

five days³ before the time so appointed,⁴ and the said — appearing in person,⁵ the court thereupon proceeds to the hearing and examination upon said petition, and, after hearing the evidence, finds that said — is incapable of taking care of himself and managing his property,⁶ and that said petition ought to be granted.

It is therefore ordered, adjudged, and decreed by the court, That said — is incapable of taking care of himself, and managing his property,⁷ and that — be appointed guardian of the person and estate of said —, and that letters of guardianship be issued accordingly, upon his giving bond as such guardian in the sum of — dollars (\$—) and taking the oath required by law. —, Clerk.

Entered —, 19—.

By —, Deputy.⁸

Explanatory notes. 1. As, In the Matter of the Estate and Guardianship of John Stiles, an Incompetent Person. 2. Give file number. 3. Or as provided by statute. 4. If the matter has been continued, say: "and said hearing having been regularly postponed to this time." 5. Or, it being also shown to the satisfaction of the court that the said — is not able to attend in court at this hearing, and cannot be produced. 6, 7. And is insane. 8. See note to § 77, ante.

§ 168. Powers and duties of such guardians. Every guardian appointed, as provided in the preceding section, has the care and custody of the person of his ward, and the management of all his estate, until such guardian is legally discharged; and he must give bond to such ward, in like manner and with like conditions as before prescribed with respect to the guardian of a minor. **Kerr's Cyc. Code Civ. Proc., § 1765.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 897, p. 330.

Arizona.* Rev. Stats. 1901, par. 1986.

Colorado. 3 Mills's Ann. Stats., secs. 4712, 4721.

Idaho.* Code Civ. Proc. 1901, sec. 4355.

Kansas. Gen. Stats. 1905, §§ 4153, 4154.

Montana.* Code Civ. Proc., sec. 2972.

Nevada. Comp. Laws, sec. 574.

North Dakota.* Rev. Codes 1905, § 8250.

Oklahoma.* Rev. Stats. 1903, sec. 1829.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5269.

South Dakota.* Probate Code 1904, § 381.

Utah. Rev. Stats. 1898, sec. 3991.

Washington. Pierce's Code, §§ 2765, 2828e.

Wyoming.* Rev. Stats. 1899, sec. 4890.

§ 169. Form. Notice of sale of real estate by guardian of incompetent person.

[Title of court.]

[Title of guardianship.]¹

{ No. ____² Dept. No. ____
[Title of form.]

Notice is hereby given, That, pursuant to the order of the ____³ court of the county⁴ of ____, state of ____, made on the ____ day of ____, 19____, in the matter of the estate of said ____, an incompetent person, the undersigned, guardian of the person and estate of said incompetent person, will sell at probate sale, as a whole, to the highest bidder, upon the terms and conditions hereinafter mentioned, and subject to confirmation by said ____⁵ court, on or after the ____ day of ____, 19____, all the right, title, interest, and estate of the said ____, an incompetent, being an undivided one fourth,⁶ in and to that certain lot, piece, or parcel of land situate, lying, and being in the county⁷ of ____, state of ____, particularly bounded and described as follows, to wit: ____⁸.

Terms and conditions of sale: Cash, in gold coin of the United States of America; ten (10) per cent of the purchase-money to be paid at the time of sale; balance on confirmation of sale. Bids or offers must be in writing, and may be left at the office of ____, attorney for said guardian, at ____⁹, or may be delivered to said guardian personally, or may be filed in the office of the clerk of said court.

Dated ____, 19____.

____, Guardian of the Person and Estate of ____, an Incompetent Person.

____, Attorney for said Guardian.¹⁰

Explanatory notes. 1. As, In the Matter of the Guardianship of the Person and Estate of ____, an Incompetent Person. 2. Give file number. 3. Title of court. 4. Or, city and county. 5. Title of court. 6. Or other fractional part. 7. Or, city and county. 8. Describe the land. 9. Name the place. 10. Give address.

§ 170. Form. Notice of guardian's sale of incompetent's real estate at private sale.

[Title of court.]

[Title of guardianship.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Notice is hereby given, That, pursuant to the order of the ____² court of the county³ of ____, state of ____, made on the ____ day of ____, 19____, in the matter of the estate of said ____, an incompetent, the undersigned, guardian of the person and estate⁴ of said incompetent, will sell at private sale, as a whole, to the highest bidder, upon the terms and conditions hereinafter mentioned, and subject to confirmation by said ____⁵ court, on or after the ____ day of ____, 19____, all the right, title, interest, and estate of the said ____, an incompetent, being an undivided one fourth,⁶ in and to that certain lot, piece, or parcel of land situate, lying, and being in the county⁷ of ____, state of ____, particularly bounded and described as follows, to wit: ____.⁸

Terms and conditions of sale: Cash, in gold coin of the United States; ten (10) per cent of the purchase-money to be paid at the time of the sale; balance on confirmation of sale. Bids or offers must be in writing, and may be left at the office of ____, attorney for said guardian, at ____,⁹ or may be delivered to said guardian personally, or may be filed in the office of the clerk of said court.

Dated ____, 19____.

____, Guardian of the Person and Estate¹⁰ of ____, an Incompetent.

____, Attorney for said Guardian.¹¹

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, city and county. 4. Or, of the estate. 5. Title of court. 6. Or other fractional part. 7. Or, city and county. 8. Describe the land. 9. Name the place. 10. Or according to the fact. 11. Give address.

§ 171. Form. Order to show cause why order of sale of insane person's real estate should not be granted.

[Title of court.]

[Title of estate and guardianship.]¹

{ No. ____² Dept. No. ____
[Title of form.]

It satisfactorily appearing to this court from the petition this day presented and filed by ____, the guardian of the

person and estate of —, an insane person, praying for an order of sale of certain real estate belonging to his said ward, that it would be beneficial to said ward and his estate that such real estate shall be sold, and the moneys applied toward the construction of dwellings on the real estate belonging to said ward, —

It is hereby ordered, That the next of kin of the said ward, and all persons interested in the said estate, appear before this court on —,³ the — day of —, 19—, at — o'clock in the forenoon,⁴ at the court-room of this court, at the court-house⁵ in the county⁶ of —, then and there to show cause why an order should not be granted for the sale of such estate, at public or private sale.

And it is further ordered, That a copy of this order be published at least once a week for three consecutive weeks before the said day of hearing,⁷ in —, a newspaper printed and published in said county⁸ of —.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. As, In the Matter of the Estate and Guardianship of —, an Insane Person. 2. Give file number. 3. Day of week. 4. Or, afternoon. 5. Designate location of court-house. 6. Or, city and county. 7. Or as directed by the court. 8. Or, city and county.

§ 172. Form. Order to show cause why order of sale of incompetent's real estate should not be granted.

[Title of court.]

[Title of estate and guardianship.]¹ { No. —,² Dept. No. —
[Title of form.]

It satisfactorily appearing from the verified petition of —, the guardian of the person and estate of —, also known as —, an incompetent person, that it would be beneficial and expedient that the real estate belonging to the said incompetent should be sold, —

It is therefore ordered, That the next of kin of said incompetent, and all persons interested in the said estate, appear before this court on the — day of —, 19—, at the hour of — in the forenoon³ of said day, to show cause, if any they can, why such sale should not be ordered.

It is further ordered, That a copy of this order be published at least once a week for three successive weeks before

said day of hearing, in —, a newspaper printed and published in said county ⁴ of —, state of —.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. As, In the Matter of the Estate and Guardianship of —, also known as —, an Incompetent Person. 2. Give file number. 3. Or, afternoon. 4. Or, city and county.

§ 173. Form. Order directing payment of monthly allowance for support of feeble-minded.

[Title of court.]

[Title of matter.] ¹

{ No. —² Dept. No. —
[Title of form.] }

—, a feeble-minded person, a resident of — county,³ state of —, having been committed to the —⁴ by an order duly given and made by me as judge of the —⁵ court of the county ⁶ of —, state of —, on this — day of —, 19—, under and pursuant to the terms of an act of the legislature of the state of —, entitled —,⁷ —

It is ordered, That the county ⁸ of — pay to the state treasurer, on account of and for the support of said person, monthly, the sum of ten dollars (\$10) for each month and part of a month that said person shall be and remain an inmate of said institution.

Dated —, 19—.

—, Judge of the —⁹ Court of the — County ¹⁰ of —, State of —.

Explanatory notes. 1. As, In the Matter of —, a Feeble-Minded Person. 2. Give file number. 3. Or, city and county. 4. Name the institution; as, California Home for the Care and Training of Feeble-Minded Children. 5. Title of court. 6. Or, city and county. 7. Give title of act and date of approval. 8. Or, city and county. 9. Title of court. 10. Or, city and county.

§ 174. Proceeding for restoration to capacity. Any person who has been declared insane or incompetent, or the guardian, or any relative of such person within the third degree, or any friend, may apply, by petition, to the superior court of the county in which he was declared insane, to have the fact of his restoration to capacity judicially determined. The petition must be verified, and must state that such

person is then sane or competent. Upon receiving the petition, the court must appoint a day for a hearing before the court, and, if the petitioner requests it, must order an investigation before a jury, which must be summoned and impaneled in the same manner as juries in civil actions. The court must cause notice of the trial to be given to the guardian of the person so declared insane or incompetent, if there is a guardian, and to his or her husband or wife, if there is one, and to his or her father or mother, if living in the county. On the trial, the guardian or relative of the person so declared insane or incompetent, and, in the discretion of the court, any other person, may contest the right to the relief demanded. Witnesses may be required to appear and testify, as in civil cases, and may be called and examined by the court on its own motion. If it is found that the person is of sound mind, and capable of taking care of himself and his property, his restoration to capacity must be adjudged, and the guardianship of such person, if such person is not a minor, must cease. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 508), § 1766.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1987.

Idaho. Code Civ. Proc. 1901, sec. 4356.

Kansas. Gen. Stats. 1905, §§ 4173, 4174.

Montana. Code Civ. Proc., sec. 2973.

North Dakota. Rev. Codes 1905, § 8251.

Oklahoma. Rev. Stats. 1903, sec. 1830.

South Dakota. Probate Code 1904, § 382.

Utah. Rev. Stats. 1898, sec. 4002.

Washington. Pierce's Code, § 2779.

Wyoming. Rev. Stats. 1899, secs. 4894, 4895.

§ 175. Form. Petition for judgment of restoration to capacity.

[Title of court.]

[Title of matter.]¹ { No. ____² Dept. No. ____
[Title of form.] }

To the Honorable the ____ Court of the County³ of ____,
State of ____.

Now comes ____, and alleges, That he is ____,⁴ and shows to this court that on the ____ day of ____, 19____, such pro-

ceedings were had before this court that ____⁵ was duly declared to be insane, and that ____ was appointed guardian of the person and estate of said ____;⁶

But your petitioner avers that the said ____ is now sane and competent; that he seeks to have the fact of his restoration to capacity judicially determined; and that he is entitled to have the question of his sanity or insanity determined by a jury.

Your petitioner therefore requests that this court order an investigation, before a jury, into the mental condition of the said ____, to the end that he may be restored to capacity.

____, Petitioner.

____, Attorney for Petitioner.

[Add ordinary verification.]

Explanatory notes. 1. As, In the Matter of ____, an Alleged Insane or Incompetent Person. 2. Give file number. 3. Or, City and County. 4. The alleged insane or incompetent person, guardian, or relative of such person within the third degree, or a friend. 5. Name of alleged insane or incompetent person. 6. Section 1766 of the Code of Civil Procedure of California does not apply to persons committed to insane asylums, and for whom no guardian has been appointed: Kellogg v. Cochran, 87 Cal. 192; 25 Pac. Rep. 677; 12 L. R. A. 104. For act to provide for restoration to capacity of persons adjudged to be insane, who have no guardians, and who are not confined at state hospitals for the insane, see *Henning's General Laws*, p. 533.

§ 176. Form. Judgment of restoration to capacity.

[Title of court.]

[Title of matter.]¹

{ No. ____² Dept. No. ____
[Title of form.]

It being shown that such proceedings were had in this court³ on the ____ day of ____, 19____, that ____ was declared to be insane, and that a guardian was appointed for his person and estate; and a petition having been filed herein, alleging that said ____ is now sane and competent, and praying that a judgment be rendered restoring the said ____ to capacity; and such proceedings having been had herein that a jury was, on the ____ day of ____, 19____, duly impaneled to determine the sanity and capacity of said ____; and said jury, after hearing the evidence, having

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returned a verdict herein to the effect that said — is now of sound mind, and fully capable of caring for himself and managing his property; —

It is therefore ordered, adjudged, and decreed, That the said — be, and he is hereby, restored to capacity.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. As, In the Matter of —, an Alleged Insane or Incompetent Person. 2. Give file number. 3. Or, before a judge thereof.

§ 177. Definition of “incompetent.” The phrase “incompetent,” “mentally incompetent,” and “incapable,” as used in this chapter, shall be construed to mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons. **Kerr's Cyc. Code Civ. Proc., § 1767.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Colorado. 3 Mills's Ann. Stats., sec. 4815j.

Utah.* Rev. Stats. 1898, sec. 4001.

Wyoming. Rev. Stats. 1899, sec. 4896.

GUARDIANSHIP OF INSANE PERSONS AND OTHER INCOMPETENTS.

1. Sanity and disability.
2. Jurisdiction of probate courts.
3. Appointment of general guardian.
 - (1) Petition for. Authority of court.
 - (2) Notice and personal presence.
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 - (4) Notice by publication.
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4. Guardian ad litem.
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6. Powers, duties, and liabilities of guardian.
 - (1) In general.
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7. "Conservators." In Colorado.
 - (1) Appointment. Notice. Jury.
 - (2) Duties. Investment of funds.
 - (3) Exceptions to report. Compensation. Removal. Discharge.
8. Report, account, and settlement of guardian.
9. Contracts and rights of insane persons.
10. Adjudication of insanity, and its effect.
 - (1) In general.
 - (2) Presumption and evidence.
11. Restoration to capacity. Termination of guardianship.
12. Proceedings against insane persons.
 - (1) In general.
 - (2) Judgment. Execution. Limitation of actions.
13. Appeal and review.

1. **Sanity and disability.** If a person arraigned for a crime is capable of understanding the nature and objects of the proceedings against him; if he rightly comprehends his own condition in reference to such proceedings; and can conduct his defense in a rational manner,—he is, for the purpose of being tried, to be deemed sane, although on some other subjects his mind may be deranged or unsound: *In re Buchanan*, 129 Cal. 330; 61 Pac. Rep. 1120. Sanity frequently exists before a judicial determination of that fact has been had. An adjudication of insanity overcomes the presumption that the party is sane; but it does not follow that because there is no adjudication there is no insanity. A legal disability may rest upon a person of unsound mind, although the question of his insanity may never have been the subject of judicial inquiry. Thus where a district court has found that a person was incapable of managing his own affairs, and that he was of unsound mind at the time of the rendition of a judgment, such person is under disability, within the meaning of the statute of limitations, although the question of his sanity has never been adjudicated by the probate court: *Lantis v. Davidson*, 60 Kan. 389; 56 Pac. Rep. 745, 747. Under a statute which says, in effect, that if any person is so distracted in mind as to render him incapable of safely and properly managing his estate, and a jury shall so find, a conservator shall be appointed, absolute insanity is not the only

test. The main object of such a statute is the protection of the property of those mentally afflicted. Inquiry must be made as to the extent of such mental infirmity. If it exists in such a degree, and is of such character, that the person so afflicted is, for that reason, unable to act intelligently with respect to his business affairs, or is affected with that imbecility of mind, not strictly insanity, but to such an extent that he is deprived of the mental power to act in a proper and provident manner in the management of his property interests, the statute is satisfied. On the other hand, although the mind may not be sound, if there be capacity to manage, as the result of consecutive reasoning, although the management might not be such as intellectual vigor and skill might approve, the party retaining the possession of his mental faculties to this extent would not come within the purview of such a statute: *Shapter v. Pillar*, 28 Col. 209; 63 Pac. Rep. 302, 303. The business of maintaining a private asylum for the treatment of mild forms of insanity, and of persons afflicted with inebriety and other nervous diseases, is a lawful one, which cannot be prohibited, either directly or indirectly: *Ex parte Whitwell*, 98 Cal. 72; 32 Pac. Rep. 870, 874.

2. **Jurisdiction of probate courts.** Except as limited by the statutes, probate courts, in Kansas, have the same power over the person and estate of lunatics as that formerly possessed by courts of chancery under the common law: *Foran v. Healy* (Kan.), 86 Pac. Rep. 470. Considering the county court, when acting as a probate court, as a court of general jurisdiction in respect to the matters exclusively committed to it by statute, including the appointment of a guardian for an insane or incompetent person, its jurisdiction will be presumed against collateral attack, until a state of facts inconsistent with such presumption is affirmatively shown. While such presumption will not prevail against contrary facts shown by the record, yet it is efficient to supply defects or omissions: *Matson v. Swenson*, 5 S. D. 191; 58 N. W. Rep. 570. The jurisdiction to appoint a guardian over the person and the estate of a lunatic belongs exclusively to the probate court of the county wherein such lunatic has a permanent residence. The jurisdiction conferred by statute upon other probate courts to inquire into and adjudicate upon the sanity of persons in the county is intended as a police regulation, and such jurisdiction ends with the adjudication and commitment or discharge of such person: *Foran v. Healy*, 73 Kan. 633; 85 Pac. Rep. 751. The superior court sitting in probate has no jurisdiction to hear and determine a disputed claim against the guardian of an insane person or his estate. Hence an order requiring such guardian to pay money out of the estate to the state hospital for the care of the insane ward therein is beyond the jurisdiction of the court: *Guardianship of Breslin*, 135 Cal. 21, 22; 66 Pac. Rep. 962. The power of the probate court to appoint a guardian for an insane person, under the

statute, is not defeated or taken away by the fact that such insane person is a married person. And in case the insane person be the wife, there is no rule of law which prefers the husband as such guardian, or forbids the court to appoint another person to be the guardian, if, in its opinion, the husband is not a fit person to discharge the duties of guardianship: *Guardianship of Fegan*, 45 Cal. 176, 177. When the proper petition is filed, and the appointment of a guardian of the person and estate of one who is alleged to be insane has been filed, and the required statutory notice given, the probate court acquires jurisdiction to adjudicate the question of insanity, and to select a guardian, whether that person be the one named in the petition or another: *Halett v. Patrick*, 49 Cal. 590. In such a proceeding, if the petitioner is appointed, but fails to give the required bond, the court may, in the same proceeding, appoint another person as guardian without a new notice. It is sufficient that notice was given of the original application: *Halett v. Patrick*, 49 Cal. 590, 595.

3. Appointment of general guardian.

(1) **Petition for. Authority of court.** A guardian may be appointed for any one who, through drunkenness or other cause, has become incapable of managing his affairs. The word "insane," in statutes on this subject, is intended to cover every person for whom a guardian might be appointed under the provisions of the statute, and includes idiotic persons, as well as all who are incapable of managing their own affairs by reason of any unsoundness of mind, due to whatever cause. The intent of the law is to include all such persons, to the end that all may be properly cared for, and that their estates may not be squandered, and such persons thus be made to become a public charge: *In re Wetmore*, 6 Wash. 271; 33 Pac. Rep. 615, 617. But the clerk of a court, having no judicial power, is not authorized, in vacation, to adjudge a person insane, and to appoint a guardian for him: *Appeal of Kane*, 12 Mont. 197; 29 Pac. Rep. 424. Even a probate court is without authority to appoint a guardian of the person and the estate of an adult, unless such person has been duly adjudged to be an idiot, a person of unsound mind, or an habitual drunkard, and incapable of managing his or her affairs. There can be no guardianship, except for infants, lunatics, and others under legal disabilities. The probate court has no authority to give one person the control of the person and estate of another, unless it is specifically conferred by law: *Martin v. Stewart*, 67 Kan. 424; 73 Pac. Rep. 107, 108. When an application is made for the appointment of a guardian for a person who is alleged to be mentally incompetent, and the statute requires that the court must cause a notice to be given to such incompetent, the verified petition should set forth his residence, in order that such notice may be given: *Coleman v. Cravens*, 41 Wash. 1; 82 Pac. Rep. 1005, 1006. Where the residence of the incompetent is set forth in such petition, and it appears that such incompetent is a non-resident,

there is no necessity to file an affidavit of non-residence: *Coleman v. Cravens*, 41 Wash. 1; 82 Pac. Rep. 1005, 1006. Where the statute provides that a guardian may be appointed for an alleged insane person on the verified petition of a relative or friend, a petition is sufficient, where it alleges that petitioner is a citizen, and a resident of a certain county, and was the agent and friend of such insane person before she was adjudged insane, and that petitioner has been requested by the sons of the incompetent, and by the person who has charge of the incompetent's affairs, to petition to be appointed guardian of the incompetent's estate within the state: *Coleman v. Cravens*, 41 Wash. 1; 82 Pac. Rep. 1005, 1006. Under the provisions of sections 1764 and 1765 of the Code of Civil Procedure of California, the guardian of an insane ward is charged with the care and custody of the person of his ward, as well as the control and management of his estate. The court, therefore, is not authorized to appoint a guardian of his estate only, and not of his person. The order of the court can be made effective only by the appointment of a guardian of both the person and the estate of the ward: *Estate and Guardianship of Kofoed*, 6 Cal. App. 347, 349 (Feb. 21, 1908). The superior court has jurisdiction to appoint guardians for insane persons, wholly independently of its jurisdiction to commit to hospitals for the insane, and the validity of the order appointing a guardian depends in no manner upon the validity of the previous adjudication of insanity, where no fraud or conspiracy is charged. Hence, in an action which involves the validity of an order for defendant's guardian to sell his land, it is improper to consider the previous adjudication of insanity: *Donaldson v. Winningham* (Wash.), 93 Pac. Rep. 534, 535. Where the hearing of a petition for the appointment of a guardian for an incompetent person is adjourned to a day certain, the court has no power to hear it on an earlier day: *McGee v. Hayes*, 127 Cal. 336; 59 Pac. Rep. 767.

REFERENCES.

That a corporation may act as executor or guardian, see *Henning's General Laws*, p. 169.

(2) **Notice and personal presence.** In the absence of statutory requirements, no notice is necessary to confer authority upon a probate court to appoint a guardian, either for a minor, or a lunatic who has been adjudged to be a person of unsound mind: *Foran v. Healy* (Kan.), 86 Pac. Rep. 470. The appointment of a guardian for a person who has been adjudged insane by the county court is valid, though not made upon a verified petition and on notice to such person: *Sprigg v. Stump*, 7 Saw. 280; 8 Fed. Rep. 207. In a proceeding for the appointment of a guardian for an incompetent person, it is not sufficient that the alleged incompetent is merely cited to appear, but he must be actually present, in order to give the court jurisdiction, where process has been served upon him, unless some reason is shown

for his failure to be present at the time: *In re Wetmore*, 6 Wash. 271; 33 Pac. Rep. 615. Under the statute of Washington, the service of notice of the application for the appointment of a guardian for a person alleged to be insane, and upon a person having the care, custody, and control of such insane person, is jurisdictional, and if no such notice was served, all subsequent proceedings are null and void: *Donaldson v. Winningham* (Wash.), 93 Pac. Rep. 534, 535. Where the statute provides that notice of application for the appointment of a guardian for an incompetent person must be served on such incompetent person, and on the person having the care, custody, and control of such incompetent person, and that the person for whom a guardian is sought must be present at the hearing, if able to attend, the former of these requirements, at least, is jurisdictional. A proceeding for the appointment of a guardian is statutory, and the requirement that notice shall be given is mandatory. Ordinarily, the notice to be served on the incompetent person is of far less importance than the notice required to be served on the person having the care, custody, and control. The incompetent person may be so far bereft of reason that the notice served on him is little more than a formality; whereas the law presumes that those having the care, custody, and control of such person have at least sufficient interest in his welfare to see that his legal rights are protected. The record should therefore show that the required notice was served, or that there was no person upon whom service could be made, and that the person for whom the guardian is sought was present at the hearing or was unable to attend: *State v. Superior Court*, 41 Wash. 450; 83 Pac. Rep. 726, 727. No one can be deprived of his personal rights, and of his right to property, by an adjudication that he is insane, and the appointment of a guardian for his person and property, unless he has had reasonable notice of the proceedings and an opportunity to be heard: *Estate of Brash*, 15 Haw. 372, 375.

(3) **Validity of notice.** Where the statute requires the personal presence of the incompetent, if it can be had, as well as that notice of the hearing of the petition be given him, notice must be given to such person of the time and place of the hearing, but the personal presence of such person on the hearing, and his request that the petition be granted, do not cure fatal defects in the notice of the hearing served on him. A copy of an order made on the filing of the petition fixing a certain day "as the time for the hearing," without specifying the hour or place, and directing the notice to be given of the time and place of the hearing, is not a sufficient notice of the hearing: *McGee v. Hayes*, 127 Cal. 336; 59 Pac. Rep. 767. Under the statute of South Dakota, a notice purporting to issue from the court under its seal, and signed by the clerk, is a good notice, whether proceeding from the judge or from the court, where the powers conferred upon the probate judge in relation to guardians and wards may be

exercised by him at chambers, or as the act of the probate court: *Matson v. Swenson*, 5 S. D. 191; 58 N. W. Rep. 570. Where the court is required by statute, before appointing a guardian of an insane person, to give notice to all persons interested, in such manner as the court shall order, by publication or otherwise, the court must specify the notice in its order, and require it to be given by publication in a newspaper, by posting, or by personal service, and state therein whether it shall be published in a newspaper or be posted, or both, or whether personal service shall be made; and, in either case, to state how long, and, if by posting, where, and in how many places. An order of the probate court which merely names the time and place for the hearing of an application for the appointment of a guardian, and then directs the clerk to cause publication thereof to be given, "as prescribed by law," that all persons interested may appear and oppose the petition, is fatally defective, because it simply directs the clerk to cause notice thereof to be given "as prescribed by law." The court is not authorized to intrust to the clerk what would be due notice "as prescribed by law"; the clerk's notice in pursuance of such order is of no effect; and the order appointing a guardian upon such notice is void: *Mosby v. Gisborn*, 17 Utah, 257; 54 Pac. Rep. 121, 127.

REFERENCES.

Lunacy proceedings; necessity of notice: See note 23 L. R. A. 737-744.

(4) **Notice by publication.** Under a statute providing that when an incompetent, having property in this state for whom a guardian is sought to be appointed, resides out of the state, the service of notice shall be against the insane person by publication, the only notice required where the incompetent is a non-resident is the notice by publication: *Coleman v. Cravens*, 41 Wash. 1; 82 Pac. Rep. 1005, 1006.

(5) **Collateral attack.** In proceedings under the Probate Code for the appointment of a guardian for an incompetent person, entertained and acted upon by the county court, resulting in such appointment, such appointment will not be held invalid on collateral attack because the written petition was formally addressed to the judge instead of to the court: *Matson v. Swenson*, 5 S. D. 191; 58 N. W. Rep. 570. In a collateral attack by a stranger, it is not a fatal objection to the validity of the appointment of a guardian for an incompetent person that five days, as required by statute, did not intervene between the service of the notice and the hearing; and, in the absence of any showing to the contrary, it will be presumed that full statutory notice was waived: *Matson v. Swenson*, 5 S. D. 191; 58 N. W. Rep. 570. Letters of guardianship of a lunatic, or an order appointing a guardian for one alleged to be incompetent to manage his affairs, issued by

the probate court, cannot be attacked in a collateral proceeding, where issued by a court of competent jurisdiction: *Warner v. Wilson*, 4 Cal. 310; *Isaacs v. Jones*, 121 Cal. 257; 53 Pac. Rep. 793, 794, 1101. But where the proceedings disclose all the steps taken to confer jurisdiction, from which it clearly appears on the face of the record that the court was without jurisdiction to make an order appointing a guardian for an incompetent person, such order can be collaterally attacked: *McGee v. Hayes*, 127 Cal. 336; 59 Pac. Rep. 767, 768.

REFERENCES.

Collateral attack on lunacy proceedings for want of notice to the lunatic: See note 12 L. R. A. (N. S.) 895, 896.

4. Guardian ad litem. Where a person has an interest in the matter in litigation, and also an interest in the success of the defendant, the court is authorized to permit such person to become a party to the action; and if such party at the time is insane, he can appear only by a general guardian or a guardian ad litem, and the court is authorized to appoint a guardian ad litem for him before the filing of his complaint in intervention: *Security Loan & T. Co. v. Kauffman*, 108 Cal. 214; 41 Pac. Rep. 466, 469.

5. Support, maintenance, and custody. The property of an incompetent person may be used for his maintenance and the payment of his debts; and the guardian may be authorized to sell any part of the incompetent's real property for such purpose when the income of the estate under guardianship is insufficient to maintain his ward: *Guardianship of Hayden*, 1 Cal. App. 75; 81 Pac. Rep. 668. Where the amounts allowed a guardian for board and lodging furnished and personal services rendered by him to the incompetent are sufficient, and even liberal, such allowance will not be increased, although there is uncontradicted testimony of witnesses that, in their opinions, a larger amount should be allowed. In these matters much must be left to the discretion of the court: *Estate of Averill*, 133 Cal. xix; 66 Pac. Rep. 14.

REFERENCES.

See note "Commitment of Insane," § 214, post.

6. Powers, duties, and liabilities of guardian.

(1) **In general.** Neither the guardians nor the courts having jurisdiction over the estates of incompetent persons have power to bind the person or estate of such persons, unless expressly authorized to do so by law: *Andrus v. Blazzard*, 23 Utah, 233; 63 Pac. Rep. 888, 890. The guardian of an insane ward is not authorized to mortgage the real property of his ward for the purpose of paying debts, and the guardian who so acts binds himself, and not the ward: *Andrus v. Blazzard*, 23 Utah, 233; 63 Pac. Rep. 888, 891.

REFERENCES.

Power and authority of guardian of insane person: See note 1 L. R. A. 270. Power of guardian or committee to bind incompetent person or his estate by contract: See note 8 L. R. A. (N. S.) 436, 437.

(2) **As to attorneys and their fees.** Although the statute makes provision for the allowance and payment of claims against the estate of an incompetent person by the guardian, such guardian, appointed for an incompetent, who was indebted to his attorney for fees at time of such appointment, has no power to pay such fees to the attorney out of the funds of the incompetent's estate before the attorney's claim has been allowed by the court: *State v. District Court*, 30 Mont. 8; 75 Pac. Rep. 516. The appointment of a guardian for a client, who has become insane, and who, at the time of such insanity, is indebted to his attorney, who has charge of his interests, does not divest the attorney of any lien or security which he had at the time to secure payment of his fees: *State v. District Court*, 30 Mont. 8; 75 Pac. Rep. 516, 517. Under a statute providing that an attorney in an action may be changed on the order of the court on the application of either client or attorney, after notice from one to the other, the guardian of an incompetent person is absolutely entitled to have a different attorney substituted to represent him, instead of the firm which had represented the incompetent before the guardian's appointment; and this right is not affected by the fact that the fees to such firm have not been paid: *State v. District Court*, 30 Mont. 8; 75 Pac. Rep. 516, 517.

(3) **Conduct of ward's business.** The custodian of an incompetent person should not allow the business affairs of his ward to be transacted by others, except under extraordinary circumstances. But, where such other persons are relatives, and conversant with the affairs of such incompetent, and the children and heirs at law of the ward request it, and no creditor appears to contest the act of the guardian, the guardian may be excused for this digression: *Racouillat v. Requeña*, 36 Cal. 651, 656. If the guardian of an incompetent person lends money upon the sole credit of the borrower, the guardian must show that he acted in good faith, and with due circumspection and prudence. In the absence of such evidence, the presumption is otherwise: *Estate of Averill*, 133 Cal. xix; 66 Pac. Rep. 14.

(4) **Actions by guardian.** A person competent to make a will has a right to select the custodian, and to cause it to remain in his hands until called for, or until death makes it necessary for the custodian to deliver it to the court, or to a person named in the will; and the guardian of a lunatic cannot therefore maintain an action to recover his ward's will from the custody of a third person, where it was placed before the ward was declared insane: *Mastick v. Superior*

Court, 94 Cal. 347; 29 Pac. Rep. 869. The guardian of an insane woman cannot maintain an action against her husband for divorce and alimony, or for alimony alone: *Birdzell v. Birdzell*, 33 Kan. 433; 6 Pac. Rep. 561; affirmed upon rehearing in same case, 35 Kan. 638; 11 Pac. Rep. 907. The complaint by the guardian of an incompetent ward will be held sufficient after judgment, and in the absence of demurrer, though the issuance of letters of guardianship to the guardian of the incompetent plaintiff are pleaded inferentially: *Elizalde v. Elizalde*, 137 Cal. 634, 637; 66 Pac. Rep. 369; 70 Pac. Rep. 861. The finding of a jury, on an inquest, that the subject of the inquiry is feeble in mind, is incapable of managing his business affairs, and is a typical imbecile, is not a finding on insanity within the statutory meaning of that term, and furnishes the probate court no authority to appoint a guardian for such feeble-minded person, and consequently gives the guardian no right to maintain an action in his behalf: *Caple v. Drew*, 70 Kan. 136; 78 Pac. Rep. 427. In ejectment by the guardian of an incompetent person to recover certain premises, the guardian's motives, and what he believed, and what he desired, are immaterial; and conversations between him and the defendant and his wife are inadmissible, as nothing which the guardian might say could deprive the ward of his property or of his rights: *Hayden v. Collins*, 1 Cal. App. 259, 266; 81 Pac. Rep. 1120.

REFERENCES.

Contracts and rights of insane persons: See head-line 9, *infra*.

(5) **What is no defense to action.** A stipulation, by the guardian of an idiot, to abide the result of an action under a defense interposed by another defendant is not a compliance with the statutory duty of a guardian to defend actions brought against his ward. A stipulation to abide the result of the action interposed by another is not defending the action: *Mattson v. Mattson*, 29 Wash. 417; 69 Pac. Rep. 1087, 1089.

7. "Conservators." In Colorado.

(1) **Appointment. Notice. Jury.** Upon the petition of a reputable person alleging that another is of unsound mind, the county court may summon a jury to determine the fact, and if it be alleged and proved that such person has property, and is so mentally unsound as to be unable to properly manage the same, a conservator may be appointed to protect the estate, without a violation of the constitutional right to acquire and possess property: *Shapter v. Pillar*, 28 Col. 209; 63 Pac. Rep. 302, 304. But an order appointing him, without notice to such incompetent, should be set aside, even though such notice is not required by statute: *Jones v. Learned*, 17 Col. App. 76; 66 Pac. Rep. 1071, 1072. If the statute requires that a jury must find that such incompetent is incapable or unfit to manage his affairs before the conservator can be appointed, an appointment without

such verdict is void: *Jones v. Learned*, 17 Col. App. 76; 66 Pac. Rep. 1071, 1072. Where a conservator was appointed in one state, and it appears that he and a conservator, afterwards appointed in another state, have discharged their duties with fidelity, and have obtained a large judgment in favor of their ward, and interest in valuable mining property in the latter state, a court there will not set aside the appointment in that state for want of jurisdiction in the court making the appointment, at the suggestion of relatives of the ward, who for many years allowed the insane person to remain in the asylum without any attention upon their part, and who made no attempt to alleviate his condition, especially where they did not manifest any interest in his behalf until the successful termination of the litigation: *Wood v. Throckmorton*, 26 Col. 248; 57 Pac. Rep. 699, 700.

(2) **Duties. Investment of funds.** It is the duty of a conservator to exercise reasonable care and diligence in investing, from time to time, such portion of the trust funds in his hands as can be utilized for that purpose, and still leave him with sufficient to meet the expenditures in behalf of the estate which he may be called upon to make; and, having failed to do so, he is, unless he has presented a valid excuse, chargeable with legal interest on the funds which he could have invested: *In re Thomas's Estate*, 26 Col. 110; 56 Pac. Rep. 907, 911. He is allowed a reasonable time, of course, after receiving the ward's funds within which to invest them, which, in the absence of any proof on the question, is usually placed at six months: *In re Thomas's Estate*, 26 Col. 110; 56 Pac. Rep. 907, 911. The conservator is not excused for failure to invest the funds of his ward by the advice of the county judge, that it is his duty to keep the funds of the estate in his hands so that he can turn them over promptly if his ward become sane; nor is he excused by the fact that the alleged insane person, from time to time, applied to be adjudged sane, and to be placed in the control of his affairs: *In re Thomas's Estate*, 26 Col. 110; 56 Pac. Rep. 907, 911. When no investments have been made by the conservator, and it is necessary to pay out sums from time to time for the benefit of the estate and the support of the ward, no inflexible rule can be laid down which would be applicable in all cases for the purpose of determining upon what portion of the funds interest should be charged; each case must, in a measure, be governed by its own peculiar circumstances; and a sound discretion must be exercised in determining how interest shall be computed in such cases: *In re Thomas's Estate*, 26 Col. 110; 56 Pac. Rep. 907, 911. The conservator should be charged with interest, where he has mingled the funds of his ward with his own funds, and it appears that the mingled funds have been used indiscriminately, although he may have had on hand at all times an amount sufficient of the funds so mingled to pay the balance belonging to the estate: *In re Thomas's Estate*, 26 Col. 110; 56 Pac. Rep. 907, 912.

(3) Exceptions to report. Compensation. Removal. Discharge. Although there may be no special statute regarding the filing of exceptions to the report of a conservator, such exceptions, although indefinite and very general, should, as a matter of practice, be sustained, if they inform the conservator that all his charges against the funds in his hands will be contested except those items that he has paid under order of court, and advises him that a claim will be made on behalf of the estate for interest on the funds which he has received: *In re Thomas's Estate*, 26 Col. 110; 56 Pac. Rep. 907, 909. The conservator of the estate of a lunatic is entitled to receive such compensation for his care and trouble as the court may deem reasonable. It is not to be computed, as commissions, but determined by the reasonable value of the time he has necessarily devoted to the discharge of his duties: *In re Thomas's Estate*, 26 Col. 110; 56 Pac. Rep. 907, 912. In the absence of a statute to the contrary, periodical or partial settlements, as evidenced by reports of conservators, are, at most, after approval by the court, but *prima facie* evidence of their correctness, and may be rectified or rebutted on a final accounting. They are not settlements, but only the exhibition of accounts; nor judgments, being merely *ex parte* presentations of the status of the estate in the hands of the conservator: *In re Thomas's Estate*, 26 Col. 110; 56 Pac. Rep. 907, 912. The court having jurisdiction is vested with a large discretion in the removal of conservators. It may remove a conservator for any default or misconduct upon his part, and its discretion will not be interfered with, except in plain cases of abuse. The effect of requiring a conservator to pay the funds of his ward into court is to discharge him: *In re Thomas's Estate*, 26 Col. 110; 56 Pac. Rep. 907, 912.

8. Report, account, and settlement of guardian. The clerk of the superior court is a mere ministerial officer, and is not authorized to make any examination of the account and report of the guardian of an insane person. That is a matter for the judge of the court: *Denny v. Holloway*, 17 Wash. 487; 49 Pac. Rep. 1073, 1074. Express findings are unnecessary in proceedings to settle a guardian's account; all facts necessary to sustain the judgment or order of the lower court will be presumed: *Estate of Averill*, 133 Cal. xix; 66 Pac. Rep. 14, 15. Equity has jurisdiction to afford relief and to compel a full and just accounting by the guardian of an incompetent person where the decree settling his final account was procured by fraud: *Silva v. Santos*, 138 Cal. 536; 71 Pac. Rep. 703. A complaint in equity to compel the guardian of an incompetent person to make a full and just accounting does not improperly unite different causes of action, where the money alleged to be fraudulently retained by the guardian came into his hands as guardian, and the facts alleged all relate to the transactions of the guardian in managing the estate, and in failing, in such management, to perform the duties in the particulars alleged:

Silva v. Santos, 138 Cal. 536; 71 Pac. Rep. 703, 705. The rule of law which sanctions a proceeding to require the guardian of an incompetent person to render a full and just account is wholesome, and should serve as an admonition to administrators, executors, guardians, and trustees generally, that they must, to the last moment of their trusteeship, scrupulously account for every dollar which has come into their hands in their trust capacity: *Silva v. Santos*, 138 Cal. 536; 71 Pac. Rep. 703, 705. The administrator of the estate of a deceased incompetent person may contest the final account of the guardian of such incompetent: *Estate of Averill*, 133 Cal. xix; 66 Pac. Rep. 14, 15. A settlement, in the probate court, of the accounts of the guardian of an insane ward is final and conclusive, where no appeal has been taken from the order of settlement. All inquiry into the correctness of the accounts having been thus finally settled by the proper tribunal, a court of equity will not open them, unless for fraud, omission, or the like, and not then unless the specific mistake or errors are pointed out. It is not enough to allege that, soon after the defendant "was appointed guardian, he became so ignorant and unsound in mind that he was incompetent to attend to any business whatever; that he was in that condition when the final account of his guardianship was rendered and filed; that the accounts which he rendered were unjust and incorrect statements of his transactions as guardian; and that the final account, as settled and allowed by the probate court, was 'false and untrue in many particulars'": *Brodrub v. Brodrub*, 56 Cal. 563, 566.

9. Contracts and rights of insane persons. Where a guardian has been appointed by the probate court of the proper county, and a suit to foreclose a mortgage upon the real estate owned by the lunatic for whose estate such guardian was appointed is commenced in the district court of such county, service of summons upon such guardian confers jurisdiction upon the district court to adjudicate the rights of such lunatic in said real estate; and if the property is sold under such proceedings, the lunatic has no right to redeem the property from such sale after his restoration to sanity, merely on the ground that the court did not acquire jurisdiction by service of summons on the guardian: *Foran v. Healy*, 73 Kan. 633; 85 Pac. Rep. 751. A plaintiff, admitted to be of unsound mind, has no capacity to bring an action to partition a tract of land, and what he cannot do in person he cannot direct or employ an attorney to do for him: *Gustafson v. Ericksdotter*, 37 Kan. 670; 16 Pac. Rep. 91. An unmarried woman, who is an imbecile, and incompetent to testify, cannot institute and prosecute a proceeding in bastardy: *State v. Jehlik*, 66 Kan. 301; 71 Pac. Rep. 572. A complaint must state facts showing a cause of action in somebody; and it must show a cause of action in the plaintiff, or a general demurrer will lie. Hence if a plaintiff becomes insane pending suit, the suit should be prosecuted in the name of such

insane person, by his guardian. The plaintiff is not deprived of his right or property in the cause of action by his insanity, nor does it vest in his guardian upon his appointment; and an erroneous order, substituting the guardian of his person and estate as plaintiff, is not cause for dismissal, but the plaintiff should have leave to reform his complaint, in accordance with the law: *Dixon v. Gries*, 106 Cal. 506; 39 Pac. Rep. 857. The judicial tendency of this enlightened age is against the enforcement of an executory contract procured by a shrewd man of affairs from one known to be mentally incapable of dealing with judgment and discretion. Hence the act of taking unfair advantage of such a person's inability to understand the nature and consequences of a purported agreement to convey his homestead is good ground for denying specific performance, and especially so when he has returned to the prospective grantee all that he ever received: *Miller v. Tjexhus* (S. D.), 104 N. W. Rep. 519, 520.

REFERENCES.

Use, by a court of chancery, of lunatic's property: See note 34 L. R. A. 297-300. Test of mental capacity to make contracts: See note 3 L. R. A. (N. S.) 174. Deed by insane person when under guardianship: See note 19 L. R. A. 490, 491. Right of insane person to institute proceedings by next friend: See note 64 L. R. A. 513-534. Validity of deed by incompetent person: See note 19 L. R. A. 489-493. Action by insane person: See note 2 L. R. A. (N. S.) 961. Opinion evidence, admissibility of, as to mental capacity of person to execute contract or deed: See note 4 Am. & Eng. Ann. Cas. 888.

10. Adjudication of insanity, and its effect.

(1) **In general.** The finding of a jury on an inquest, that the subject of inquiry is feeble in mind, is incapable of managing his business affairs, and is a typical imbecile, is not a finding of insanity within the statutory meaning of that term, and furnishes the probate court no authority to appoint a guardian for such feeble-minded person, and consequently the guardian so appointed has no right to maintain an action in behalf of such person: *Caple v. Drew*, 70 Kan. 136; 78 Pac. Rep. 427, 429. An adjudication of lunacy, legally had, is conclusive upon the lunatic and all other persons, and the probate court of the county where such lunatic has a permanent residence may accept and act thereon, the same as if such adjudication had occurred in that court: *Foran v. Healy*, 73 Kan. 633; 85 Pac. Rep. 751. Where a person was held to answer for a crime, and was insane when the preliminary examination was had, and when the order of commitment was made, the proceedings are void: *Ex parte Wright*, 74 Kan. 406; 86 Pac. Rep. 460.

(2) **Presumption and evidence.** The fact of insanity having been once established, it is presumed to continue until the demented person

is shown to have been restored to reason: *Lantis v. Davidson*, 60 Kan. 389; 56 Pac. Rep. 745, 747. An allegation in a petition that plaintiff employed counsel to set aside a judgment rendered against the plaintiff will not overthrow a finding by the court that plaintiff was at the time of unsound mind and incapable of managing his own affairs: *Lantis v. Davidson*, 60 Kan. 389; 56 Pac. Rep. 745, 747. The presumption, however, of continued insanity arising from an adjudication thereof may be overcome by evidence other than an adjudication of restoration: *Rodgers v. Rodgers*, 56 Kan. 483; 43 Pac. Rep. 779, 781; *Lower v. Schumacher*, 61 Kan. 625; 60 Pac. Rep. 538, 539. In determining the question whether a person is so mentally unsound as to be incapable to care for his property, the admission of opinion evidence as to his capacity is not properly the subject of opinion evidence, but must be determined from the probative facts bearing thereon: *Shapter v. Pillar*, 28 Col. 209; 63 Pac. Rep. 302, 304.

REFERENCES.

Evidence of insanity of ancestors or kindred, admissibility of, on issue of sanity: See notes 6 Am. & Eng. Ann. Cas. 29; 7 Am. & Eng. Ann. Cas. 267.

11. Restoration to capacity. Termination of guardianship. The provision in section 1666 of the Code of Civil Procedure of California, authorizing the court to restore the person adjudged insane or incompetent to capacity, is applicable only to persons adjudged insane or incompetent, and for whom guardians have been appointed under section 1764 of the same code. The application of it to persons committed to asylums would be utterly inconsistent with the government of those institutions according to the requirements and regulations of the Political Code. Hence a person who has been regularly examined and committed to the state insane asylum, though out on parole, cannot maintain an original petition for a writ of mandate to be directed to the court which examined and committed him, commanding such court "to proceed to take testimony and try, hear, and determine" his application, which prays for a judicial determination that the applicant is of sound mind, capable of taking care of himself and his property, and for restoration to capacity: *Aldrich v. Superior Court*, 120 Cal. 140, 142; 52 Pac. Rep. 148. A judgment of restoration to capacity of an insane person is conclusive upon the condition or relation of the person: *Aldrich v. Barton* (Cal.), 95 Pac. Rep. 900, 903. A statute which provides that every guardian of an incompetent person shall have the custody of the person of his ward and his estate until such guardian is "legally discharged" does not extend the authority of an incompetent's guardian until he is discharged by an order of court, but, under a statute which provides that if, on an inquiry, it be found that an incompetent has been restored to capacity, the guardianship shall cease, the authority of such guardian is termi-

nated ipso facto by an adjudication that such incompetent person has been restored to capacity: *In re Scheuer's Estate*, 31 Mont. 606; 79 Pac. Rep. 244.

REFERENCES.

Act providing for the restoration to capacity of persons adjudged to be insane, who have no guardians, and who are not confined at the state asylum for the insane: See *Henning's General Laws*, p. 533.

12. Proceedings against insane persons.

(1) *In general.* If a plaintiff in an action knows that the defendant, at the time such action is brought, is not in a condition to attend to any business, and is non compos mentis, and was so both at the time service was obtained and when judgment rendered, it is incumbent on him to suggest it to the court, in order that a guardian ad litem may be appointed: *Townsend v. Price*, 19 Wash. 415; 53 Pac. Rep. 668, 669. It may be that service might regularly be made upon an insane person, and that the judgment obtained from such service is not void, but voidable merely; yet in an action on a judgment recovered in a court of record in another state, and under proper averments, evidence may be admitted that a guardian ad litem was never appointed: *Townsend v. Price*, 19 Wash. 415; 53 Pac. Rep. 668, 669. Guardians should be appointed to represent insane persons, and such persons may be sued and jurisdiction over them acquired, as of other persons, but a judgment against an insane person who has no guardian, and without the appointment of a guardian ad litem; though irregular, is not void. Such judgment may be vacated in a direct proceeding if no innocent person has acquired rights under it: *Dunn v. Dunn*, 114 Cal. 210; 46 Pac. Rep. 5; *White v. Hinton*, 3 Wyo. 753; 30 Pac. Rep. 953; *Pollock v. Horn*, 13 Wash. 626; 43 Pac. Rep. 885. Neither an incompetent person, nor his estate, can make any appearance whatsoever, except by and through a legally appointed guardian. The fact that a party becomes an incompetent while indebted to an attorney, who was representing him at the time with respect to his property interests, does not give such attorney the right to appear for the incompetent's guardian: *State v. District Court*, 30 Mont. 8; 75 Pac. Rep. 516. While evidence of adjudication of unsoundness of mind may make out a prima facie defense, yet in an action against a person of unsound mind, it is not conclusive, and it may be shown by any competent evidence that defendant was of sound mind at the time he executed the contract: *Walker v. Coates*, 5 Kan. App. 209; 47 Pac. Rep. 158. The act of March 11, 1893 (*Laws of Washington 1893*, c. cxx, p. 286), concerning incompetents residing out of the state, repeals all conflicting laws, and authorizes the sale of the property of the non-resident incompetent for the payment of debts, etc., on application of the domestic guardian: *Coleman v. Cravens*, 41 Wash. 1; 82 Pac. Rep. 1005. In an action against an incompetent on a promissory note, the court obtains jurisdiction of the Probate — 17

person of the ward, where it is plain from the language of the answer that the guardian intended to appear for and represent his ward in the case, and that the ward appeared and answered by the guardian: *Mullen v. Dunn*, 134 Cal. 247; 66 Pac. Rep. 209. Where the general guardian of an incompetent person is in possession of mortgaged premises belonging to such incompetent, which have been sold, the presentation of a commissioner's deed to such guardian and demand of the premises, both as guardian and individually, is a sufficient demand, without a demand being made on the incompetent: *Taylor v. Ellenberger* (Cal.), 65 Pac. Rep. 832, 833.

REFERENCES.

Service of process on the guardian of an infant, insane, or incompetent person: See *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1722.

(2) Judgment. Execution. Limitation of actions. "While an occasional difference of opinion manifests itself in regard to the propriety and possibility of binding *femes covert* and infants by jurisdictional proceedings in which they were not represented by some competent authority, no such difference has been made apparent in relation to a more unfortunate and more defenseless class of persons; but, by a concurrence of judicial authority, lunatics are held to be within the jurisdiction of the courts. Judgments against them, it is said, are neither void nor voidable; the proper remedy in favor of a lunatic being to apply to chancery to restrain proceedings, and to compel plaintiff to go there for justice. In a suit against a lunatic, the judgment is properly entered against him, and not against his guardian. A lunatic has capacity to appear in court by an attorney. The legal title to his estate remains in him, and does not pass to his guardian": *Pollock v. Horn*, 13 Wash. 626; 43 Pac. Rep. 885, citing *Freeman on Judgments*, 4th ed., § 152. A judgment against an insane surety on an attachment bond is valid, where such surety was sane at the time the bond was executed: *Pollock v. Horn*, 13 Wash. 626; 43 Pac. Rep. 885. An execution of a valid judgment may run against the property of a lunatic: *Pollock v. Horn*, 13 Wash. 626; 43 Pac. Rep. 885, 886. Even a judgment rendered subsequently to the establishment of defendant's insanity is not void, and the judgment debtor's land is subject to execution. Hence the creditor is not obliged to file his claim for settlement in due course of the administration of the estate. The remedy of a lunatic, or of his estate, is an action in equity to set aside the judgment, if it was fraudulently obtained. If the judgment was not fraudulently or wrongfully obtained, then no harm was worked upon the defendant; and if it was, the courts will set it aside: *Pollock v. Horn*, 13 Wash. 626; 43 Pac. Rep. 885, 886. In Washington, proceedings to set aside a judgment rendered against a person of unsound mind are, by express provisions of the statute, not barred until the expiration of one year

from the removal of the disability: *Curry v. Wilson* (Wash.), 87 Pac. Rep. 1065, 1066.

13. Appeal and review. A person who has been adjudged to be insane is an "aggrieved party," within the law relating to appeals, and has a right to appeal from the order adjudging him to be insane and appointing for him a guardian: *Appeal of Kane*, 12 Mont. 197; 29 Pac. Rep. 424. In proceedings for the appointment of a guardian for an alleged incompetent, neither the incompetent nor the attorney can consent to the entry of an order appointing a guardian so as to deprive the incompetent of the right to appeal therefrom: *In re Sullivan*, 143 Cal. 462; 77 Pac. Rep. 153. Nor is such incompetent deprived of the right to appeal from an order appointing a guardian on the ground of his incompetency because he had sought an order restoring him to capacity: *In re Sullivan*, 143 Cal. 462; 77 Pac. Rep. 153. Under a statute which provides that an appeal may be taken from any order granting or refusing to grant letters of guardianship, an appeal may be taken from an order appointing a guardian for an incompetent person: *In re Moss*, 120 Cal. 695; 53 Pac. Rep. 357. A statute which provides that mentally incompetent persons can take an appeal only by their general guardian or guardian ad litem appointed by the court does not apply to a case where the very question involved is the validity of the order of guardianship itself, and where the appeal is taken directly from that order: *In re Moss*, 120 Cal. 695; 53 Pac. Rep. 357. Upon appeal by the alleged incompetent person, the notice of appeal need only be served upon the guardians to whom letters were granted. It need not be served upon one who has ceased to be a party to the proceeding: *Guardianship of Sullivan*, 143 Cal. 462; 77 Pac. Rep. 153. An adjudication of the incompetency of a person cannot be entered by his consent. If he is in fact incompetent, he cannot consent, and if not incompetent, his consent cannot make him so. Hence the rule that an appeal will not be entered from a judgment entered by consent has no application to an order appointing a guardian of the person and estate of an incompetent person: *Guardianship of Sullivan*, 143 Cal. 463; 77 Pac. Rep. 153. One who has been adjudged incapable of managing his own affairs is entitled to sue out a writ of error, without a guardian ad litem, to review the judgment: *Shapter v. Pillar*, 28 Col. 209; 63 Pac. Rep. 302, 303. In a proceeding on a writ of certiorari to rescind an order committing the relator as an insane person, it is no ground for a reversal of the commitment that the venire for the jury did not expressly direct that one of the jurors to be summoned should be a practising physician, where a jury with the proper qualifications was in fact summoned: *State v. Third Judicial Dist. Court*, 17 Mont. 411; 43 Pac. Rep. 385. An appeal taken by a guardian ad litem, who failed to file a bill of exceptions, or statement on appeal, and who did not request the clerk of the lower court to certify any transcript

of the record on appeal, will be dismissed, where no such transcript is on file: *In re Moss* (Cal.), 74 Pac. Rep. 546. If an appeal in a proceeding to appoint a guardian for an incompetent is taken by the incompetent himself, the court will, upon his written request, after notice to his attorneys thereof, dismiss such appeal: *In re Moss* (Cal.), 74 Pac. Rep. 546. It is the duty of the guardian of an insane ward to protect the latter's estate against what he considers an unjust or illegal claim, and he has a right to appeal from an order of the court requiring him to pay out the money of his ward, where the court has no power to make such order: *Guardianship of Breslin*, 135 Cal. 21, 22; 66 Pac. Rep. 962.

REFERENCES.

Guardians of insane and incompetent persons: See **Kerr's Cal. Cyc. Code Civ. Proc.**, §§ 1763-1767, and notes. See separate note to § 200, post, on commitment and discharge of insane persons.

CHAPTER VIII.

SPENDTHRIFTS AND DRUNKARDS.

- § 178. Court may appoint guardian for spendthrift.
- § 179. Notice to spendthrift. Hearing and appointment.
- § 180. Copy of complaint to be filed. What contracts are rendered void.
- § 181. Allowance to ward for expense of defense.
- § 182. Powers and duties of guardian for spendthrift.
- § 183. Meaning of term "spendthrift."
- § 184. Drunkard squandering his property.
- § 185. Judgment of drunkenness.
- § 186. Relative may make complaint.
- § 187. Service of copy of complaint.
- § 188. Information. Appointment of guardian. Powers.
- § 189. Form. Complaint against habitual drunkard.
- § 190. Vacation of judgment of drunkenness.
- § 191. Form. Petition to vacate judgment of drunkenness.

NOTE ON SPENDTHRIFTS.

In general.

§ 178. Court may appoint guardian for spendthrift.
 When any person by excessive drinking, gaming, idleness, or debauchery of any kind, shall so spend, waste, or lessen his estate as to expose himself or his family to want or suffering, or the county to charge and expense for the support of himself and family, the county court [?] for such county of which such spendthrift is a resident or an inhabitant shall present a complaint to the county judge setting forth the facts and circumstances of the case, and praying to have a guardian appointed for him. Bellinger and Cotton's Ann. Codes and Stats., § 5270.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 898, p. 330.

North Dakota. Rev. Codes 1905, § 8252 (spendthrifts are included with habitual drunkards, etc.).

§ 179. Notice to spendthrift. Hearing and appointment.

The county judge shall cause notice to be given to such supposed spendthrift of the time and place appointed for hearing the case, not less than ten days before the time so appointed; and if, after a full hearing, it shall appear to the judge that the person complained of comes within the description contained in the preceding section, he shall appoint a guardian of his person and estate, with the powers and duties hereinafter specified. Bellinger's and Cotton's Ann. Codes and Stats., § 5271.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 898, p. 330.

§ 180. Copy of complaint to be filed. What contracts are rendered void. After the order of notice has been issued, the complainants shall cause a copy of the complaint, with the order of notice, to be filed in the office of the county clerk for the county, and if a guardian shall be appointed on such application, all contracts, excepting for necessities, and all gifts, sales, or transfer of real or personal estate made by such spendthrift, after such filing of the complaint in the county clerk's office, and before the termination of the guardianship, shall be null and void. Bellinger and Cotton's Ann. Codes and Stats., § 5272.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 899, p. 330.

§ 181. Allowance to ward for expense of defense. When a guardian shall be appointed for an insane person or spendthrift, the judge shall make an allowance, to be paid by the guardian, for all reasonable expenses incurred by the ward in defending himself against the complaint. Bellinger and Cotton's Ann. Codes and Stats., § 5273.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 900, p. 330.

§ 182. Powers and duties of guardian for spendthrift. Every guardian so appointed for a spendthrift shall have the care and custody of the person of the ward, and the management of all his estate, until the guardian shall be legally discharged; and he shall give bond to the state of Oregon, in like manner and with like condition as is before directed with respect to the guardian of an insane person. Bellinger and Cotton's Ann. Codes and Stats., § 5274.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 901, p. 330.

§ 183. Meaning of term "spendthrift." The word "spendthrift" is intended to include any one who is liable to be put under guardianship on account of excessive drinking, gaming, idleness, or debauchery, and this word shall be so construed in all the provisions relating to guardians and wards contained in this or any other statute. Bellinger and Cotton's Ann. Codes and Stats., § 5290.

§ 184. Drunkard squandering his property. Any person may make complaint of any person addicted to the excessive use of intoxicating liquors, to the superior judge in the county wherein such person so addicted resides, that the person complained of is a habitual drunkard, and that in consequence thereof such person is squandering his or her earnings or property, or that he or she neglects his or her business, or that such person abuses or maltreats his or her family, which complaint must be verified by the oath of the complainant to the effect that the same is true. Pierce's Washington Code, § 2810.

§ 185. Judgment of drunkenness. Any person addicted to the use of intoxicating liquors may, upon complaint thereof, or upon certificate of a justice of the peace, as hereinafter provided, be adjudged a habitual drunkard. Pierce's Washington Code, § 2811.

Note. The statute of Washington makes no provision for the appointment of a guardian for an habitual drunkard.

§ 186. Relative may make complaint. Either the father, husband, mother, wife, son or daughter of any person addicted to the excessive use of intoxicating liquors, or any person in the interest of the relative aggrieved, or of the general public, may make complaint to the superior judge of the county wherein such person, so addicted, resides, that the person complained of is a habitual drunkard, and that in consequence thereof, such person is squandering his earnings or property, or that he neglects his business, or that he abuses or maltreats his family, which complaint must be verified by the oath of the complainant, to the effect that the same is true. And every justice of the peace in whose court any person shall have been convicted twice on a charge of being drunk, or drunk and disorderly, shall certify to the superior judge, of the county in which he resides, that said person has thus twice been convicted. Pierce's Washington Code, § 2812.

§ 187. Service of copy of complaint. Upon filing of the complaint, duly verified, the superior judge shall cause a copy thereof to be served upon the accused forthwith and shall summon him to appear and answer, giving at least ten days' notice; and if, upon the hearing of the evidence, the allegations of the complaint are sustained, or upon filing a certificate of a justice of the peace, as above provided, such judge shall, in open court, declare the accused to be a habitual drunkard, and shall cause the proceeding to be entered in full upon the records of the court. Pierce's Washington Code, § 2813.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Oklahoma. Rev. Stats. 1903, secs. 3164-3167 (commitment to institution for cure).

§ 188. Information. Appointment of guardian. Powers. If information in writing be given to the court or judge of any county that any person in its county is so addicted to habitual drunkenness as to be incapable of managing his affairs, and praying that an inquiry thereinto be had, the

court shall proceed therein in all respects as herein provided in respect to an idiot, lunatic, or person of unsound mind; and if a guardian is appointed on such proceedings, he shall have the same powers and be subject to the same control as the guardian mentioned in this chapter. Wyoming Rev. Stats. 1899, § 4897.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Kansas. Gen. Stats. 1905, §§ 4148-4177 (included with incompetents).

New Mexico. Comp. Laws 1897, secs. 1896-1934 (classed with lunatics).

North Dakota. Rev. Codes 1905, § 8252.

§ 189. Form. Complaint against habitual drunkard.

[Title of court.]

[Title of action.] ¹

{ Department No. _____
[Title of form.]

To the Honorable the _____ Judge of the _____ Court of the County of _____, State of _____.

Now comes _____,² the plaintiff, and alleges:

That he is the _____³ of said defendant; that said defendant is addicted to the excessive use of intoxicating liquors; that said defendant, by reason of such use, has become, and is, an habitual drunkard; and that said defendant resides in the county aforesaid;

That, in consequence of defendant's said excessive use of intoxicating liquors, and by reason of his being an habitual drunkard, said defendant is squandering his ⁴ earnings and property,⁵ and neglects his business;⁶

That by reason of defendant's habits as aforesaid, the said defendant abuses ⁷ and maltreats ⁸ his family.

Complainant therefore prays that the said defendant be declared an habitual drunkard.

_____, Attorney for Complainant. _____, Plaintiff.

[Add ordinary verification.]

Explanatory notes. 1. As, John Doe, Complainant, v. Richard Roe, Defendant. 2. Name of plaintiff. 3. The father, husband, or other person interested. 4. Or, her. 5. Or as the case may be. 6. Giving brief statement of facts. 7. State in what respect. 8. State how.

§ 190. **Vacation of judgment of drunkenness.** Any person so declared to be a habitual drunkard may, at any time after the expiration of two years from the time he was so declared to be such, by petition addressed to the judge of the court in which he was so adjudged, have a hearing in such court, upon a day which shall be by such court set, which day shall not be more than ten days after the filing of such petition in such court, which petition may contain a statement of facts tending to show the improved condition and habits of such petitioner and to establish his character for sobriety, and a prayer that the order on record so declaring him to be such habitual drunkard be vacated and he be released from the effects thereof; which petition shall be duly verified by the petitioner. And if upon the hearing of such petition and the evidence in support thereof it appear to the judge that such petitioner is entitled to have such record vacated and be so released, then he shall make an order so declaring that such record be vacated and annulled and that the petitioner be thereafter released from the effects thereof. *Pierce's Washington Code*, § 2818.

Drunkenness, as it is commonly understood, is the result of the excessive drinking of intoxicating liquors: 10 Am. & Eng. Ency. of Law, 276.

§ 191. **Form. Petition to vacate judgment of drunkenness.**

[Title of court.]

[Title of action.]

{ No. ____ Dept. No. ____
[Title of form.]

To the Honorable ____, Judge of the ____ Court of ____ County,¹ State of ____.

The undersigned, your petitioner, respectfully represents that, on the ____ day of ____, 19____,² he was, in said court, adjudged to be an habitual drunkard, and that the court's order so declaring him to be an habitual drunkard is now on record;

That your petitioner has entirely ceased to use intoxicating liquors, and is no longer an habitual drunkard, or a drunkard at all.³

Your petitioner therefore prays that the record of said order be vacated and annulled. ———, Petitioner.

———, Attorney for Petitioner.

[Add ordinary verification.]

Explanatory notes. 1. The county in which petitioner was adjudged to be an habitual drunkard. 2. This date must be at least two years before the filing of the petition. 3. State briefly the changed habits and improved condition of petitioner.

Note. All proceedings provided by statute relating to guardian and ward subsequently to the appointment of the guardian apply equally to the guardianship of a spendthrift: *Sturgis v. Sturgis* (Or., Jan. 28, 1908), 93 Pac. Rep. 696, 699.

SPENDTHRIFTS.

In general.

After one has been adjudged a spendthrift by a court of competent jurisdiction, and a guardian has been appointed for him, the presumption is that the necessity for the guardianship continues, until the contrary is shown, and the burden of proving that there is no longer any reason for its continuance is on the ward: *Guardianship of Humeku*, 14 Haw. 413, 415. The marriage of a female ward under guardianship as a spendthrift does not, of itself, operate as a termination of the relationship of guardian and ward, nor operate as a legal discharge of the guardian; but, as the statute provides, it must be made to appear, by proper application to the judge of probate, that such "guardianship is no longer necessary": *Guardianship of Kapukini*, 12 Haw. 22, 25. The fact that a person is under guardianship as a spendthrift does not render him incapable of making a will: *Estate of Lunalilo*, 3 Haw. 519, 520.

CHAPTER IX.

COMMITMENT AND DISCHARGE OF INSANE PERSONS.

- § 192. Charges of insanity, and proceedings thereon.
- § 193. Form. Affidavit of insanity.
- § 194. Form. Warrant of arrest.
- § 195. Form. Certificate of service of warrant of arrest.
- § 196. Form. Order fixing time for hearing and examination.
- § 197. Form. Certified copy of order for hearing and examination.
- § 198. Form. Certificate of service of certified copy of order for hearing and examination.
- § 199. Form. Exhibit A. Medical examination of —, charged with insanity.
- § 200. Form. Physicians' certificate of insanity.
- § 201. Form. Judgment of insanity and order of commitment of insane person.
- § 202. Form. Statement of financial ability.
- § 203. Form. Clerk's certificate as to papers.
- § 204. Attendance and examination of witnesses.
- § 205. Certificate of medical examiners.
- § 206. Order of commitment.
- § 207. Execution of the order of commitment.
- § 208. Right to refuse to receive person committed.
- § 209. Jury trial.
- § 210. Habeas corpus.
- § 211. State hospitals, discharge of patients from.
- § 212. Powers of persons, whose incapacity has been adjudged, after restoration to reason.
- § 213. Contracts by persons without understanding.
- § 214. By persons of unsound mind.

COMMITMENT AND DISCHARGE OF INSANE PERSONS.

- | | |
|---|--|
| <ul style="list-style-type: none"> 1. Examination and commitment. <ul style="list-style-type: none"> (1) Jurisdiction. Distinction. (2) Constitutionality of statute. (3) Notice, and opportunity to be heard. (4) Adjudication of insanity. 2. Collateral attack. 3. Support, maintenance, and custody. <ul style="list-style-type: none"> (1) Liability of estate. (2) Suit by directors of asylum. (3) Unauthorized order as to custody. 4. Contracts and rights of insane persons. | <ul style="list-style-type: none"> (1) Contract of conveyance. Deed. Mortgage. 5. Restoration to capacity. Discharge. <ul style="list-style-type: none"> (1) Distinction. (2) Purpose of statute. (3) Power to discharge. Habeas corpus. (4) Power to discharge. "Patient." (5) Power to discharge. Effect of discharge. (6) Conclusiveness of discharge. |
|---|--|

§ 192. Charges of insanity, and proceedings thereon.

Whenever it appears by affidavit to the satisfaction of a magistrate of a county, or city and county, that any person therein is so far disordered in his mind as to endanger health, person, or property, he must issue and deliver to some peace-officer, for service, a warrant directing that such person be arrested and taken before a judge of the superior court of the county, for a hearing and examination on such charge. Such officer must thereupon arrest and detain such person until a hearing and examination can be had, as hereinafter provided.

[Copy must be served.] At the time of the arrest a copy of said affidavit and warrant of arrest must be personally delivered to said person. He must be taken before a judge of the superior court, to whom said affidavit and warrant of arrest must be delivered to be filed with the clerk.

[Accused must be informed of his rights.] The judge must then inform him that he is charged with being insane, and inform him of his rights to make a defense to such charge and produce any witnesses in relation thereto.

The judge must by order fix such time and place for the hearing and examination in open court as will give reasonable opportunity for the production and examination of witnesses. Said order must be entered in the minutes of the court by the clerk and a certified copy of the same served on such person.

[Service of notice on relatives.] The judge may also order that notice of the arrest of such person and of the hearing on the said charge of insanity be served on such relatives of said person known to be residing in the county, as the court may deem necessary or proper. **Kerr's Cyc. Pol. Code, § 2168.**

§ 193. Form. Affidavit of insanity.

[Title of court.]

[Title of matter.] ¹

{ Department No. ____
[Title of form.]

State of _____,
County ² of _____, } ss.

_____, being duly sworn, deposes and says, That there is now in said county,³ in the city or town of _____, a person

named —, who is insane, and is so far disordered in mind as to endanger the health, person, and property of himself, and of others, and that he, at —,⁴ in said county,⁵ on the — day of —, 19—, threatened and attempted —;⁶

That, by reason of said insanity, said person is dangerous to be at large.

Wherefore affiant prays that a warrant of arrest of such person be issued, and that such action may be had as the law requires in the cases of persons who are so far disordered in mind as to endanger health, person, and property.

— (Name of affiant.)

Subscribed and sworn to before me this — day of —, 19—. —, Judge of the — Court.

Explanatory notes. 1. As, In the Matter of —, an Alleged Insane Person. 2, 3. Or, City and County. 4. Name the place. 5. Or, city and county. 6. State threats and actions in detail.

§ 194. Form. Warrant of arrest.

[Title of court.]

[Title of matter.]¹

{ Department No. —.
[Title of form.]

The People of the State of —.

To any Sheriff, Constable, Marshal, Policeman, or Peace-Officer, in this State.

The affidavit of — having been presented this day to me, —, judge of the —² court of the county³ of —, state of —, from which it appears that there is now in this county,⁴ at —,⁵ a person of the name of —, who is insane, and who is so disordered in mind as to endanger his own health, person, and property,⁶ and that it is dangerous for said person to be at large;

And it satisfactorily appearing to me that said — is insane, and so far disordered in his mind as to endanger health, person, and property;—

Now, therefore, you are commanded forthwith to arrest the above-named person, and take him before a judge of the —⁷ court of the said county⁸ of —, for a hearing and examination on said charge of insanity;

And I hereby direct that a copy of this warrant, together with a copy of said affidavit, be delivered to said —, at

the time of his arrest; and I further direct that this warrant may be served at any hour of the night.

Witness my hand this ____ day of ____, 19__.

____, Judge of the ____ Court.

Explanatory notes. 1. As, In the Matter of ____, an Alleged Insane Person. 2. Title of court. 3, 4. Or, city and county. 5. Name the place. 6. Or, the person, lives, and property of others. 7. Title of court. 8. Or, city and county.

§ 195. Form. Certificate of service of warrant of arrest.

[Title of court.]

[Title of matter.]¹

{ Department No. ____
[Title of form.]

I hereby certify, That I received the above warrant of arrest on the ____ day of ____, 19__, and served the said warrant by arresting the said ____, alleged to be insane, and bringing him before the Honorable ____, judge of the ____² court of said county³ of ____, on the ____ day of ____, 19__; and I further certify that I delivered a copy of said warrant of arrest, together with a copy of the affidavit of insanity, as directed in said warrant, personally, to said ____, at the time of the arrest.

____ (Officer serving warrant.)

Explanatory notes. 1. As, In the Matter of ____, an Alleged Insane Person. 2. Title of court. 3. Or, city and county.

§ 196. Form. Order fixing time for hearing and examination.

[Title of court.]

[Title of matter.]¹

{ Department No. ____
[Title of form.]

____ having been brought before me on a warrant of arrest and affidavit of insanity, charged with being insane, —

It is hereby ordered, That said ____ appear before me, at the court-room of said court, at the court-house² in the said county³ of ____, state of ____, on ____,⁴ the ____ day of ____, 19__, at ____ o'clock in the forenoon⁵ of said day, for an examination and hearing on said charge, and that he be committed to the custody of the sheriff of said county⁶ until said hearing and examination is had.

It is further ordered, That a copy of this order be personally served on said _____ before said examination and hearing.

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. As, In the Matter of _____, an Alleged Insane Person. 2. Designate location of court-house. 3. Or, city and county. 4. Day of week. 5. Or, afternoon. 6. Or, city and county.

§ 197. Form. Certified copy of order for hearing and examination.

[Title of court.]

[Title of matter.] ¹

{ Department No. _____
[Title of form.]

State of _____,
County ² of _____, } ss.

I hereby certify, That the foregoing is a true copy of the order for hearing and examination made by the Honorable _____, judge of the _____³ court of the county ⁴ of _____, in the matter of the alleged insanity of _____, on the _____ day of _____, 19____, and duly entered in the minutes of said court on the _____ day of _____, 19____.

_____, Clerk of the _____ Court, County ⁵ of _____.

By _____, Deputy Clerk.

Explanatory notes. 1. As, In the Matter of _____, an Alleged Insane Person. 2. Or, City and County. 3. Title of court. 4, 5. Or, city and county.

§ 198. Form. Certificate of service of certified copy of order for hearing and examination.

[Title of court.]

[Title of matter.] ¹

{ Department No. _____
[Title of form.]

State of _____,
County ² of _____, } ss.

I hereby certify, That I received a duly certified copy of the order for hearing and examination in the matter of the alleged insanity of _____, and served the same on said _____, the alleged insane person named therein, by delivering to said _____, personally, at _____,³ county ⁴ of _____,

state of _____, on the _____ day of _____, 19____, a true copy of said order for hearing and examination.

Dated _____, 19____. _____ (Officer serving warrant.)

Explanatory notes. 1. As, In the Matter of _____, an Alleged Insane Person. 2. Or, City and County. 3. Name the place. 4. Or, city and county.

§ 199. Form. Exhibit A. Medical examination of _____, charged with insanity.

State of _____, }
County ¹ of _____, } ss.

Statement of Facts.²

1. Name, _____. Alleged insane person resides at _____,³ county ⁴ of _____. Age, _____ years. Nativity, _____. If foreign-born, how long in the United States, _____. How long in _____.⁵ Sex, _____. Place from which he came to this state, _____. Color, _____. Occupation, _____. Religious belief, _____. Education, _____.⁶ Civil condition, _____.⁷ If female and married, give maiden name, _____. Give maiden name of mother, _____. Number of children, _____; living, _____; dead, _____.

2. Has either parent been addicted to the use of opium, cocaine, tobacco, or alcoholic beverages to excess, or other stimulating narcotics? _____.

3. Have any relatives been eccentric or peculiar in any way in their habits or pursuits? _____. If so, how? _____. Have any relatives, direct or collateral, suffered, or are they suffering, from any form of chronic disease, such as consumption or tuberculosis, syphilis, rheumatism, neuralgia, hysteria, or nervousness, or had epilepsy or falling sickness? _____.

4. Which parent does alleged insane person resemble? mentally, _____; physically, _____. Habits, _____.⁸ (a) What degree of intelligence does he possess in comparison with other members of the family? _____. (b) Has alleged insane person normally any eccentricity or peculiarity in manner, speech, or action? _____. (c) Has alleged insane person ever been addicted to masturbation or sexual excesses? _____. If

so, for how long? _____. (d) Has alleged insane person ever had convulsions? _____. If so, when did he have the first one? _____. When the last one? _____. (e) Had alleged insane person any severe disease, accompanied by prolonged high temperature or convulsions, during the first two years of life, or afterwards? _____. (f) State alleged insane person's habits as to use of liquor, tobacco, opium, or other drugs, and whether excessive or moderate, _____. (g) What is alleged insane person's natural disposition or temperament, and mental capacity? _____.

5. Has alleged insane person insane relatives? _____. If so, state the degree of consanguinity, and whether paternal or maternal, _____.

6. Has alleged insane person any peculiarities of temper or disposition, making him different from other members of the family? _____.

7. What is alleged insane person's general physical condition? _____.

8. Specify any disease of which alleged insane person has suffered or does suffer, or any injury received, _____.

9. Has alleged insane person ever been an inmate of an institution for the insane? _____. If so, state when, _____. where, _____. how long an inmate, _____. whether discharged recovered, or otherwise, _____. (a) Number of previous attacks, _____. (b) Dates of previous attacks, _____. (c) Length of time each previous attack lasted, _____.

10. Present attack began, _____. (a) Was the present attack gradual or rapid in its onset? _____. (b) When was any change in his habits, conversation, or mode of living first noticed? _____. (c) Give progress of development of the disease from date of first manifestation to present time, _____.

11. Is alleged insane person noisy, restless, violent, dangerous, destructive, incendiary, excited or depressed, homicidal or suicidal? _____.

12. Age when menses appeared, _____. (a) Amount and character before insanity appeared, _____. (b) Since insanity appeared, _____. (c) Has menstruation been painful? _____. (d) Is it now painful? _____.

13. Has the change of life taken place? _____. (a) Was it gradual or sudden? _____; (b) Give symptoms, _____; (c) How changed from normal, _____.

14. Memory, _____; (a) Sleep, _____; (b) Headache or neuralgia, _____; (c) Constipation or indigestion, _____.

15. What is the supposed cause of insanity? Predisposing, _____ Exciting, _____.

Facts indicating insanity, personally observed by me, as follows:

The alleged insane person said _____.¹⁰

The alleged insane person _____.¹¹

Other facts indicating insanity, including those communicated to me by others, as follows: _____.¹²

Illusions, _____. Hallucinations, _____.¹³ Delusions, _____.¹⁴

What treatment has been pursued? _____.¹⁵ Whether patient has been restrained by muff, belt, or otherwise, _____.

Diagnosis, _____.

Name and address of correspondent, _____. Telegraphic address, _____. Relationship of correspondent to alleged insane person, _____.

That the facts stated and information contained in this exhibit are true, to the best of my knowledge and belief.

Dated _____, 19____.

_____, M. D.

_____, M. D.

Explanatory notes. 1. Or, City and County. 2. This must be filled out by at least two medical examiners, who should answer every question as fully as possible. 3. Name the place. 4. Or, city and county. 5. The state. 6. Whether illiterate, reads only, common school, academic, collegiate, or unknown. 7. Whether single, married, widowed, or divorced. 8. Cleanly or uncleanly. 9. If either homicide or suicide has been attempted or threatened, it should be so stated. 10. State what the alleged insane person said, if anything, in the presence of the examiners. 11. State what the alleged insane person did in the presence of the examiners, and also describe his or her appearance and manner. 12. State what, if any, significant change there has been in the alleged person's disposition, mental condition, business, or social habits, or bodily health. 13. Whether of sight, hearing, taste, or smell. 14. Character of; are they fixed, or changeable? 15. State remedies given, and whether given hypodermically or not.

§ 200. Form. Physicians' certificate of insanity.

[Title of court.]

[Title of matter.]¹{ Department No. ____
[Title of form.]

____ and _____, being duly sworn, depose and say, and certify, each for himself, and not one for the other, That he is a duly qualified medical examiner; that, at the request and in the presence of the Honorable _____, judge of the _____² court in and for the county³ of _____, state of _____, he has heard the testimony of the witnesses, and has carefully and personally examined the said _____ in reference to the charge of insanity, in the manner and with the results set forth in the medical examination hereto annexed and marked "Exhibit A," and made a part hereof; and finds that said _____ is insane, and is so far disordered in his mind as to endanger health, life, person, and property, and that the condition of said _____ is such as to require care and treatment in a hospital or asylum for the care, custody, and treatment of the insane; that said testimony was taken in the presence of said insane person; that the insanity of said _____ is not a case of idiocy, imbecility, simple feebleness of mind, a case of acute mania a potu, of harmless chronic mental unsoundness, or of epilepsy.

_____, M. D.

_____, M. D.

Subscribed and sworn to before me this _____ day of _____, 19____.

_____, Notary Public, etc.⁴

Explanatory notes. 1. As, In the Matter of _____, an Alleged Insane Person. 2. Title of court. 3. Or, city and county. 4. Or other officer taking the oath.

§ 201. Form. Judgment of insanity and order of commitment of insane person.

[Title of court.]

[Title of matter.]¹{ Department No. ____
[Title of form.]

_____, the person named in the affidavit of insanity now on file in this court, being this day brought before me, judge of the _____² court of the county³ of _____, state of _____, for a hearing and examination on a charge of insanity as set forth in the said affidavit, and said warrant of arrest and notice of said affidavit of insanity having been duly served on

the said —, and said — having been made acquainted by me with the nature of said charge, and of his right to make a defense thereto and to produce witnesses thereto; and said matter coming on regularly for hearing in open court, said — being personally present, on this — day of —, 19—, in pursuance of an order of this court fixing the time and place for hearing and examination of said — on said charge of insanity, duly entered in the minutes of the court, and a certified copy of said order having been duly served on said —, and — and — having been duly sworn and having testified as witnesses at said hearing, including — and —, medical examiners, whose certificate that said — is insane is hereto attached and marked "Exhibit A," said medical examiners having been present at the taking of the testimony of the other witnesses, and being satisfied from the testimony of the said witnesses and the matters set forth in said certificate that — is insane, and that it is dangerous to life, health, person, and property for said person to be at large, and that the condition of said person is such as to require care and treatment in a hospital or institution for the care, custody, and treatment of the insane;—

Now, therefore, said — is declared and adjudged to be insane, and it is ordered and directed that he be committed to the —, to be held in custody, cared for, and treated as an insane person.

It is further ordered and directed, That —, sheriff of the county⁴ of —, state of —, take and convey said — to the — state hospital, to be held and confined therein, and cared for and treated as an insane person.

The sum of — dollars (\$—) having been found on the person of said — at the time of his arrest, the said sheriff, —, is ordered to take possession of the same and deliver it to the medical superintendent of said institution with said —.

Done in open court this — day of —, 19—.

—, Judge of the — Court.

[Seal] Attest: —, Clerk of the — Court.

By —, Deputy Clerk.

Explanatory notes. 1. As, In the Matter of —, an Alleged Insane Person. 2. Title of court. 3, 4. Or, city and county.

§ 202. Form. Statement of financial ability.

[Title of court.]

[Title of matter.]¹{ Department No. ____
[Title of form.]

As to the ability of said ____ to pay for his care and support at the hospital, I find, on diligent inquiry, that said ____ is possessed of real estate of the estimated value of ____ dollars (\$____), situated in the county² of ____, state of ____, and of the following description, to wit: ____; ³ also the following described personal property, viz., ____; ⁴ that the income from said property is as follows: ____; and that said ____ is able to pay the sum of ____ dollars (\$____) per month for his care and support at the hospital. Name and address of guardian: ____, residing at ____, county⁵ of ____, state of ____.

Dated ____, 19____, ____, Judge of the ____ Court.

Explanatory notes. 1. As, In the Matter of, etc. 2. Or, city and county. 3, 4. Describe the property. 5. Or, city and county.

§ 203. Form. Clerk's certificate as to papers.

[Title of court.]

[Title of matter.]¹{ Department No. ____
[Title of form.]

State of ____,
County² of ____, } ss.

I, ____, county clerk and ex officio clerk of the ____³ court of the county⁴ of ____, state of ____, hereby certify that the within and foregoing are the certificate of the physicians, judgment of insanity, and order of commitment, and statement of the judge in the matter of ____, an insane person, committed on the ____ day of ____, 19____, to the ____ state hospital by ____, judge of the ____⁵ court, and I further certify that attached thereto are true copies of the affidavit of insanity, warrant of arrest, and order for the hearing and examination in said matter, the originals of the same being on file of record in my office.

Witness my hand and the seal of said court this ____ day of ____, 19____.

[Seal]

____, Clerk.
By ____, Deputy Clerk.

Explanatory notes. 1. As, In the Matter of ____, an Alleged Insane Person. 2. Or, City and County. 3. Title of court. 4. Or, city and county. 5. Title of court.

§ 204. Attendance and examination of witnesses. The superior judge may, for any hearing, issue subpoenas and compel the attendance of witnesses and must compel the attendance of at least two medical examiners, who must hear the testimony of all witnesses, make a personal examination of the alleged insane person, and testify before the judge as to the result of such examination, and to any other pertinent facts within their knowledge. The judge must also cause to be examined before him as a witness, any other person whom he has reason to believe has any knowledge of the mental condition of the alleged insane person or of his financial condition or that of the persons liable for his maintenance. The alleged insane person must be present at the hearing, and if he has no attorney, the judge may appoint an attorney to represent him. **Kerr's Cyc. Pol. Code, § 2169.**

§ 205. Certificate of medical examiners. If the medical examiners, after making the examination and hearing the testimony, believe such person to be dangerously insane, they must make a certificate, under their hand, showing as nearly as possible:

1. That such person is so far disordered in his mind as to endanger health, person, or property;
2. The premonitory symptoms, apparent cause or class of insanity, the duration and condition of the disease;
3. The nativity, age, residence, occupation, and previous habits of the person;
4. The place whence the person came and the length of his residence in the state.

Such certificates must be made in the form prescribed by, and, if they can be had, upon blanks furnished by the general superintendent of the state hospitals. **Kerr's Cyc. Pol. Code, § 2170.**

§ 206. Order of commitment. The judge, after such examination and certificate made, if he believes the person so far disordered in his mind as to endanger health, person, or property, must adjudge him insane, and make an order that he be confined in a hospital for the care and treatment

of the insane, designated in such order, and the order must be accompanied by a written statement of the judge as to the financial condition of the insane person and of the persons legally liable for his maintenance, as far as can be ascertained.

[Duty of county clerk.] Copies of such order, of the certificate of the examiners and of such accompanying statement must be filed with the county clerk, and said order must be recorded by the county clerk of the county in which such order was made as are other judgments of said court. He shall also keep, in convenient form, an index-book, showing the name, age, and sex of the person so ordered to be confined in any such hospital, with the date of the order and the name of the hospital in which the person is ordered to be confined.

No fees must be charged by the clerk for performing any of the duties provided for in this section. **Kerr's Cyc. Pol. Code, § 2171.**

§ 207. Execution of the order of commitment. The insane person, together with certified copies of the affidavit, warrant of arrest, and of the order for hearing and examination, the order and accompanying statement of the judge and the certificate of the physicians, must be delivered to the sheriff of the county, and by him must be delivered to the officer in charge of the hospital to which such person is committed; but no female insane person shall be taken to any hospital without the attendance of some other female or of some relative of such insane person. **Kerr's Cyc. Pol. Code, § 2172.**

§ 208. Right to refuse to receive person committed. The superintendent or person in charge of any state hospital may refuse to receive any person upon any order, if the papers presented do not comply with the provisions of the preceding section. **Kerr's Cyc. Pol. Code, § 2173.**

§ 209. Jury trial. If a person ordered to be committed, or any friend in his behalf, is dissatisfied with the order of the judge committing him, he may, within five days after

the making of such order, demand that the question of his sanity be tried by a jury before the superior court of the county in which he was committed. Thereupon that court must cause a jury to be summoned and to be in attendance at a date stated, not less than five nor more than ten days from the date of the demand for a jury trial.

[Procedure.] At such trial the cause against the alleged insane must be represented by the district attorney of the county, and the trial must be had as provided by law for the trial of civil causes before a jury, and the alleged insane person must be discharged unless a verdict that he is insane is found by at least three fourths of the jury.

[Commitment.] If the verdict of the jury is that he is insane, the judge must adjudge that fact and make an order of commitment as upon the original hearing. Such order must be presented, at the time of commitment of such insane person, to the superintendent or person in charge of the hospital to which the insane person is committed, and a copy thereof be forwarded by such superintendent to the commission, and filed in its office.

Proceedings under the order must not be stayed, pending the proceedings for determining the question of sanity by a jury, except upon the order of a superior judge, with provision made therein for such temporary care and custody of the alleged insane person as may be deemed necessary.

[Bond for appearance.] If the superior judge, by the order granting the stay, commits the accused insane to the custody of any person other than a peace-officer, he may, by such order, require a bond for his appearance at the trial. If a judge refuses to grant an application for an order of commitment of an insane person alleged to be dangerous to himself and others if at large, he must state his reasons for such refusal, and any person aggrieved thereby may demand a trial of the question of the insanity of such accused insane, in the manner hereinbefore provided for a jury trial when demanded by or on behalf of the accused insane. **Kerr's Cyc. Pol. Code, § 2174.**

§ 210. Habeas corpus. Any one in custody as an insane or incompetent person is entitled to a writ of habeas corpus,

upon a proper application made by the commission, by such person, a relative or friend in his behalf to the superior judge of the county in which the hospital is located. Upon the return of such writ, the fact of his insanity or incompetency must be inquired into and determined. The medical history of such person as it appears in the clinical records, must be given in evidence, and the superintendent in charge of the state hospital wherein such person is held in custody, and any other person, must be sworn touching the mental condition of such person. **Kerr's Cyc. Pol. Code, § 2188.**

§ 211. State hospitals, discharge of patients from. The superintendent of a state hospital on filing his written certificate with the secretary of board of managers, may discharge any patient, except one held upon an order of a court or judge having criminal jurisdiction in an action or proceeding arising out of a criminal action or proceeding arising out of a criminal offense, at any time, as follows:

1. A patient who, in his judgment, has recovered;
2. Any patient who is not recovered, but whose discharge, in the judgment of the superintendent, will not be detrimental to the public welfare, or injurious to the patient.

[Superintendent may refuse to discharge.] The medical superintendent may, when he deems it advisable, refuse to discharge any patient as improved, unless the guardian, friends or relatives of such patient shall satisfy such medical superintendent that they are financially able and willing to properly care for such patient after his discharge.

[Superior judge may order discharge.] When the superintendent is unwilling to certify to the discharge of an unrecovered patient, upon request, and so certifies in writing, giving his reasons therefor, any superior judge of the county in which the hospital is situated may, upon such certificate, and an opportunity of hearing thereon being accorded the superintendent, and upon [such] other proofs as may be produced before him, direct, by order, the discharge of such patient, upon such security to the people of the state as he may require for the good behavior and maintenance of the patient.

The certificate and the proof, and the order granted thereon, must be filed in the clerk's office of the county in which the hospital is situated, and a certified copy of the order in the hospital from which the patient is discharged.

3. **[Parole of patient.]** The superintendent may grant a parole to a patient, not exceeding thirty days, under general conditions prescribed by the commission.

4. **[Patient redelivered to sheriff.]** A patient committed to a hospital under the provisions of chapter six, title ten, part two, of the Penal Code, must, upon the certificate of the superintendent that such person has recovered, approved by the superior judge of the county from which the patient was committed, be redelivered to the sheriff of such county, and dealt with as provided for by said chapter six of the Penal Code.

5. **[Discharge of patient on order of commission. Return to county.]** The medical superintendent of a state hospital may on his own motion[,] and must on the order of the commission, discharge any patient who is not insane, or because he is not a proper case for treatment therein, or because such patient is a case of idiocy, imbecility, chronic harmless mental unsoundness or acute mania a potu. Such person, when discharged, shall be returned to the county from which he was committed at the expense of said county. When such person is a poor and indigent person he shall be delivered to the sheriff of the county who must take the necessary steps for the care of such person.

When such person is a poor and indigent person he shall be cared for by such county as are other indigent poor, and it is hereby made the duty of the board or officer or officers having charge of the place where other poor and indigent persons are kept by the county to receive such discharged patients therein.

[Conditions on recommitment.] When any person is discharged from any state hospital as is last herein provided he shall not be again committed to any state hospital for the insane unless permission for such recommitment be first obtained from the medical superintendent thereof. Said medical superintendent shall refuse to receive such person

on such recommitment unless such permission is obtained as herein provided.

6. **[Certificate of discharge filed. Recording.]** When any person is discharged as recovered from a state hospital a copy of the certificate of discharge duly certified by the secretary of the board of managers, may be filed for record with the clerk of the superior court of the county from which said person was committed. The clerk shall record the same in a book kept for that purpose and shall keep an index thereof. No fee shall be charged by the clerk for performing such duties.

[Copy of certificate as evidence.] Such certified copy of such certificate and the record of the same shall have the same legal effect as the original, and if no guardian has been appointed for such person as provided by sections seventeen hundred and sixty-three and seventeen hundred and sixty-four of the Code of Civil Procedure, such certificate, duly certified copies thereof and such record thereof shall have the same legal force and effect as a judgment of restoration to capacity made under the provisions of section seventeen hundred and sixty-six of the Code of Civil Procedure.

[“Patient” defined.] The term patient as used in subdivisions one, two, three and six of this section shall be regarded as referring to and including inmates of the home for the feeble-minded. **Kerr’s Cyc. Pol. Code, § 2189.**

§ 212. Powers of persons, whose incapacity has been adjudged, after restoration to reason. After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right, until his restoration to capacity. But a certificate from the medical superintendent or resident physician of the insane asylum to which such person may have been committed, showing that such person had been discharged therefrom, cured and restored to reason, shall establish the presumption of legal capacity in such person from the time of such discharge. **Kerr’s Cyc. Civ. Code, § 40.**

§ 213. **Contracts by persons without understanding.** A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or the support of his family. **Kerr's Cyc. Civ. Code, § 38.**

Note. Concerning insane asylums, see **Henning's General Laws**, p. 532. For provisions in other states relative to the same subject-matter covered by sections 2167-2189 of the Political Code of California, see as follows.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Arizona.** Rev. Stats. 1901, pars. 2768-2771.
- Colorado.** 3 Mills's Ann. Stats., secs. 2935-2962b, 2970m.
- Idaho.** Pol. Code 1901, secs. 401, 406-416.
- Kansas.** Gen. Stats. 1905, §§ 7591-7612.
- Montana.** Pol. Code, secs. 2282, 2283, 2300-2308.
- Nevada.** Comp. Laws, secs. 1465, 1466, 1469-1470, 1478.
- New Mexico.** Comp. Laws 1897, secs. 3618, 3619.
- North Dakota.** Rev. Codes 1905, §§ 1889-1906, 4142.
- Oklahoma.** Rev. Stats. 1903, secs. 3831, 3966-3982.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., §§ 3619-3627.
- South Dakota.** Pol. Code 1904, §§ 2806-2829.
- Utah.** Rev. Stats. 1898, secs. 2171-2190.
- Washington.** Pierce's Code, §§ 5546, 5547, 5568, 5569.
- Wyoming.** Rev. Stats. 1899, secs. 4879-4896.

§ 214. **By persons of unsound mind.** A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, as provided in the chapter on rescission of this code. **Kerr's Cyc. Civ. Code, § 39.**

Note. The commitment of incompetents, other than insane persons, is provided for by the Political Code of California, § 2192. For provisions in other states relative to the feeble-minded, see as follows.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Kansas.** Gen. Stats. 1905, §§ 7578-7581.
- Montana.** Pol. Code, secs. 2342-2346.
- Nevada.** Comp. Laws, sec. 1473.
- North Dakota.** Rev. Codes 1905, §§ 1160, 1165.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 3619.
- South Dakota.** Pol. Code 1904, §§ 552, 558-564.

COMMITMENT AND DISCHARGE OF INSANE PERSONS.

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| 1. Examination and commitment. | (1) Contract of conveyance. |
| (1) Jurisdiction. Distinction. | Deed. Mortgage. |
| (2) Constitutionality of statute. | 5. Restoration to capacity. Dis- |
| (3) Notice, and opportunity to | charge. |
| be heard. | (1) Distinction. |
| (4) Adjudication of insanity. | (2) Purpose of statute. |
| 2. Collateral attack. | (3) Power to discharge. Ha- |
| 3. Support, maintenance, and custody. | beas corpus. |
| (1) Liability of estate. | (4) Power to discharge. "Pa- |
| (2) Suit by directors of asylum. | tient." |
| (3) Unauthorized order as to | (5) Power to discharge. Effect |
| custody. | of discharge. |
| 4. Contracts and rights of insane | (6) Conclusiveness of discharge. |
| persons. | |

1. Examination and commitment.

(1) **Jurisdiction. Distinction.** The jurisdiction of a court to appoint guardians for insane persons is wholly independent of its jurisdiction to commit to hospitals for the insane: *Donaldson v. Winningham* (Wash.), 93 Pac. Rep. 534, 535.

REFERENCES.

Establishment of asylums for the insane: See *Henning's General Laws*, p. 532, note.

(2) **Constitutionality of statute.** A statute which provides for the examination and commitment and custody of persons charged and found to be insane is not necessarily unconstitutional, though it may be imperfect in some of its protective requirements: *Territory v. Sheriff of Gallatin County*, 6 Mont. 297; 12 Pac. Rep. 662.

(3) **Notice, and opportunity to be heard.** An inquiry and trial in the probate court, had upon an information charging one with being a person of unsound mind and incapable of managing his own affairs, should be had only after notice to the person alleged to be insane, and after an opportunity has been given such person to be present at the trial, in person or by counsel. An adjudication of insanity which is made without such notice and opportunity to be heard is a nullity and void; and a commitment thereunder to the insane asylum would therefore be illegal: *In re Wellman*, 3 Kan. App. 100; 45 Pac. Rep. 726. The authorities of an asylum are not vested with power to commit a person thereto, nor to confine him there against his consent, without the legal inquiry provided by law, except, perhaps, temporarily, in the case of one violently and dangerously insane, until the necessary proceedings can be had, to avoid the injury which might be reasonably expected to occur if the party was allowed to be at large. Generally, it is permissible, without warrant or express

authority, to confine temporarily a person disposed to do mischief to himself or another person, until the proper proceedings can be instituted to have the question of his insanity determined. In such a case the restraint becomes necessary and proper, both for the safety of the party himself and for the preservation of the public peace: *Byers v. Solier* (Wyo.), 93 Pac. Rep. 59, 65. But where a patient, who is not violently or dangerously insane, has been unconditionally discharged by competent authorities of the hospital, he cannot be reincarcerated without another judicial inquiry; and the person charged with insanity or other mental infirmity has the same legal right as any other citizen to claim the benefit of constitutional and statutory provisions affecting his personal liberty. He is therefore, if legally confined in an asylum, and in actual custody, entitled to a writ of habeas corpus: *Byers v. Solier* (Wyo.), 93 Pac. Rep. 59, 64. The right to appear at an inquisition in lunacy must be preserved, and an opportunity afforded to do so, in person or by counsel, as far as the circumstances will permit, though actual appearance at the trial is, of course, not necessary, as there are many cases in which the parties are so mentally disordered that they cannot appear: *In re Wellman*, 3 Kan. App. 100; 45 Pac. Rep. 726, 727.

REFERENCES.

Commitment of insane persons, due process of law in: See note 1 Am. & Eng. Ann. Cas. 733.

(4) **Adjudication of insanity.** An adjudication of insanity, under a law, the purpose of which is to provide a procedure whereby a judicial determination may be had as to whether or not the person being examined is a proper subject to become a patient in the state hospital for the insane, does not conclusively show that the person therein named is a lunatic or mentally unfit to answer, or to make defense to a criminal charge against him: *Ex parte Wright*, 74 Kan. 406; 89 Pac. Rep. 678. In proceedings for the commitment of a person alleged to be insane, the verdict of the jury declaring such person to be of unsound mind, incapable of caring for himself, and unsafe to be at large, is a sufficient "certificate under oath" that the charge of insanity is correct: *State v. Third Judicial Dist. Court*, 17 Mont. 411; 43 Pac. Rep. 385, 386.

2. **Collateral attack.** If a court has power conferred upon it to hold an examination and to determine the question of insanity, and to commit to an asylum, its orders, made by virtue of such authority and that of jurisdiction, are not subject to collateral attack: *Napa State Hospital v. Dasso* (Cal.), 96 Pac. Rep. 355, 356.

3. Support, maintenance, and custody.

(1) **Liability of estate.** The statute which authorizes a recovery from the estates of insane persons confined in state hospitals, for the

support of such persons, is not unconstitutional: *Napa State Hospital v. Dasso* (Cal.), 96 Pac. Rep. 355. The estate of an insane person may be charged with the expense of his maintenance and necessities furnished him without an express promise, either by the insane person or guardian, to pay therefor: *Palmer v. Hudson R. S. Hospital*, 10 Kan. App. 98; 61 Pac. Rep. 506. An insane person is liable for the reasonable value of things furnished to him, necessary for his support. This was so at common law, when the necessities were furnished by an individual; and there seems to be no reason why the same rule should not apply to a state hospital for the insane, which does and furnishes for the insane person only those things required by the law of the state: *State Commission in Lunacy v. Eldridge* (Cal. App.), 94 Pac. Rep. 597, 600. If, however, the estate of the insane person was not sufficient to any extent to provide for his maintenance at the time of his commitment to the asylum, such property, existing at the time of his commitment, as he possessed belonged to the creditors, and the state has no legal claim against the insolvent estate of such insane person for his maintenance: *Estate of Callen*, 35 Cal. Dec. 127, 128 (Feb. 11, 1908).

(2) **Suit by directors of asylum.** Where, by statute, it is provided that in case an insane person is able to pay actual charges and expenses, a guardian may be appointed, whose duty it shall be to pay such expenses to the board of directors of the insane asylum, and that "if indigent insane persons have kindred of degree of husband or wife, father, mother, or children, living within this state, of sufficient ability, who are otherwise liable, said kindred shall support such indigent insane person to the extent prescribed for paying such patients," the board has power to collect a debt due the directors from the husband of an inmate of the asylum; and the directors have capacity to sue, on the ground that they are trustees of an express trust: *Watt v. Smith*, 89 Cal. 602; 26 Pac. Rep. 1071, 1072.

(3) **Unauthorized order as to custody.** Under a law requiring that a female patient shall be accompanied, in the absence of some member of her family, by a female attendant in being conducted to the state insane asylum, an order of the county court committing such patient to the sheriff of the county for custody is not unauthorized, where the statute makes no requirement as to custodian when the person is retained in custody in the county of her commitment: *Board of Commissioners v. Adams*, 16 Col. App. 513; 66 Pac. Rep. 683, 684.

4. Contracts and rights of insane persons.

(1) **Contract of conveyance. Deed. Mortgage.** A contract of conveyance, made by one who has been adjudged a lunatic, but who was in fact sane when the contract of conveyance was made, is valid, although no adjudication has been made that he has been restored to his right mind: *Lower v. Schumacher*, 61 Kan. 625; 60 Pac. Rep.

538, 539; *Water-Supply Co. v. Root*, 56 Kan. 187; 42 Pac. Rep. 715. Prior to the decision of these cases it had been held in Kansas that the deed to the homestead of an insane person, executed by him and his wife after he had been duly adjudicated insane and placed under guardianship, and a record thereof duly made in the probate court, while he was out on a temporary leave of absence, after having been confined in the insane asylum, was void, and conveyed no title to the purchaser; that a mortgagee of the grantee in such a deed, having actual notice of such insanity, and such adjudication by the probate court, acquired no lien on the land; and that a mortgage on the homestead of an insane person, executed by his wife and guardian without any order of the probate court, was absolutely void: *Loan and Trust Co. v. Spitler*, 54 Kan. 560, sub nom. *New England L. & T. Co. v. Spitler*, 38 Pac. Rep. 799. An adjudication that a person is insane does not make void a deed afterwards executed by him, where he had no notice of the proceeding, and no guardian was appointed to take charge of his property: *Hawaiian T. & I. Co. v. Barton*, 16 Haw. 294, 301.

5. Restoration to capacity. Discharge.

(1) **Distinction.** The statutory proceeding for the restoration of an insane or incompetent person to capacity is applicable only to those for whom guardians have been appointed, and does not apply to persons committed to state hospitals for the insane without having been put under guardianship: *Aldrich v. Barton* (Cal.), 95 Pac. Rep. 900, 902.

(2) **Purpose of statute.** The legislature of California, in enacting section 2189 of the Political Code, doubtless intended to afford to persons who, upon recovery, should be discharged from insane asylums, some record proof, which should operate to establish the fact of their recovery in the same way that the judgment of restoration, under section 1766 of the Code of Civil Procedure of that state, operated in the case of persons who had been declared incompetent and for whom guardians had been appointed: *Aldrich v. Barton* (Cal.), 95 Pac. Rep. 900, 903.

(3) **Power to discharge. Habeas corpus.** After a person has been committed to an insane asylum in California under a charge of insanity, and received therein, no court in the state is authorized to discharge him therefrom, or to restore him to the capacity of a sane person under any circumstances, except upon a writ of habeas corpus. The power to discharge him otherwise than by a writ of habeas corpus is vested exclusively in officers of the asylum: *Kellogg v. Cochran*, 87 Cal. 192, 197; 25 Pac. Rep. 677; 12 L. R. A. 104; *Aldrich v. Superior Court*, 120 Cal. 140, 142; 52 Pac. Rep. 148. An alleged insane person is entitled to notice of an application to deprive him of his personal

liberty. He is entitled to due process of law, and this includes, in all cases, the right of the person to such notice of the claim as is appropriate to the proceedings and adapted to the nature of the case, and the right to be heard before any order or judgment in the proceeding can be made by which he will be deprived of his life, liberty, or property. To say that, if he is in fact insane, any notice to him will be vain, is to beg the very question the determination of which underlies the right of the state to deprive him of his liberty. The fact of his insanity is to be determined before his right to his liberty can be violated. If that question is determined against him, without any notice or opportunity to be heard, or to introduce evidence in his behalf, and, under such determination, he is confined in the asylum, his constitutional guaranty is violated: *Matter of Lambert*, 134 Cal. 626, 633; 86 Am. St. Rep. 296; 66 Pac. Rep. 851; 55 L. R. A. 856. In the case last cited it was held that the insanity law of 1897, to the extent that it authorizes the confinement of a person in an insane asylum without giving him notice and an opportunity to be heard upon the charge against him, is unconstitutional, and that the proceedings by virtue of which the petitioner was held by the respondent were invalid. It was therefore ordered that the petitioner be released from the asylum. So the commitment of a person to a state hospital for the insane does not authorize his confinement if he is permanently restored to sanity. The act of 1897 and the act of 1903 both recognize this, and provide that any patient who has become sane may be discharged from further custody after examination on habeas corpus proceedings. And where the petition for the writ alleges that the petitioner is not insane, he is, upon that allegation, entitled to a preliminary writ, in order to inquire into its truth and discharge him if he is found to be sane; and the court, having power, will issue the writ, and make it returnable before any superior judge for determination by him: *Ex parte Clary*, 149 Cal. 732; 87 Pac. Rep. 580, 582. The effect of an unconditional discharge of a patient from an insane asylum, by the authorities thereof, is to entitle him to his freedom until he has been recommitted by another judicial inquiry. A statute which authorizes the authorities of the asylum to discharge an inmate, if that be deemed proper in their judgment, does not vest them with authority to commit a person thereto without a judicial inquiry pursuant to that required by the statute: *Byers v. Solier* (Wyo.), 93 Pac. Rep. 59, 65. Under a statute which provides that the resident physician shall be the executive officer of a state asylum for the insane, and shall discharge such patients as, "in his opinion, have permanently recovered their reason," where a person has escaped from the asylum, but, shortly after, the physician causes his discharge to be recorded as recovered, it is a valid exercise of his authority, where he had intended, prior to such escape, to discharge the patient in a few days, believing him to have been then restored to reason. Under such circumstances there is a *prima facie* showing that the

defendant has been restored to reason: *People v. Geiger*, 116 Cal. 440; 48 Pac. Rep. 389. Even the discharge of a person from an insane asylum, though the certificate of the resident physician and secretary does not state that such person is cured and restored to reason, is prima facie evidence that the person is so restored, or that he was improperly committed: *Clements v. McGinn* (Cal.), 33 Pac. Rep. 920, 923.

(4) **Power to discharge. "Patient."** The jurisdiction of the superintendent of an insane asylum to discharge a person as recovered from insanity exists, under section 2189 of the Political Code of California, only where such person is a patient in the asylum. The only authority given to the superintendent by the statute is to discharge a "patient," and that by such "patient" is meant one who has been committed to the asylum and has remained there (except in case of a temporary absence, as on parole) for care and treatment. This is clear from a reading of the entire chapter of the Political Code dealing with the commitment and care of insane persons. One who has, for many years, been away from the asylum, claiming, without objection, to have been discharged by virtue of an order purporting to have that effect, and over whom the asylum authorities do not exercise, or claim the right to exercise, any power of restraint whatever, cannot be said to be a "patient," within the meaning of the law: *Aldrich v. Barton* (Cal.), 95 Pac. Rep. 900, 904.

(5) **Power to discharge. Effect of discharge.** In the absence of a statute making contrary regulations or restrictions, or expressly or impliedly vesting exclusive authority in the premises elsewhere, the controlling authorities of an asylum, to carry out the obvious purpose of its establishment, must be held to possess the power to voluntarily release a committed party upon his recovery; or, in the exercise of a reasonable discretion, and acting in good faith, whenever the circumstances are deemed proper to justify such a course, to release a patient, who may not have fully recovered, either conditionally or temporarily, and upon expressed conditions; but where a patient has been unconditionally discharged by a competent authority of such institution, he cannot be reincarcerated without another judicial inquiry: *Byers v. Solier* (Wyo.), 93 Pac. Rep. 59, 64. The effect of a discharge, by the officers of an asylum, of an insane inmate, if no guardian has been appointed for him, is to restore the person discharged to the legal capacity to sue: *Kellogg v. Cochran*, 87 Cal. 192; 25 Pac. Rep. 677; 12 L. R. A. 104.

(6) **Conclusiveness of discharge.** The reasonable interpretation of section 2189 of the Political Code of California is, that it purports to make a certificate of discharge conclusive as against collateral attack, if issued by one having authority, in the particular case, to make it,

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but that such certificate always remains open to attack for want of such authority. The purpose of the section was to give to a certificate of discharge the effect of a judgment, as an adjudication of a fact, not to confer upon it any evidentiary value as conclusive proof of jurisdiction to make such adjudication: *Aldrich v. Barton* (Cal.), 95 Pac. Rep. 900, 903.

REFERENCES.

See separate note to § 177, ante, concerning the guardianship of insane persons and other incompetents.

PART III.

JURISDICTION OF COURTS.

CHAPTER I.

JURISDICTION OF COURTS.

§ 215. Over the estate, when exercised.

§ 216. First application. Exclusive jurisdiction.

JURISDICTION OF COURTS.

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| <ol style="list-style-type: none"> 1. In general. 2. Is statutory and limited. 3. Probate courts as courts of record. 4. Jurisdictional facts. 5. Construction of statute. 6. Invoking, effect of, and loss of. 7. Exercise of jurisdiction. Effect of assuming, and refusing to exercise. Prohibition. 8. Original and concurrent jurisdiction. 9. Of particular courts. <ol style="list-style-type: none"> (1) District courts of Arizona. (2) District courts of Kansas. (3) District courts of Montana. (4) Superior courts of Washington. (5) Superior courts of California. (6) County courts of Colorado. 10. Exclusive and conflicting jurisdiction. <ol style="list-style-type: none"> (1) Exclusive jurisdiction. (2) County courts of Oregon. (3) Conflicting jurisdiction. 11. Exists in what cases. 12. In particular matters. 13. To set aside its own decrees. 14. No jurisdiction when. <ol style="list-style-type: none"> (1) In general. (2) In county in which estate has not been "devised." | <ol style="list-style-type: none"> (3) Over proceeds of life-insurance policy. (4) To foreclose mortgage. (5) To order property to escheat when. (6) Over timber-culture claimant's claim. (7) To appropriate share of heir or devisee to payment of his debts. (8) Where deceased was a non-resident. (9) Of body of deceased. (10) To administer a living person's estate. (11) To adjust disputed rights generally. (12) To try title. (13) To enforce a trust. (14) In what matters of guardianship. 15. Collateral attack. 16. Jurisdiction in equity. <ol style="list-style-type: none"> (1) Exists when. (2) Does not exist when. (3) Where same court has jurisdiction in equity and in matters of probate. (4) Concurrent jurisdiction. |
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§ 215. Over the estate, when exercised. Wills must be proved, and letters testamentary or of administration granted:

1. In the county of which the decedent was a resident at the time of his death, in whatever place he may have died;

2. In the county in which the decedent may have died, leaving estate therein, he not being a resident of the state;

3. In the county in which any part of the estate may be, the decedent having died out of the state, and not resident thereof at the time of his death;

4. In the county in which any part of the estate may be, the decedent not being a resident of the state, and not leaving estate in the county in which he died;

5. In all other cases, in the county where application for letters is first made. **Kerr's Cyc. Code Civ. Proc.**, § 1294.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 772, p. 305.

Arizona.* Rev. Stats. 1901, par. 1598.

Colorado. 3 Mills's Ann. Stats., secs. 4691, 4815 l.

Idaho.* Code Civ. Proc. 1901, sec. 3993.

Kansas. Gen. Stats. 1905, § 2875.

Montana.* Code Civ. Proc., sec. 2310.

Nevada. Comp. Laws, sec. 2786.

New Mexico. Comp. Laws 1897, secs. 1936, 1965.

North Dakota. Rev. Codes 1905, § 7891.

Oklahoma.* Rev. Stats. 1903, sec. 1483.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1106.

South Dakota. Probate Code 1904, § 31.

Utah. Rev. Stats. 1898, sec. 3774.

Washington. Pierce's Code, § 2371.

Wyoming. Rev. Stats. 1899, sec. 4530.

§ 216. **First application. Exclusive jurisdiction.** When the estate of the decedent is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, or being such non-resident, and dying within the state, and not leaving estate in the county where he died, the superior court of that county in which application is first made, for letters testamentary or of administration, has exclusive jurisdiction of the settlement of the estate. **Kerr's Cyc. Code Civ. Proc.**, § 1295.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1599.

Colorado. 3 Mills's Ann. Stats., sec. 4815 l.

Idaho.* Code Civ. Proc. 1901, sec. 3994.
Kansas. Gen. Stats. 1905, § 2875.
Montana.* Code Civ. Proc., sec. 2311.
Nevada. Comp. Laws, sec. 2786.
North Dakota. Rev. Codes 1905, § 7891.
Oklahoma.* Rev. Stats. 1903, sec. 1484.
South Dakota.* Probate Code 1904, § 32.
Utah. Rev. Stats. 1898, sec. 3775.
Washington. Pierce's Code, § 2372.
Wyoming.* Rev. Stats. 1899, sec. 4538.

JURISDICTION OF COURTS.

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9. Of particular courts.
 - (1) District courts of Arizona.
 - (2) District courts of Kansas.
 - (3) District courts of Montana.
 - (4) Superior courts of Washington.
 - (5) Superior courts of California.
 - (6) County courts of Colorado.
10. Exclusive and conflicting jurisdiction.
 - (1) Exclusive jurisdiction.
 - (2) County courts of Oregon.
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 - (2) In county in which estate has not been "devised."
- (3) Over proceeds of life-insurance policy.
- (4) To foreclose mortgage.
- (5) To order property to escheat when.
- (6) Over timber-culture claimant's claim.
- (7) To appropriate share of heir or devisee to payment of his debts.
- (8) Where deceased was a non-resident.
- (9) Of body of deceased.
- (10) To administer a living person's estate.
- (11) To adjust disputed rights generally.
- (12) To try title.
- (13) To enforce a trust.
- (14) In what matters of guardianship.
15. Collateral attack.
16. Jurisdiction in equity.
 - (1) Exists when.
 - (2) Does not exist when.
 - (3) Where same court has jurisdiction in equity and in matters of probate.
 - (4) Concurrent jurisdiction.

1. In general. Under our system, the same court has jurisdiction of cases at law, in equity, and in matters of probate, but the sev-

eral classes of cases must be kept separate, and a petition to the court of probate ought not to be confounded with an action at law or a suit in chancery: *Lucich v. Medin*, 3 Nev. 93, 99. Proceedings for the settlement of an estate, and matters connected therewith, are not civil actions: *Estate of Scott*, 15 Cal. 220, 222. If the probate court has no jurisdiction of the subject-matter before it, it follows that the higher courts can get no jurisdiction on appeal: *Stewart v. Lohr*, 1 Wash. 341; 25 Pac. Rep. 457. The superior court, in the exercise of its probate jurisdiction, proceeds upon principles of equity: *Estate of Glenn (Cal.)*, 94 Pac. Rep. 230, 232. It is the universal rule, that a judgment rendered without jurisdiction of the person or of the subject-matter is void, and therefore can be attacked directly or collaterally, and set aside. Jurisdiction of the person can be waived, but that of the subject-matter cannot. Jurisdiction, in the later decisions, is held to be not only the power to hear and determine, but also the power to render the particular judgment entered in the particular case: *Watkins Land Mortgage Co. v. Mullen*, 8 Kan. App. 705; 54 Pac. Rep. 921.

REFERENCES.

Probate court jurisdiction: See note 3 L. R. A. 812-815. Jurisdiction of surrogate's court: See notes 2 L. R. A. 175-177, 828. Power of surrogate's court to vacate or set aside decree or order: See note 2 L. R. A. 644.

2. Is statutory and limited. The probate court is a court of special and limited jurisdiction: *Clarke v. Perry*, 5 Cal. 58; *Ethell v. Anchols*, 1 Ida. 741. Its jurisdiction cannot be inferred; it must be given by positive law: *Cast v. Cast*, 1 Utah, 112. Proceedings for the administration of the estates of deceased persons, and for their distribution to those who may be entitled thereto, including the determination of the heirs of the decedent, are purely statutory: *Smith v. Westerfield*, 88 Cal. 374, 378; 26 Pac. Rep. 206. The whole subject-matter of dealing with the estates of deceased persons is one of statutory regulation: *Estate of Strong*, 119 Cal. 663, 665; 51 Pac. Rep. 1078. In New Mexico, the jurisdiction of the probate court is confined to personal estates: *Chaves v. Perea*, 3 N. M. 71; 2 Pac. Rep. 73, 75. By statute, original jurisdiction in bastardy proceedings was conferred upon the probate courts of Oklahoma, and said power was ratified by Congress: *In re Comstock*, 10 Okl. 299; 61 Pac. Rep. 921.

3. Probate courts as courts of record. In Oregon, the county court is to be regarded, in probate proceedings, as one of superior jurisdiction, because it is a court of record, and derives its power from the constitution: *Monastes v. Catlin*, 6 Or. 119, 122; *Tustin v. Gaunt*,

4 Or. 305, 310; *Russell v. Lewis*, 3 Or. 380, 382; *Gager v. Henry*, 5 Saw. 237; Fed. Cas., No. 5,172; *Holmes v. Oregon & C. R. R. Co.*, 6 Saw. 262; 5 Fed. Rep. 75. The probate powers of the county courts of Oregon are enlarged, limited, or varied by the statute, but not created by it: *Ramp v. McDaniel*, 12 Or. 108. In that state, the county courts, in acting as courts of probate, are courts of general jurisdiction: *Gager v. Henry*, 5 Saw. 237; Fed. Cas., No. 5,172; *Holmes v. Oregon & C. R. R. Co.*, 7 Saw. 380, 9 Fed. Rep. 229; 6 Saw. 262, 5 Fed. Rep. 75. After the jurisdiction of the probate court is once established, every intendment is in its favor, the same as in cases in courts of general jurisdiction: *Glendenning v. McNutt*, 1 Ida. 592, 594; *Lucas v. Todd*, 28 Cal. 182, 185; *Irwin v. Scriber*, 18 Cal. 499. The same presumption attaches as to the proceedings of courts of general jurisdiction: *Brodrigg v. Tibbits*, 63 Cal. 80; *Irwin v. Scriber*, 18 Cal. 499, 505. When the record recites the method adopted to acquire jurisdiction of the persons interested in the estate, it will not be presumed that something different was done: *Pearson v. Pearson*, 46 Cal. 609, 636. If the record is silent as to what was done, it will be presumed that what ought to have been done was not only done, but rightly done: *Hahn v. Kelly*, 34 Cal. 391, 407; 94 Am. Dec. 742. Under the Idaho constitution, probate courts are made courts of record: *Clark v. Rossier*, 10 Ida. 348; 78 Pac. Rep. 358; but they are courts of record only in matters of probate, settlement of estates of deceased persons, and the appointment of guardians. They are not courts of record in proceedings in civil and criminal actions: *Dewey v. Schreiber Imp. Co.*, 12 Ida. 280; 85 Pac. Rep. 921. In other words, they have general jurisdiction of the "particular department of law allotted to them": *Dewey v. Schreiber Imp. Co.*, 12 Ida. 280; 85 Pac. Rep. 921, 922. The probate courts in Kansas are courts of record, and, while they have jurisdiction of particular classes of things only, such as the care of the estates of deceased persons, minors, and persons of unsound mind, yet they have general jurisdiction of these things. Hence all presumptions should be in favor of the regularity of all the proceedings in a probate court, within its jurisdiction, and such proceedings should seldom be held to be void when attacked collaterally; never, indeed, except where it is shown affirmatively that the court had no jurisdiction: *Higgins v. Reed*, 48 Kan. 272; 29 Pac. Rep. 389.

4. Jurisdictional facts. There are two jurisdictional facts that must exist to support administration in every case: 1. The death of the party; 2. His residence within the county at the time of his death. These two facts must be alleged in the petition for letters, and they must be true in point of fact: *Haynes v. Meeks*, 10 Cal. 110, 118; 70 Am. Dec. 703; *Abel v. Love*, 17 Cal. 234, 239;

Estate of Harlan, 24 Cal. 182, 189; 85 Am. Dec. 58. The residence of the party at the time of his death, and not the situation of the estate, is the test of jurisdiction: Estate of Harlan, 24 Cal. 182, 189; 85 Am. Dec. 58. While the residence of the decedent at the time of his death is the jurisdictional fact upon which the issuance of letters of administration must be based: Holmes v. Oregon & C. R. R. Co., 7 Saw. 380, 9 Fed. Rep. 229; 6 Saw. 262, 5 Fed. Rep. 75, yet the jurisdiction of the court may be disproved by showing the true place of residence of the deceased at the time of his death. A party is not estopped or concluded by the decision of the court proceeding without jurisdiction of the subject-matter, but may prove the want of jurisdiction in the court, in order to show that he is not concluded by its decision: Ewing v. Mallison, 65 Kan. 484; 70 Pac. Rep. 369. Residence is one of those jurisdictional facts which the court must determine from the evidence produced before it, and its determination is valid until set aside in some proper manner: Estate of Griffith, 84 Cal. 107, 110; 23 Pac. Rep. 528; 24 Pac. Rep. 381. The probate court of a county has no jurisdiction over the estate of a deceased resident of the state to appoint an executor or administrator, or to prove a will, unless the deceased was at the time of his death an inhabitant or resident of the county of such probate court: Ewing v. Mallison, 65 Kan. 484; 70 Pac. Rep. 369; Estate of Latour, 140 Cal. 414, 425; 73 Pac. Rep. 1070; 74 Pac. Rep. 441. The supreme court will not, on appeal, review the conclusions of a trial court as to facts essential to its jurisdiction, concerning which such court was vested with the power to hear and determine, at the instance of a party who has appeared in that court in an action or proceeding, and has omitted to urge in such court, in any way, his objection, but has proceeded therein upon the theory that the court had jurisdiction: Estate of Latour, 140 Cal. 414, 425; 73 Pac. Rep. 1070; 74 Pac. Rep. 441.

5. Construction of statute. The laws of California not only recognize, but sedulously preserve, the distinction between foreign and domestic wills and the probate thereof. All domestic wills must be proved in the county of which the decedent was a resident at the time of his death. The state thus preserves its sovereignty and its jurisdiction over matters primarily belonging to it, and also preserves the rights of its other residents and citizens. All foreign wills may be proved and allowed as provided in the sections of the code relating thereto. In the case of a domestic will, all questions touching the validity of the instrument are, and should be, primarily and exclusively cognizable by the courts of the state of the domicile. When a foreign will is offered for probate in that state, two questions are open as new and original questions for the determination of its own probate courts: 1. The suffi-

ciency of the proofs of foreign probate; and 2. The question of the residence of the deceased. And if, upon the question of residence, it shall be determined that the deceased was in truth a resident of that state, it follows, of necessity, that the proper state court has exclusive primary jurisdiction to admit the will to probate, and will not admit it as a foreign will for ancillary proceedings. It does not, of course, follow, that, because the probate court, under such circumstances, will not admit it as a foreign will, it will refuse it probate altogether. It will grant it probate, the facts warranting, in proceedings under the section relating thereto for original probate: *Estate of Clark*, 148 Cal. 108, 114; 113 Am. St. Rep. 197; 82 Pac. Rep. 760; 1 L. R. A. (N. S.) 996; 7 Am. & Eng. Ann. Cas. 306.

6. **Invoking, effect of, and loss of.** While "the superior court is clothed with original jurisdiction over matters at probate," and provision is made that "a judge of the superior court, at any time, may make and issue all necessary orders or writs, and enforce the production of wills and the attendance of witnesses," yet it is not bound, of its own motion, to see that all necessary proceedings are taken, and witnesses called to probate every document filed, which is claimed to be a will. It is safe to assume that parties interested as devisees and legatees will always take the necessary steps and provide necessary funds to procure the attendance of witnesses to establish the validity of a will, if it is worthy of probate: *Henry v. Superior Court*, 93 Cal. 569, 573; 29 Pac. Rep. 230. The old probate court did not lose its jurisdiction over a subject of which it had taken cognizance by sending an issue of fact from the probate to the old district court: *Pond v. Pond*, 10 Cal. 495, 500. An insufficient showing made for the appointment of a special administrator is only an irregularity, and does not affect the court's jurisdiction: *State v. Ayres*, 17 Wash. 127; 49 Pac. Rep. 226. The probate court ordinarily loses all jurisdiction over the property of the estate after the entry of the decree of distribution, except to compel delivery. Upon this principle, it has therefore been held that a writ of prohibition will lie to prevent partition, in probate proceedings, as between heirs and strangers, of interests held in common: *Buckley v. Superior Court*, 102 Cal. 6, 10; 36 Pac. Rep. 360; 41 Am. St. Rep. 135.

7. **Exercise of jurisdiction. Effect of assuming, and refusing to exercise. Prohibition.** After a probate court has acquired jurisdiction of the subject-matter, all subsequent proceedings are nothing but the exercise of jurisdiction over that subject-matter; and after it has once acquired jurisdiction of a person, any other movement affecting the person must be the exercise of jurisdiction as to that

person; and when jurisdiction is once acquired of both the subject-matter and the person, then any subsequent movement of the court must be the exercise of jurisdiction as to both: *Haynes v. Meeks*, 10 Cal. 110, 118; 70 Am. Dec. 703. The county court of Colorado has power to hear and determine whether an instrument proposed is the last will and testament of the testator. In adjudicating this question, it has power to determine all pertinent facts. It has the power to determine whether or not the will is a forgery, and whether or not it was executed with the formalities essential to the validity of a will. This would include whether or not it was properly attested. An error committed in deciding upon any of these questions would be an error, not in assuming jurisdiction, but in the exercise of jurisdiction: *Camplin v. Jackson*, 34 Col. 447; 83 Pac. Rep. 1017, 1018. After the court has assumed jurisdiction of an estate, in a proper case, it is without power to dispense summarily with its further administration because the heirs have consented that there shall be no administration of certain real property belonging to the decedent, who died without debts, or other estate, and refused to proceed further therein. It is the duty of the court, in such a case, to appoint an administrator and complete the administration: *Estate of Strong*, 119 Cal. 663, 667; 51 Pac. Rep. 1078. Where letters of administration have been granted in one county to a public administrator, he has a sufficient beneficial interest in the estate to entitle him to a writ of prohibition to prevent further proceedings in the same estate, under a subsequent application in another county: *Dungan v. Superior Court*, 149 Cal. 98, 104; 117 Am. St. Rep. 119; 84 Pac. Rep. 767.

8. Original and concurrent jurisdiction. Under the provisions of the constitution of Idaho, probate courts are given original jurisdiction in all matters of probate, settlement of estates of deceased persons, and the appointment of guardians, and also jurisdiction to hear and determine all civil cases wherein the debt or damage claimed does not exceed the sum of five hundred dollars, exclusive of interest, and concurrent jurisdiction with justices of the peace in criminal actions: *Dewey v. Schreiber Imp. Co.*, 12 Ida. 280; 85 Pac. Rep. 921; *Clark v. Rossier*, 10 Ida. 348; 78 Pac. Rep. 358. In California, there is no concurrent jurisdiction as to probate matters: *Rosenberg v. Frank*, 58 Cal. 387, 419. The courts of a state may, and do, grant original probate upon wills of non-residents, who leave property within that state, but this exercise of original jurisdiction over the estate of non-residents affects only the property within the state. The judgment admitting the will to probate is valid in all other states only as to the property within the jurisdiction of the court pronouncing the judgment. It has no extraterritorial force, establishes nothing beyond that, and does not

dispense with nor abrogate the formalities and proofs which may be exacted by other jurisdictions in which the deceased also left property subject to their laws of administration: *Estate of Clark*, 148 Cal. 108, 112; 113 Am. St. Rep. 197; 82 Pac. Rep. 760; 1 L. R. A. (N. S.) 996; 7 Am. & Eng. Ann. Cas. 306.

9. Of particular courts.

(1) **District courts of Arizona.** In Arizona, the jurisdiction of the district courts is purely appellate. They have no power to appoint administrators of the estates of deceased persons: *Territory v. Mix*, 1 Ariz. 52; *Territory v. Forrest*, 1 Ariz. 49.

(2) **District courts of Kansas.** In Kansas, where a fraudulent claim is presented to the probate court against the estate of a deceased person, and the administrator and claimant conspire together to secure its allowance, and land is sold to satisfy the demand, and bid in by the claimant, the sale approved, and the administrator discharged, the district court has jurisdiction of an action to set aside the proceedings and to annul the deed: *McAdow v. Boten*, 67 Kan. 136; 72 Pac. Rep. 529.

(3) **District courts of Montana.** A district court of Montana, sitting as a court of probate, has only such powers as are expressly conferred upon it by statute, and such as are necessarily implied in order to carry out those expressly conferred, and in the exercise of its jurisdiction it is limited by the provisions of the statute: *In re Tuohy's Estate*, 33 Mont. 230; 83 Pac. Rep. 486, 489.

(4) **Superior courts of Washington.** The constitution of the state of Washington does not make the superior courts probate courts. On the contrary, it vests the superior courts with jurisdiction "of all matters of probate." Hence the probate court is not shorn of its general powers, simply because the matter before it may be one which was cognizable formerly in a court of probate. It possesses in every case, and at all times, its powers as a court of superior and general jurisdiction, and among these is the power to hear and determine the question to whom a bequest made by a decedent rightfully belongs. A statute, therefore, can neither add to nor can it take away the power, and it is immaterial to inquire whether or not one conferring such a power is in existence: *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643; 72 Pac. Rep. 502, 503.

(5) **Superior courts of California.** The jurisdiction of the old probate courts did not divest the old district courts of California of their general jurisdiction as courts of chancery, over actions for

a settlement of partnership affairs: *Griggs v. Clark*, 23 Cal. 427, 429; and the district court had jurisdiction of an action to construe the will of a testator after the same had been admitted to probate: *Rosenberg v. Frank*, 58 Cal. 387, 404. The jurisdiction of the superior courts of the state of California in matters of probate is derived from the constitution. The court is not therefore, while sitting in probate, a statutory tribunal, and does not derive its power from the act of the legislature. Nor are probate proceedings classed by the constitution as special proceedings. The administration of an estate is a proceeding in rem, which is not, in the technical sense, such a special proceeding, unknown to the framework of the common law, as will change the presumptions which attach to the action of the court, making it, *pro hac vice*, a court of inferior and limited jurisdiction: *Burris v. Kennedy*, 108 Cal. 331, 336; 41 Pac. Rep. 458. The probate jurisdiction of the superior court of the state of California is separate and distinct from its jurisdiction in ordinary civil actions: *Estate of Allgier*, 65 Cal. 228; 3 Pac. Rep. 849. Such court, while sitting as a court of probate, has only such powers as are given to it by the statute, and such incidental powers as pertain to all courts for the purposes of enabling them to exercise the jurisdiction which is conferred upon them. Although it is a court of general jurisdiction, yet, in the exercise of these powers, its jurisdiction is limited and special, and whenever its acts are shown to have been in excess of the power conferred upon it, and without the limitation of this special jurisdiction, such acts are nugatory, and have no binding effect, even upon those who have invoked its authority or submitted to its decision: *Smith v. Westerfield*, 88 Cal. 374, 378; 26 Pac. Rep. 206. Probate proceedings being purely statutory, and therefore special in their nature, the superior court, although a court of general jurisdiction, is circumscribed in this class of proceedings by the provision of the statute conferring such jurisdiction, and may not competently proceed in a manner essentially different from that provided: *Estate of Strong*, 119 Cal. 663, 666; 51 Pac. Rep. 1078. The superior court, while sitting in matters of probate, is the same as it is while sitting in cases of equity, in cases of law, or in special proceedings; and, when it has jurisdiction of the subject-matter of a case falling within either of these classes, it has power to hear and determine, in the mode provided by law, all questions of law and fact, the determination of which is ancillary to a proper judgment in such cases. This is an incidental power pertaining to all courts, for the purpose of enabling them to exercise the jurisdiction which is conferred upon them: *Estate of Burton*, 93 Cal. 459, 463; 29 Pac. Rep. 36. No distinct "court of probate" has been created or recognized by the present constitution of California. The constitution has created superior courts, and has

given to them original jurisdiction of the subject-matter of various classes of actions and proceedings, more or less distinct from each other; among which are "all actions at law which involve the title or possession of real property," and "all such special cases and proceedings as are not otherwise provided for," and "all matters of probate": *Estate of Burton*, 93 Cal. 459, 462; 29 Pac. Rep. 36. Under the present constitution of the state of California, the superior courts of that state have jurisdiction both of matters in equity and of probate. They are the same superior courts for all purposes, where they have jurisdiction: *Pennie v. Roach*, 94 Cal. 515, 521; 29 Pac. Rep. 956; 30 Pac. Rep. 106. But the superior court, sitting in probate, has jurisdiction to hear and determine a defense of fraud raised by a widow in her answer to a petition contesting her right to appointment as administratrix of the estate: *Estate of Warner* (Cal. App.), 92 Pac. Rep. 191, 194. The superior court, sitting as a court of equity, has power to hear and determine, in proper cases, questions relating to the rights and duties of executors and beneficiaries under wills which have been admitted to probate: *Williams v. Williams*, 73 Cal. 99, 104; 14 Pac. Rep. 394. But the superior court, as a superior court, has no power to set aside land, sought to be recovered in an action of ejectment, as a homestead for the benefit of minor heirs of the intestate. That matter comes within the domain of the superior court sitting as a court of probate: *Richards v. Wetmore*, 66 Cal. 365, 366; 5 Pac. Rep. 620. It may be said that, at the present time, in California, there is no probate court, in the sense in which that term has been used in the earlier volumes of the California reports. Under the fundamental law, it is a probate jurisdiction vested in the superior court. It may be said that the probate court is gone, but that the probate jurisdiction remains. And that jurisdiction is now vested in the same court that exercises jurisdiction in cases of law and equity. Yet the probate jurisdiction of the superior court is different from its law and equity jurisdiction in this: it is essentially a jurisdiction under the control of the state legislature. That law-making power may enlarge it or may restrict it. The character and extent of the jurisdiction is not only a matter under legislative control alone, but the procedure by which that jurisdiction may be invoked and rights thereunder adjudicated is expressly laid down by statute; and that procedure must be followed, or relief under that jurisdiction cannot be secured. While the superior court in that state exercises both equity and probate powers, still, the procedure to be followed in seeking relief within those two jurisdictions is widely varied. And if the probate procedure laid down by the code is followed, then relief under probate jurisdiction only can be granted. In such a case, general equity relief cannot be secured: *Estate of Davis*, 136 Cal. 590, 597; 69 Pac. Rep. 412.

(6) **County courts of Colorado.** In Colorado, county courts, in matters of probate business, relating to the settlement of the estates of deceased persons, are invested with extensive and unlimited original jurisdiction, legal and equitable, and with large discretionary powers. The power to regulate and to control the settlement of such estates is expressly conferred upon them: *Fleming v. Kelly*, 18 Col. App. 23; 69 Pac. Rep. 272.

10. Exclusive and conflicting jurisdiction.

(1) **Exclusive jurisdiction.** Probate courts have exclusive jurisdiction of the accounts of executors and administrators and the final distribution of the estates of decedents: *Auguisola v. Arnaz*, 51 Cal. 435, 439. Probate courts do not have exclusive jurisdiction in cases where equities are involved: *Garces y Perea v. Barela*, 6 N. M. 239; 27 Pac. Rep. 507; *Ferris v. Higley*, 20 Wall. (U. S.) 375. The superior court of the state of California, which has charge of the administration of decedents' estates, has exclusive jurisdiction, under the present probate system, of all questions relating to the settlement and distribution of such estates; and it may, in sitting in matters of probate, exercise all equity powers necessary for a complete administration without resort to a court of equity: *Toland v. Earl*, 129 Cal. 148, 152, 153; 79 Am. St. Rep. 100; 61 Pac. Rep. 914; *Estate of Burton*, 93 Cal. 459, 463; 29 Pac. Rep. 36. A court which has probate jurisdiction over the estate of a decedent has exclusive jurisdiction over the question of distribution thereof, and to determine all matters incidental thereto. Hence the court, in an action to foreclose the right of redemption, has no jurisdiction to determine any matter involved in the distribution of the estate: *Estate of Freud*, 134 Cal. 333, 335; 66 Pac. Rep. 476. If the estate of the deceased is in more than one county, he having died out of the state, the probate court of the county in which application is first made for letters of administration has exclusive jurisdiction of the settlement of the estate: *Territory v. Klee*, 1 Wash. 183; 23 Pac. Rep. 417, 418. The jurisdiction to prove wills and to grant letters testamentary is exclusively in the superior court of the county of which decedent was a resident at the time of his death, but it is for the court to which the petition is addressed to determine, from the evidence introduced before it, whether or not the deceased did, as a matter of fact, reside in the county. Its finding in the matter is conclusive on the question of jurisdiction, except upon appeal, and cannot be collaterally attacked, whatever the fact may be as to residence: *Estate of Latour*, 140 Cal. 414, 425; 73 Pac. Rep. 1070; 74 Pac. Rep. 441; *Estate of Griffith*, 84 Cal. 107, 110; 23 Pac. Rep. 528; 24 Pac. Rep. 381. The power to appoint administrators belongs exclusively to the probate courts: *Territory v. Mix*, 1 Ariz. 52. Probate courts do not have exclusive

original jurisdiction over the persons of minors and of their estates. Courts of equity have complete jurisdiction over such matters: *Wilson v. Roach*, 4 Cal. 362, 367. In Utah, the probate courts are vested with exclusive original jurisdiction of all matters pertaining to the settlement of estates of deceased persons, and while the district court, under its general equity powers, may entertain a suit for the construction of a will, yet it cannot execute it: *Allen v. Barnes*, 5 Utah, 100; 12 Pac. Rep. 912.

(2) **County courts of Oregon.** In Oregon, the county court has exclusive jurisdiction, in the first instance, to direct and control the conduct, and to settle the accounts, of executors, administrators, and guardians, and this includes the power to inquire into a case of devastavit, and to charge the delinquent with the amount thereof: *Steele v. Holladay*, 20 Or. 70; 25 Pac. Rep. 69. It has exclusive jurisdiction to grant and revoke letters testamentary, etc.: *Ramp v. McDaniel*, 12 Or. 108; but it does not have exclusive jurisdiction of an action between the administrator of a partnership estate and the administrator of an individual to determine the title to certain property, although such administrators are under the control of the county court; but such action is within the jurisdiction of the circuit court. The functions of the county court, as respects administrators and executors, are limited to the control of the transmission and disposition of property upon the death of the owner, and it cannot adjudicate upon collateral matters. The right of title of the decedent to property claimed by the administrator, as against third persons, or by third persons against him, must, if an adjudication become necessary, be tried in courts of ordinary jurisdiction. He is entitled to the possession of the property of his decedent, but, if it is in possession of some person who refuses to surrender to him, the county court cannot aid him in obtaining such possession. It may call him to account for not doing so, but he must seek his remedy in some other court: *Gardner v. Gillihan*, 20 Or. 598; 27 Pac. Rep. 220.

(3) **Conflicting jurisdiction.** A superior court of the state of California, in taking jurisdiction over an administration for the purpose of appointing a special administrator, does not thereby secure jurisdiction over the estate of the deceased for the purpose of appointing a general administrator; and it necessarily follows that such court should give way, and allow the superior court of another county to conduct the further administration of the estate, where such last-named court has first acquired jurisdiction of the estate for purposes of general administration. The proceedings are not necessarily to be dismissed, but should stand in abeyance until a final judgment has been entered in the superior court last named,

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holding that the said court has or has not jurisdiction over the administration of the estate: *Estate of Damke*, 133 Cal. 430; 65 Pac. Rep. 889; 133 Cal. 433; 65 Pac. Rep. 888. In California, the superior court of the county in which the petition for letters of administration is first filed has exclusive jurisdiction to determine the question as to the residence of the decedent, and the courts of other counties must abide the determination of that court, which is reviewable only upon appeal: *Estate of Latour*, 140 Cal. 414, 425; 73 Pac. Rep. 1070; 74 Pac. Rep. 441; *Dungan v. Superior Court*, 149 Cal. 98, 103; 117 Am. St. Rep. 119; 84 Pac. Rep. 767. The same rule applies to the hearing and determination of the question of the residence of a minor, the need of a guardian, and the propriety of appointing a designated person as such: *Guardianship of Danneker*, 67 Cal. 643, 645; 8 Pac. Rep. 514. That provision of the constitution of California which confers jurisdiction "in all matters of probate" upon the superior court does not mean that all superior courts in the state shall have concurrent jurisdiction in every particular probate matter. The legislature undoubtedly has the right to prescribe, by general laws, the rules which shall obtain in determining which of the many superior courts shall exercise the constitutionally conferred jurisdiction in any particular estate; and the county containing a portion of the decedent's estate, and in which application is first made, is the one which the legislature has declared to be the one which shall have exclusive jurisdiction of the settlement of the estate: *Dungan v. Superior Court*, 149 Cal. 98; 84 Pac. Rep. 767, 769. Between courts of co-equal authority, that one which first obtains jurisdiction will be permitted to pursue it to the end, to the exclusion of all others, and it will not permit its jurisdiction to be impaired or subverted by resort to some other tribunal: *Ewing v. Mallison*, 65 Kan. 484; 70 Pac. Rep. 369. Section 1294 of the Code of Civil Procedure of California fixes the place of jurisdiction for all grants of original probate, while section 1322 of that code does the same for grants of ancillary probate of authenticated copies of wills proved and probated in foreign jurisdictions. These laws mean that the will of a resident of the state of California must be proved originally as a domestic will in the county of his residence, and that, so far as the state of California is concerned, it cannot be primarily proved elsewhere, and brought to that state for purposes of secondary and ancillary administration: *Estate of Clark*, 148 Cal. 108, 111; 82 Pac. Rep. 760; 113 Am. St. Rep. 197; 1 L. R. A. (N. S.) 996; 7 Am. & Eng. Ann. Cas. 306.

11. **Exists in what cases.** The probate court does not have jurisdiction of all matters relating to the estates of deceased persons, but only so far as conferred by statute: *Bush v. Lindsey*, 44 Cal. 121,

125; *Haynes v. Meeks*, 10 Cal. 110; 70 Am. Dec. 703; *Grimes's Estate v. Norris*, 6 Cal. 621; 65 Am. Dec. 545. If the probate court of the county of which the decedent was a resident at the time of his death alone has jurisdiction of his estate, it follows that if, after the death of the intestate, that portion of the county in which he resided at the time of his death is erected into a new county, or is attached to another county, the probate court of the old county has jurisdiction: *Estate of Harlan*, 24 Cal. 182, 189; 85 Am. Dec. 58. Though a probate court is without jurisdiction to set aside an order discharging an administrator of an unadministered estate, it has power, upon a proper petition, to order an administration and distribution of such estate: *Otero v. Otero* (Ariz.), 90 Pac. Rep. 601, 603. In Colorado, the county court, in all matters pertaining to probate business, has as ample powers and as full jurisdiction with respect thereto as have the district courts of that state over matters within their jurisdiction. Hence if a judgment is tendered for classification as a valid judgment, the county court, sitting for probate business when such judgment is tendered for classification as a claim against the estate, has power to determine the defense that the judgment was void, because rendered without jurisdiction of the defendant, the administratrix, and, if such judgment is established, to decline to classify it as a valid claim: *Symes v. People*, 17 Col. App. 466; 69 Pac. Rep. 312, 313. Probate courts have the undoubted right to pass upon and to allow claims against the estates of deceased persons; but it is doubtful whether they have authority, or whether the legislature, under the original act of New Mexico, could confer upon such courts the authority to entertain actions at law to recover judgments against administrators and to enforce the collection thereof by their own executions: *Perea v. De Gallegos*, 3 N. M. 204, 208. In the state of Washington, the probate court has jurisdiction to grant administration upon a decedent's estate, if the only property within that jurisdiction belonging to the decedent consists of real estate, and there are no creditors, and the estate is in course of administration in another state: *Hanford v. Davies*, 1 Wash. 476; 25 Pac. Rep. 329. In that state the probate court acquires jurisdiction of the estate for the purpose of administration by the appointment and qualification of the administrator: *Ackerson v. Orchard*, 7 Wash. 377; 35 Pac. Rep. 605. When a question arises in the administration of an estate as to whether the property shall be inventoried as a part of the estate or not, the probate court has jurisdiction to hear evidence sufficient to determine whether the property in question belongs to the estate, or whether the estate has any interest therein, or has reasonable claim thereto, which claim may become an asset of the estate; not for the purpose of judicially determining the title of any property claimed by any third person, but to determine the

good faith of the claim: *In re Belt's Estate*, 29 Wash. 535; 70 Pac. Rep. 74, 76.

12. **In particular matters.** The probate court is required to direct administrators to pay all taxes which have accrued against the estate in their hands, and is forbidden to distribute the property of the estate among the heirs and devisees until all taxes are paid: *People v. Olvera*, 43 Cal. 492, 494. An act of a legislature of the state of Idaho, extending the jurisdiction of the probate court to try and determine actions to enforce mechanics' and laborers' liens and mortgages and other liens upon real property, has been held unconstitutional and void: *Dewey v. Schreiber Imp. Co.*, 12 Ida. 280; 85 Pac. Rep. 921. The jurisdiction of the court of probate to determine the interests of grantees of heirs or devisees depends upon the statute. In the absence of statutory authority, such court would have no power to adjudicate such a question. But the statute may confer such power: *Snyder v. Murdock*, 26 Utah, 233; 73 Pac. Rep. 22, 23. In Colorado, the county court is vested with authority to hear and determine claims against the estate of a deceased person; and one of several sureties on an obligation, who discharges the debt, may enforce contribution from the estate of a deceased co-surety, without going into a court of equity, to have the amount due from the estate determined; but he can recover from each of his co-sureties only the aliquot portion of the whole amount paid, calculated upon the basis of the number of sureties, unless it appears that some of them are insolvent, in which event he may recover from each of the solvent sureties the moiety of the whole debt, having regard only to the number solvent: *McAllister v. Irwin's Estate*, 31 Col. 253; 73 Pac. Rep. 47. A decree for the payment of money in probate proceedings cannot be enforced as for a contempt; the proper process is an execution: *Rostel v. Morat*, 19 Or. 181; 23 Pac. Rep. 900. In Oklahoma, the probate court has jurisdiction of an action in replevin against a sheriff to recover personal property levied on under an execution against the property of another, where the value of the property does not exceed one thousand dollars: *Walters v. Ratliff*, 10 Okl. 262; 61 Pac. Rep. 1070. In that jurisdiction, actions for the recovery of specific personal property in the probate courts are governed by the procedure applicable to courts of justices of the peace, where the value of the property sought to be recovered is less than one hundred dollars: *First Nat. Bank v. Hesser*, 14 Okl. 115; 77 Pac. Rep. 36. If an attachment is properly issued after filing with the court a sufficient affidavit and bond, and property is taken thereunder, the lien of such attachment is not lost by failure on the part of the probate court or justice of the peace to make proper docket entries of the issuance of such order of attachment: *First Nat. Bank v.*

Hesser, 14 Okl. 115; 77 Pac. Rep. 36. In proper cases, the superior court of the state of California has jurisdiction to hear and determine questions relating to the rights and duties of executors and beneficiaries under wills which have been admitted to probate: *Williams v. Williams*, 73 Cal. 99, 104; 14 Pac. Rep. 394. It is a question solely for the consideration of the probate court, whether an attorney shall be appointed to represent absent or minor heirs, and if so appointed, the amount of compensation to be allowed to him: *Dougherty v. Bartlett*, 100 Cal. 496, 499; 35 Pac. Rep. 431. Probate courts in Kansas have jurisdiction of the allowance of claims against estates. No provision is made whereby the heirs, or those holding under them, are made parties to such procedure, and no right is given by statute to such heirs to appeal from the allowance of any claim by the probate court. In fact, they are wholly strangers to that proceeding, unless it can be said that they are represented by the administrator: *Black v. Elliott*, 63 Kan. 211; 65 Pac. Rep. 215.

13. To set aside its own decrees. A probate court has power to set aside its order, made out of court and without notice, and no notice or motion to set it aside is necessary: *Estate of Sullenberger*, 72 Cal. 549, 552; 14 Pac. Rep. 513. Section 473 of the Code of Civil Procedure of California, relative to relieving a party from a judgment, order, or proceeding taken against him "through his mistake, inadvertence, surprise, or excusable neglect," is applicable to probate matters, and the court has jurisdiction within six months to vacate an order made by it, on motion, based upon the ground of such inadvertence, surprise, or excusable neglect: *Levy v. Superior Court*, 139 Cal. 590, 591; 73 Pac. Rep. 417; *Cahill v. Superior Court*, 145 Cal. 42, 44; 78 Pac. Rep. 467. After a decree of distribution and discharge, and after the time specified by statute in which to seek relief from a judgment on the ground of fraud, surprise, or excusable neglect, or mistake, a probate court has no jurisdiction to set aside the decree for fraud, or because the court had been imposed upon by false testimony; but, in such cases, courts of equity have jurisdiction to afford proper relief: *Estate of Hudson*, 63 Cal. 454, 457.

14. No jurisdiction when.

(1) In general. A probate court has no jurisdiction to allow a claim against a decedent's estate for counsel fees incurred by the claimant after the death of the testator, and at a time when he was not a personal representative of the estate: *In re Carrier's Estate*, 19 Col. App. 245; 74 Pac. Rep. 340, 341. The district court of Kansas has no jurisdiction of an appeal to that court from an order of the probate court refusing, upon application, to revoke letters testamentary or of administration: *Graves v. Bond*, 70 Kan.

464; 78 Pac. Rep. 851. The old probate courts of Montana had no power or authority to entertain a petition involving the construction of a will: *Chadwick v. Chadwick*, 6 Mont. 566; 13 Pac. Rep. 385, 388. In Idaho, the jurisdiction of the probate court in civil cases is limited to actions at law, where the debt or damage, exclusive of interest, does not exceed five hundred dollars: *Dewey v. Schreiber Imp. Co.*, 12 Ida. 280; 85 Pac. Rep. 921, 923. A probate court has no jurisdiction to receive, or in any other way to act upon, an account presented by an executor of an executor against the estate of the deceased executor's testator. This is a proper case for the exercise of jurisdiction in equity: *Witzler v. Fitch*, 52 Cal. 638, 643; *Bush v. Lindsey*, 44 Cal. 121. In Colorado, the district court is not authorized to decree that a judgment rendered by it against an administrator shall be allowed and paid as a claim of a designated class, as this is a usurpation of the province of the county court: *Hotchkiss v. First Nat. Bank (Col.)*, 85 Pac. Rep. 1007, 1008. An order of the probate court, requiring an executor, after he has filed his final account, to pay the moneys in his hands to the county treasurer, to be placed to the credit of heirs and devisees of the testator, is without authority of law and void: *Estate of McMahon*, 19 Nev. 241; 8 Pac. Rep. 797. A probate court has no jurisdiction to enter an order requiring a decedent's widow to pay a designated sum of money to one who applies for letters of administration on the decedent's estate: *Leach v. Misters*, 13 Wyo. 239; 79 Pac. Rep. 28, 29. A probate court has no power to make an order authorizing the assignment, by an administrator, of a bond of indemnity given to the decedent in his lifetime as sheriff: *McDermott v. Mitchell*, 53 Cal. 616, 618. It has no power to authorize a special administrator to defray the expenses of a controversy in a probate proceeding, unless expressly authorized to do so by statute: *Henry v. Superior Court*, 93 Cal. 569, 571; 29 Pac. Rep. 230. A probate court has no jurisdiction, in any case, to make partition, in probate proceedings, among the heirs of a decedent as to interests held in common with strangers, unless the petition therefor is filed before the entry of the final decree of distribution. The rights of such parties should be settled by a suit for partition, in which all persons having any interest in the lands may be made parties; and a writ of prohibition will lie to restrain the probate court from making partition: *Buckley v. Superior Court*, 102 Cal. 6, 10; 36 Pac. Rep. 360; 41 Am. St. Rep. 135. The probate court is not a court of equity, and it has no power to foreclose a mortgage: *Meyers v. Farquharson*, 46 Cal. 190, 200.

(2) **In county in which estate has not been "devised."** Under the Oregon statute, where the testator had not "devised" any real property in a designated county, the county court of that county does not have jurisdiction of the estate, and has no power to

appoint an administrator; and, this fact being apparent from an inspection of the record, such court may properly set aside its order appointing an administrator: *Henkle v. Slate*, 40 Or. 349; 68 Pac. Rep. 399, 400. The county court, empowered to admit the will of a testator to probate, being authorized to grant administration of the estate of an intestate, the statute prescribing the county in which the will must be probated necessarily controls in determining the particular court possessing the requisite power to grant administration of the estate of an intestate: *Henkle v. Slate*, 40 Or. 349; 68 Pac. Rep. 399.

(3) **Over proceeds of life-insurance policy.** A probate court has no jurisdiction over a contest involving the proceeds of a life-insurance policy, made payable, by its terms, to the widow and minor children of the deceased: *Heydenfeldt v. Jacobs*, 107 Cal. 373, 378; 40 Pac. Rep. 492.

REFERENCES.

Money paid on an insurance policy is not an asset of the estate: See note § 378, head-line 1, subd. 6, post.

(4) **To foreclose mortgage.** A probate court has no jurisdiction to foreclose a mortgage against the estate of a decedent. Such a matter is one purely of equitable cognizance: *Willis v. Farley*, 24 Cal. 490, 499; *Harp v. Calahan*, 46 Cal. 222, 231.

(5) **To order property to escheat when.** In Washington, where the estate of the deceased is in more than one county, he having died outside of that state, the probate court of the county in which application is first made for letters of administration has exclusive jurisdiction of the settlement of the estate; and where one court has acquired jurisdiction of the estate, another court of that state is not authorized to assume jurisdiction of the estate, and to order that it escheat to the state: *Territory v. Klee*, 1 Wash. 183; 23 Pac. Rep. 417, 418.

(6) **Over timber-culture claimant's claim.** The county court of Oregon does not have jurisdiction of a timber-culture claimant's claim, where such claimant died before performance, by him, of the conditions precedent to obtaining title from the government, because there was, at such time, no interest which could be devised or which would descend or pass to the claimant's heirs or personal representatives; and the proceedings of the court in assuming jurisdiction over the claim and authorizing its sale are absolutely void for want of jurisdiction of the subject-matter, as the claim at that time belonged to the heirs in their own right: *Haun v. Martin* (Or.), 86 Pac. Rep. 371, 373.

(7) **To appropriate share of heir or devisee to payment of his debts.** While a probate court has power to pay claims against the estate, and to distribute the remainder among heirs and devisees, or to direct the administrator to do so, it has no power to appropriate the share of an heir or of a devisee to the payment of his debts. Hence if one of the devisees is confined in the state prison for a term less than life, such devisee is not dead in law, although his civil rights in some matters are suspended, and the probate court has no power to appropriate his share of an estate to the payment of his debt, although such debt is in judgment. The probate court may pay the debts of the dead, but not of the living: *Estate of Nerac*, 35 Cal. 392, 397; 95 Am. Dec. 1011.

(8) **Where deceased was a non-resident.** The probate court of a county in Kansas has no jurisdiction over the estate of a deceased resident of that state, to appoint an executor or administrator, or to prove a will, unless the deceased was, at the time of his death, an inhabitant or a resident of the county of such probate court: *Ewing v. Mallison*, 65 Kan. 480; 70 Pac. Rep. 369, 371. Where a person dies intestate, who was not a resident or inhabitant of the state at the time of his death, and who left no estate within the state to be administered, a probate court of such state has no jurisdiction to issue letters of administration on the estate of such intestate; and where letters are issued under such circumstances, the act of the court in doing so is utterly null and void: *Mallory v. Burlington etc. R. R. Co.*, 53 Kan. 557; 36 Pac. Rep. 1059.

(9) **Of body of deceased.** The body of one whose estate is in probate unquestionably forms no part of the property of that estate. The individual has a sufficient proprietary interest in his body after his death to be able to make a valid and binding testamentary disposition of the same. The court in probate, and the personal representatives, acquire jurisdiction from the last testament to see that its provisions in this regard, as in all others, are duly executed; but, where the will is silent, the court in probate has no such power. In such a case neither the court in probate nor the personal representative has any right to control the manner of disposition of the remains, nor to dictate the place of interment. The proper expenses of such disposition may well be a charge against the estate, but the duty and right of burial are quite different things from auditing or paying the expenses of such burial: *O'Donnell v. Slack*, 123 Cal. 285, 288, 290; 55 Pac. Rep. 906; 43 L. R. A. 388.

REFERENCES.

Injunctive relief as to cemetery property, burials, or removal of remains: See note 3 L. R. A. (N. S.) 481-495.

(10) **To administer a living person's estate.** A probate court has no power to administer upon the estate of a living person. Such administration is totally void: *Stevenson v. Superior Court*, 62 Cal. 60, 64; *Fay v. Costa*, 2 Cal. App. 241; 83 Pac. Rep. 275; *Scott v. McNeal*, 154 U. S. 34; 38 L. ed. 896. A court has power to right an injury done in an effort to administer upon the estate of a living person, and may declare the grant of administration in all subsequent proceedings in such case void; but if the matter is a probate proceeding, where the administrator was served with a citation only in the matter of the estate, which does not require him to answer, and which did not notify him that judgment would go against him for want of an answer, the court exceeds its jurisdiction in directing the administrator to pay to the owner of the estate a designated sum of money and costs, and in directing its clerk to issue execution for that sum. Such an order will be annulled and vacated on a writ of review: *Costa v. Superior Court*, 137 Cal. 79, 82; 69 Pac. Rep. 840.

REFERENCES.

Executor or administrator of estate of a living person: See note 30 Am. Rep. 748-752. Right to and effect of administration on the estate of a person presumed to be dead: See notes 3 Am. & Eng. Ann. Cas. 1126; 7 Am. & Eng. Ann. Cas. 881. Power to administer on estate of living person: See note § 378, head-line 1, subd. 1, post.

(11) **To adjust disputed rights generally.** The probate court has no jurisdiction, save in certain excepted instances, to determine disputes between the heirs or representatives of the deceased and third persons: *Theller v. Such*, 57 Cal. 447, 459; *In re Singleton's Estate*, 26 Nev. 106; 64 Pac. Rep. 513. It has no jurisdiction of an action brought by attorneys to recover on a contract with a legatee for the collection of legacies, although the controversy concerns a fund which is in the possession of the court, acting in its probate capacity, and notwithstanding the fact that such court has power to distribute the fund as between the parties: *In re Gorkow's Estate*, 28 Wash. 65; 68 Pac. Rep. 174, 175. While probate courts have all the powers of a court of equity in the settlement of estates, the conflicting interests of heirs or lienors, no matter what their nature or origin, can only be determined in an appropriate proceeding under proper pleadings: *Estate of Heeney*, 3 Cal. App. 548; 86 Pac. Rep. 842, 844. Probate courts are without jurisdiction to determine successive claims of title to property as between an estate and a stranger: *Caron v. Old Reliable Gold Min. Co.*, 21 N. M. 211; 78 Pac. Rep. 63. Under its probate jurisdiction, the court cannot bring before it strangers to the estate for the purpose of adjusting their claims to property held by the executrix or

administrator, or for the purpose of determining their rights to the proceeds of a sale derived under those for whose benefit the sale was ordered: *Curtis v. Schell*, 129 Cal. 208, 221; 79 Am. St. Rep. 107; 61 Pac. Rep. 951. A probate court has no power to enforce the payment of a debt by commitment as for a contempt: *In re Wolford*, 10 Kan. App. 283; 62 Pac. Rep. 731. It has no jurisdiction to determine the right to real estate as between the administrator and the decedent's husband, who asserts an adverse claim: *Stewart v. Lohr*, 1 Wash. 341; 25 Pac. Rep. 457. It has no power to strike from the inventory property listed by the administrator, where there is a dispute between him and another as to the possession thereof: *In re Bolander's Estate*, 38 Or. 490; 63 Pac. Rep. 689, 690.

(12) **To try title.** The probate court is without jurisdiction to try title to property as between the representatives of an estate and strangers thereto: *Stewart v. Lohr*, 1 Wash. 341; 25 Pac. Rep. 457; *In re Wolford*, 10 Kan. App. 283; 62 Pac. Rep. 731; *In re Bolander's Estate*, 38 Or. 490; 63 Pac. Rep. 689; *Falke v. Terry*, 32 Col. 85; 75 Pac. Rep. 425, 427. When a probate court orders a sale of the land of a third person to pay the debts of a decedent, such order is void for want of jurisdiction over the property. As such court has no power to sell the lands of another, and no power to pass upon the question of title, the order is void, and would be void although the real owners of the property were parties to the proceeding, and therein contested the question of title. A probate court has no jurisdiction to try such an issue: *Gjerstadenjen v. Van Duzen*, 7 N. D. 612; 76 N. W. Rep. 233. A foreign executor, who comes into another state to reside, and who brings with him property belonging to the estate, cannot be made liable in the latter state, upon the suit of a local creditor of the testator, to the extent of the property brought therein, but may be to the extent of the property already there. The courts of a state, other than that of the domiciliary jurisdiction, have no power to try the title of real estate situate in the latter state, where the action is one between legatees under a will, and a foreign executrix, who is charged with a conversion of the personal assets of the estate, in fraud of the rights of the heirs; and the action of the court in trying and adjudicating the title of real estate situate in another state cannot be upheld: *Falke v. Terry*, 32 Col. 85; 75 Pac. Rep. 425, 427. A court, while sitting as a court of probate, has no other powers than those given to it by the statute, and such incidental powers as pertain to it for the purpose of enabling it to exercise the jurisdiction which is conferred upon it. It has no power to determine disputes between heirs or devisees and strangers as to the title to property: *Smith v. Westerfield*, 88 Cal.

374, 378; 26 Pac. Rep. 206; In re Haas, 97 Cal. 232, 234; 31 Pac. Rep. 893.

(13) **To enforce a trust.** There are many proceedings which relate to the estates of deceased persons of which the probate courts have no jurisdiction. They have no jurisdiction to enforce a trust by compelling an administrator to convey property by him held in trust, and to render an account of the money received by him from the property. Such an action is within the domain of equity: *Haverstick v. Trudel*, 51 Cal. 431, 434.

(14) **In what matters of guardianship.** The determination of the question of title to property is one of the many matters relating to the estates of deceased persons of which the probate court has no jurisdiction; and if an executor, upon the settlement of his annual account, alleges that property, which a legatee under the will claims to belong to the estate, is the property of his ward, and that he holds it as her guardian, and that he had returned it to the court in his inventory and appraisement of the estate of the ward, and had objected to the jurisdiction of the probate court to hear and determine the question, an issue is thereby raised as to the legal title to the property, which the probate court has no jurisdiction to hear and determine: *Estate of Haas*, 97 Cal. 232, 234; 31 Pac. Rep. 893. The probate court has no jurisdiction, in settling the accounts of the guardian, to render judgment against the ward for advances made by the guardian after the ward attains his majority. When the guardian assumes his office, he contracts not only to manage the estate according to law, and for the best interests of the ward, but also that at the termination of his trust he will account for the property, estate, and moneys of the ward in his hands, and to pay over and deliver such as remains to the person entitled thereto. This is the account which the probate court has jurisdiction to determine. No jurisdiction is given to ascertain a balance against a former ward, except as that will tend to show what the guardian must pay or deliver to his former ward. It is in the nature of a proceeding in rem, and the estate is the res, and, after majority, the only matter of which the court has jurisdiction: *Estate of Kincaid*, 120 Cal. 203; 52 Pac. Rep. 492, 493. An order of the probate court, in a guardianship proceeding, made without authority of the statute, is void: *Andrus v. Blazzard*, 23 Utah, 233; 63 Pac. Rep. 888, 891. In Kansas, ample authority is vested in the probate court to make all proper and just orders in respect to the estates of lunatics, and, in the absence of special reasons therefor, the district court should not be called on to interfere. A court of general chancery is not, perhaps, entirely divested of jurisdiction in cases of guardianship by

the creation of a statutory court for the control of the ward's property, but such jurisdiction as it has is reserved to it in extraordinary cases and for special reasons; and, in accordance with this principle, it has been held that, where a decedent's estate is still unsettled, the administrators still acting, and no special reason shown why the jurisdiction of the probate court should not be invoked, the district court will not make orders affecting the administration of the estate. Hence the district court does not have jurisdiction to entertain an action to subject funds in the hands of a guardian of an insane person to the payment of the latter's debts, when the creditor does not have a lien on such funds, and there exists no special or extraordinary reason preventing the probate court from making the desired order if it be a proper and just one to make: *Hill Inv. Co. v. Honeywell*, 65 Kan. 349; 69 Pac. Rep. 334. The superior court, sitting in probate, has no jurisdiction to appoint a guardian ad litem for an alleged insane person who has not been made a party to the action: *Boyd v. Dodson*, 66 Cal. 360; 5 Pac. Rep. 617.

15. Collateral attack. The orders and judgments of probate courts in regard to probate matters cannot be collaterally attacked, except for want of jurisdiction in the court. The remedy of one aggrieved thereby is by a proper motion in the court, or by appeal: *Dennis v. Winter*, 63 Cal. 16, 18; *Clark v. Rossier*, 10 Ida. 348; 78 Pac. Rep. 358; *Dungan v. Superior Court*, 149 Cal. 98; 84 Pac. Rep. 767; *Symes v. People*, 17 Col. App. 466; 69 Pac. Rep. 312, 313. Even the determination of the court that it has jurisdiction must be made from evidence produced before it, and such determination is valid until set aside in some proper manner, notwithstanding the court was mistaken in its view of the evidence, or that other evidence could have been produced which would have required a different determination. The court's judgment that it has jurisdiction cannot be collaterally attacked: *Estate of Griffith*, 84 Cal. 107, 110; 23 Pac. Rep. 528; 24 Pac. Rep. 381; *Dungan v. Superior Court*, 149 Cal. 98; 84 Pac. Rep. 767, 769. A decree of a probate court cannot be collaterally attacked for want of jurisdiction, unless the same appears on the face of the proceedings, or because of any error or irregularity; but the decree, if not totally void, is conclusive on collateral attack so long as it remains in force. "If it be found that the tribunal is one competent to decide whether the facts in any given matter confer jurisdiction, it follows with inexorable necessity that if it decides that it has jurisdiction, then its judgments, within the scope of the subject-matter over which its authority extends, in proceedings following the lawful allegation of circumstances requiring the exercise of its power, are conclusive against all the world, unless reversed or avoided for error

or fraud in a direct proceeding. It matters not how erroneous the judgment. Being a judgment, it is the law of that case, pronounced by a tribunal created for that purpose. To allow such judgment to be questioned or ignored collaterally would be to ignore practically, and logically to destroy, the court. And it is not necessary that the facts and circumstances upon which the jurisdiction depends shall appear upon the face of their proceedings, because, being competent to decide, and having decided, that such facts exist, by assuming the jurisdiction, this matter is adjudicated, and cannot be collaterally questioned": *Lethbridge v. Lauder*, 13 Wyo. 9; 76 Pac. Rep. 682, 685, quoting from 1 Woerner on Law of Administration, § 145.

16. Jurisdiction in equity.

(1) **Exists when.** When there are peculiar circumstances of embarrassment to the administration of an estate, and when the assuming of jurisdiction would prevent great delay, expense, inconvenience, or waste, and thus conclude by one action and decree a protracted and vexatious litigation, a court, in the exercise of its equitable powers, may take jurisdiction of the settlement of such estate: *Deck v. Gerke*, 12 Cal. 433, 437. The jurisdiction of the probate court is limited to those matters over which the statute directs it to exercise jurisdiction: *Bush v. Lindsey*, 44 Cal. 121, 125. Hence, where jurisdiction is not conferred upon the probate court by statute, a court of equity has jurisdiction of actions against the administrator of an administrator to settle the account of his intestate with the estate of which he was the administrator: *Bush v. Lindsey*, 44 Cal. 121, 124. A court of equity has jurisdiction to enforce a trust, by compelling the administrator to convey property, held by him in trust, to the heirs of the intestate, and to order him to account for money received by him for the property: *Haverstick v. Trudel*, 51 Cal. 431, 433. And the rights of representatives or successors of several partners can be determined only in a court of equity: *Theller v. Such*, 57 Cal. 447. The jurisdiction vested in the old probate courts did not divest the old district courts of their general jurisdiction as courts of chancery over actions for a settlement of affairs of a partnership: *Griggs v. Clark*, 23 Cal. 427, 429. If a guardian dies, without settlement of his guardianship in a probate court, his executors have no authority to present his final account to the probate court for settlement for charges made by him against the ward, either during or after his nonage; and the court has no authority to receive or in any way to act upon it. This settlement can only be had in a court of equity, by a proceeding against the executors of the deceased guardian and the necessary parties: *Estate of Allgier*, 65 Cal. 228; 3 Pac. Rep. 849, 850. In Oklahoma, the appointment of a receiver is the exercise of chancery power, and such power cannot be conferred upon or

exercised by the probate courts: *Garrett v. London etc. Fire & Ins. Co.*, 15 Okl. 222; 81 Pac. Rep. 421.

(2) **Does not exist when.** In California, it seems that no independent suit in equity lies to construe a will: *Toland v. Earl*, 129 Cal. 148, 151; 79 Am. St. Rep. 100; 61 Pac. Rep. 914; but see *Siddall v. Harrison*, 73 Cal. 560; 15 Pac. Rep. 130; *Williams v. Williams*, 73 Cal. 99; 14 Pac. Rep. 394; *Rosenberg v. Frank*, 58 Cal. 387. Nor can a suit in equity be maintained for the purpose of determining heirship, pending proceedings in probate for the settlement of an estate, where no special reasons are given why such a matter should be determined prior to the final decree of distribution in a probate proceeding: *Siddall v. Harrison*, 73 Cal. 560, 562; 15 Pac. Rep. 130. A proceeding to set aside administration of the estate of a living person is a probate proceeding, and cannot be treated as a suit in equity, especially where the administrator was not served with summons, but with a citation, which did not require him to answer, and which did not notify him that, in case of failure to do so, judgment would go against him: *Costa v. Superior Court*, 137 Cal. 79, 82; 69 Pac. Rep. 840. In the absence of fraud, a court of equity has no power to review the orders of a probate court: *Dougherty v. Bartlett*, 100 Cal. 496, 499; 35 Pac. Rep. 431. A court of equity is not a proper forum in which to set aside a probate decree obtained by fraud, and without notice to the party against whom it was rendered: *Baker v. O'Riordan*, 65 Cal. 368, 371; 4 Pac. Rep. 232; *Sanford v. Head*, 5 Cal. 297. A probate court in Kansas has no equitable jurisdiction, and a district court in that state, on the trial of an appeal de novo from a probate court, has such powers and jurisdiction only as had the court from which the appeal was taken: *Ross v. Wollard* (Kan.), 89 Pac. Rep. 680.

(3) **Where same court has jurisdiction in equity and in matters of probate.** In California, where the same superior court has jurisdiction both in equity and in matters of probate, and the jurisdiction of the court as to matters of accounting between the estate of a deceased administrator and his successor is admitted, a court can administer full and entire relief according to the principles of equity, and also in accordance with the statutes which exist with reference to the matters of probate or any others within the court's jurisdiction. Hence it may, as a court of equity, determine the amount due the attorney of the deceased administrator, and may withhold for future determination, by the probate court, the question as to the amount of commissions due to the deceased administrator upon final settlement of the estate: *Pennie v. Roach*, 94 Cal. 515, 521; 29 Pac. Rep. 956; 30 Pac. Rep. 106. While it is true that the probate and equity jurisdictions of the superior court are sepa-

rate and distinct, that the former furnishes a method of administering the affairs of a decedent, and that when final distribution has been had its jurisdiction is exhausted, yet it is the peculiar province of a court of equity to appoint and control trustees for the management of trust estates, and, under our system, the same tribunal exercises equity and probate jurisdiction. Hence if an objection to the jurisdiction of a probate court is raised for the first time in the appellate court, such objection is held to have been waived by the appearance of the defendant without objection to the form of the petition filed in probate, asking for the accounts and removal of the trustees, etc. The petition, under such circumstances, is to be regarded as a bill in equity addressed to the equitable powers of the superior court, and the form of its title is immaterial: *Estate of Thompson*, 101 Cal. 349, 354; 35 Pac. Rep. 991; 36 Pac. Rep. 98, 508. The superior court of California, sitting as a court of probate, assumes a special and limited jurisdiction under statutory procedure, and, although guided by principles of equity in the exercise of that jurisdiction, does not exercise its general jurisdiction in equity, but is limited to matters in probate, and, in the administration of the estates of decedents, to the objects of such administration. These objects are the temporary preservation and protection of the estate of the deceased, the satisfaction or payment of such debts and claims as are charges or liens upon it, and the distribution of the residue to those who are entitled thereto. Incidentally, the expenses incurred in the administration, and the temporary provision for the support of the family, including a homestead where proper, are to be taken from the estate. This provision, however, is, in reality, a distribution of a portion of the estate to those who, by virtue of the statute, are entitled thereto. If it is necessary or proper to appeal to a court of chancery, the probate court is such a court, at least so far as matters in probate are concerned; but, while probate courts have all the powers of a court of equity in the settlement of estates, yet conflicting interests must be determined by appropriate proceedings, under proper pleadings, even in that court: *Estate of Heeney*, 3 Cal. App. 548; 86 Pac. Rep. 842, 844; *Curtis v. Schell*, 129 Cal. 208, 220; 79 Am. St. Rep. 107; 61 Pac. Rep. 951; *Toland v. Earl*, 129 Cal. 148, 153; 79 Am. St. Rep. 100; 61 Pac. Rep. 914. Wherever it appears that there is a want of jurisdiction in the proceeding for the administration of the estate, the jurisdiction of a court of equity may properly be invoked and exercised, as where it becomes necessary to determine the rights of strangers to the estate, or to bring them in for the purpose of determining their rights to the proceeds of a sale derived under those for whose benefit the sale was ordered: *Curtis v. Schell*, 129 Cal. 208, 221; 79 Am. St. Rep. 107; 61 Pac. Rep. 951. But no action in equity

brought in the same court which has probate jurisdiction over the estate to obtain from that court, sitting in equity, a construction of the will, for the edification of the same court sitting in probate, can be entertained. It is the province of the probate court which settles the estate of a deceased person to construe the will and the trusts created thereby; and it may exercise all equity powers necessary to that end: *Toland v. Earl*, 129 Cal. 148, 153; 79 Am. St. Rep. 100; 61 Pac. Rep. 914.

(4) **Concurrent jurisdiction.** The district courts of Kansas have jurisdiction, concurrently with the probate courts, of certain matters relating to the estates of deceased persons; and, in the exercise of their equity or chancery jurisdiction, the district courts may entertain and determine actions to foreclose mortgages, where the defendant is a legal representative of a deceased person, or any other proper proceeding over the estates of deceased persons, and over the legal representatives and heirs of decedents. The district courts of that state have full chancery powers, and courts of equity in that state have always had a paramount jurisdiction over the estates of deceased persons. These powers are not taken away by the statutes regulating the duties and defining the powers of the probate court. In that state, when certain facts exist, growing out of the liabilities of a deceased person, or, it may be, arising out of the settlement of the estate of a deceased person wherein the probate court, by reason of its limited and restricted authority, cannot protect and enforce the rights of all persons involved in the controversy, the equitable power of the district court may be invoked in their behalf. Hence the district courts of that state have jurisdiction to entertain and enforce a demand against the property of a deceased person, who, by will, devoted almost his entire estate to the perpetuation of a banking business in which he had been engaged, during his lifetime, and whose continuance he committed to executors named in his will; the claim sought to be enforced in the district court having originated in the course of the banking business, some years after the death of the testator, and after all debts of the testator existing at the time of his death had been paid: *In re Hyde*, 47 Kan. 277; 27 Pac. Rep. 1001, 1002. In Nevada, where a probate court has jurisdiction, and can administer full relief, a court of equity has discretion to assume jurisdiction or to turn the parties over to the probate court. If others than the decedent are necessary parties to a foreclosure suit, the proceeding must be in equity, and not in the probate court. And if a mortgagee only and the representatives of the deceased mortgagor are parties, courts of equity and the probate court have concurrent jurisdiction: *Corbett v. Rice*, 2 Nev. 330.

PART IV.

EXECUTORS AND ADMINISTRATORS.

EXECUTORS AND ADMINISTRATORS.
THEIR LETTERS AND BONDS.
REVOCATION OF LETTERS. SPECIAL ADMINISTRATORS.
WILLS FOUND AFTER LETTERS GRANTED.
DISQUALIFICATION OF JUDGES. TRANSFERS.
REMOVALS AND SUSPENSIONS.

CHAPTER I.

LETTERS TESTAMENTARY AND OF ADMINISTRATION WITH THE WILL ANNEXED. HOW AND TO WHOM ISSUED.

- § 217. Corporations as executors.
- § 218. Letters on proved will must issue to whom.
- § 219. Form. Affidavit of no knowledge of subsequent will.
- § 220. Who are incompetent as executors.
- § 221. Form. Petition for letters of administration with the will annexed.
- § 222. Form. Order admitting will to probate, and for letters of administration with the will annexed.
- § 223. When no executor is named in will.
- § 224. Interested parties may file objections.
- § 225. Form. Objections to issuance of letters testamentary.
- § 226. Married woman may be executrix.
- § 227. Executor of an executor.
- § 228. Form. Petition for letters, etc., upon estate de bonis non.
- § 229. Form. Order appointing administrator (de bonis non).
- § 230. Letters where person is absent from state, or a minor.
- § 231. Acts of a portion of executors are valid when.
- § 232. Authority of administrators with will annexed. Letters, how issued.

LETTERS TESTAMENTARY AND OF ADMINISTRATION WITH THE WILL ANNEXED.

- | | |
|---|---|
| 1. Letters testamentary. <ul style="list-style-type: none">(1) In general.(2) Application by foreign executor. | 4. Objections to appointment. |
| | 5. Failure to apply or to qualify. Effect of. |
| 2. Jurisdiction of courts. | 6. Letters of administration with will annexed. |
| 3. Appointment of executor by court. <ul style="list-style-type: none">Probate — 21 | (1) In general. |
| | (§21) |

- | | |
|---|--|
| (2) Where executors appointed cannot or will not act. | (5) To be issued when. Order of appointment. |
| (3) Right to nominate. Non-residents. Preference. | (6) Who are not entitled to. |
| (4) Right to letters. Foreign wills. | 7. Validity and effect of appointment. |
| | 8. Appeal. |

§ 217. **Corporations as executors.** Corporations authorized by their articles of incorporation to act as executor, administrator, guardian of estates, assignee, receiver, deposi- tary, or trustee, and having a paid-up capital of not less than two hundred and fifty thousand dollars, of which one hundred thousand dollars shall have been actually paid in in cash, may be appointed to act in such capacity in like manner as individuals. In all cases in which it is required that an executor, administrator, guardian, assignee, receiver, deposi- tary, or trustee, shall qualify by taking and subscribing an oath, or in which an affidavit is required, it shall be a suffi- cient qualification by such corporation, if such oath shall be taken and subscribed, or such affidavit made, by the presi- dent or secretary or manager thereof; and such officer shall be liable for the failure of such corporation to perform any of the duties required by law to be performed by individuals acting in like capacity and subject to like penalties; and such corporation shall be liable for such failure to the full amount of its capital stock and upon the bond required upon its assuming the trusts provided for herein. **Kerr's Cyc. Code Civ. Proc., § 1348.**

§ 218. **Letters on proved will must issue to whom.** If no objection is made as provided in section thirteen hundred and fifty-one, the court admitting a will to probate, after the same is proved and allowed, must issue letters thereon to the persons named therein as executors who are competent to discharge the trust, unless they or either of them have re- nounced their right to letters. In the order, the court must ascertain and determine whether said estate is worth more or less than ten thousand dollars, which determination is con- clusive for the purpose of giving notice to creditors, but for no other purpose. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 492), § 1349.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 773, p. 305.**Arizona.** Rev. Stats. 1901, par. 1636.**Colorado.** 3 Mills's Ann. Stats., secs. 4693, 4698.**Idaho.** Code Civ. Proc. 1901, secs. 4031.**Kansas.** Gen. Stats. 1905, §§ 2876, 8697.**Montana.** Code Civ. Proc., sec. 2400.**Nevada.** Comp. Laws, sec. 2812.**New Mexico.** Comp. Laws 1897, sec. 1940.**North Dakota.** Rev. Codes 1905, § 8016.**Oklahoma.** Rev. Stats. 1903, sec. 1521.**Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1107.**South Dakota.** Probate Code 1904, § 69.**Utah.** Rev. Stats. 1898, sec. 3798.**Washington.** Pierce's Code, § 2417.**Wyoming.** Rev. Stats. 1899, sec. 4627.**§ 219. Form. Affidavit of no knowledge of subsequent will.**

[Title of court.]

[Title of proceeding.]

{ No. ____¹ Dept. No. ____
[Title of form.]State of _____,
County of _____, } ss.

_____, being duly sworn, deposes and says: That, on or about the _____ day of _____, 19____, he was, by order of this court, duly appointed administrator with the will annexed of the estate of _____,² deceased; which will was dated the _____ day of _____, 19____, and was duly admitted to probate herein on or about the _____ day of _____, 19____; that affiant knows of no other and subsequent will of said deceased than said will above named.

Subscribed and sworn to before me this _____ day of _____, 19____.

Explanatory notes. 1. Give file number. 2. Or, executor of the last will and testament of _____, deceased. This affidavit is required by the statute of Washington: See Pierce's Washington Code, § 2428.

§ 220. Who are incompetent as executors. No person is competent to serve as executor who, at the time the will is admitted to probate, is:

1. Under the age of majority;
2. Convicted of an infamous crime;
3. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 492), § 1350.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 773, p. 305; sec. 797, p. 309.
Arizona. Rev. Stats. 1901, par. 1637.
Colorado. 3 Mills's Ann. Stats., secs. 4693, 4698.
Idaho. Code Civ. Proc. 1901, sec. 4032.
Kansas. Gen. Stats. 1905, § 8697.
Montana. Code Civ. Proc., sec. 2401.
Nevada. Comp. Laws, sec. 2813.
New Mexico. Comp. Laws 1897, secs. 1940, 1959; Laws 1901, p. 154, sec. 16, as amended Laws 1903, p. 56.
North Dakota. Rev. Codes 1905, §§ 8016, 8046.
Oklahoma. Rev. Stats. 1903, sec. 1522.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 1107, 1135.
South Dakota. Probate Code 1904, § 70.
Utah. Rev. Stats. 1898, sec. 3799.
Washington. Pierce's Code, §§ 2417, 2488.
Wyoming. Rev. Stats. 1899, sec. 4628.

§ 221. Form. Petition for letters of administration with the will annexed.

[Title of court.]

[Title of estate.]

{ No. ____ Dept. No. ____
 [Title of form.]

To the Honorable the ____¹ Court of the County² of ____, State of ____.

The petition of ____, of said county,³ respectfully shows:

That ____ died on or about the ____ day of ____, 19____, in the county⁴ of ____, state of ____;

That said deceased, at the time of his death, was a resident of the county⁵ of ____, state of ____;

That said deceased left estate in the county⁶ of ____, state of ____, consisting of ____⁷ property;

That the value, character, and annual revenue of said property are as follows, to wit: ____;⁸

That the estate and effects for or in respect to which letters of administration are hereby applied for do not exceed the value of _____ dollars (\$_____);⁹

That said decedent left a last will and testament, which is herewith presented to this court for probate;

That the names, ages, and residences of the next of kin of said deceased, and whom your petitioner is advised and believes, and therefore alleges, to be the heirs at law of said deceased, are as follows, namely:

Names.	Ages.	Residences.
_____	_____	_____
_____	_____	_____

That the names, ages, and residences of said testator's devisees and legatees, so far as known to your petitioner, are as follows, namely:

Names.	Ages.	Residences.
_____	_____	_____
_____	_____	_____

That your petitioner is the widow¹⁰ of said _____, deceased, and is interested in his estate;

That _____ is the person named in said will as the executor thereof, but has failed to apply for letters testamentary.¹¹

Wherefore your petitioner prays that a day of court may be appointed for hearing this application; that the clerk of this court be directed to give due notice thereof by posting notices according to law; and that, upon said hearing and upon the proofs to be adduced, letters of administration with the will annexed, upon said estate, be issued to your petitioner.

Dated _____, 19____.

_____, Petitioner.

_____, Attorney for Petitioner.

Explanatory notes. 1. Title of court. 2-6. Or, city and county. 7. Real or personal, or real and personal. 8. Give separate description of real and personal property, stating what is the separate property of decedent, or what is the community property of decedent and of his widow. 9. Whether estate exceeds certain amount governs the time expressed in the notice to creditors. 10. Or, legatee or devisee, or other person interested in said estate. 11. Or, is incompetent, or renounces his right to letters testamentary; or, as the case may be, that no one is named in said will as the executor thereof.

§ 222. Form. Order admitting will to probate, and for letters of administration with the will annexed.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Now comes the petitioner, —, by —, his attorney, and proves to the satisfaction of the court that the time for hearing the petition for the probate of the will, and for letters of administration with the will annexed, filed herein on the — day of —, 19—, was by the clerk duly set for the — day of —, 19—, and that notice of said hearing has been duly given as required by law;² and no person appearing to contest said petition, the court proceeds to hear the evidence, and thereupon finds that the allegations of said petition are true, and that said petition ought to be granted.

It is therefore ordered and adjudged by the court, That said — died on or about the — day of —, 19—, leaving estate in the state of —; that he was then a resident of the county³ of —, in said state; that the instrument in writing hereinbefore filed, purporting to be his last will, and so alleged to be in said petition, be admitted to probate as the last will of said deceased; that said petitioner, —, be appointed administrator with the will annexed of the estate of said deceased; and that letters of administration with the will annexed issue to him upon his taking the oath required by law and giving bond in the sum of — dollars (\$—). —, County Clerk.⁴

Entered —, 19—.

By —, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. If matter has been continued, say, "and the hearing having been regularly continued by the court to this time." 3. Or, city and county. 4. See note, § 77, ante. In case the will has been previously admitted to probate, and only the appointment of an administrator with the will annexed is sought to fill a vacancy in administration, the portions of this order relating to probate can be eliminated.

§ 223. When no executor is named in will. If no executor is named in the will, or if the sole executor or all the executors therein named are dead, or incompetent, or renounce, or

fail to apply for letters, or to appear and qualify, letters of administration with the will annexed must be issued as designated and provided for in granting of letters in case of intestacy. **Kerr's Cyc. Code Civ. Proc.** (new section; see **Kerr's Stats. and Amdts.**, p. 493), § 1350a.

§ 224. **Interested parties may file objections.** Any person interested in the estate or will may file objections in writing to granting letters testamentary to the persons named as executors or any of them, and the objections must be heard and determined by the court; a petition may, at the same time, be filed for letters of administration with the will annexed. **Kerr's Cyc. Code Civ. Proc.** (**Kerr's Stats. and Amdts.**, p. 493), § 1351.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1638.
Idaho. Code Civ. Proc. 1901, sec. 4033.
Montana. Code Civ. Proc., sec. 2402.
Nevada. Comp. Laws, sec. 2814.
North Dakota. Rev. Codes 1905, § 8016.
Oklahoma. Rev. Stats. 1903, sec. 1523.
South Dakota. Probate Code 1904, § 71.
Utah. Rev. Stats. 1898, sec. 3800.
Washington. Pierce's Code, § 2418.
Wyoming. Rev. Stats. 1899, sec. 4629.

§ 225. **Form. Objections to issuance of letters testamentary.**

[Title of court.]

[Title of estate.] { No. ____.¹ Dept. No. ____
 [Title of form.] }

The undersigned, _____, widow² of said deceased, now comes and objects to this court granting letters testamentary to _____, the person named as executor in the last will and testament of said _____, deceased, on the following grounds, namely:

That said _____ is under the age of majority;

That said _____ was, on the _____ day of _____, 19____, in the _____ court of the county of _____, state of _____, convicted of the crime of _____;*

That said — is an idle and dissolute person; that he uses intoxicating liquors so immoderately, that he is frequently in a condition of drunkenness; and that he wants integrity and lacks understanding.

Contestant therefore asks that the issuance of letters testamentary to the said — be refused.

—, Attorney for Contestant. —, Contestant.

Explanatory notes. 1. Give file number. 2. Or, legatee named in the will of said deceased; or other person interested in the estate. 3. State name of infamous crime. Concerning objections, see also § 258, post.

§ 226. Married woman may be executrix. A married woman may be appointed an executrix. The authority of an executrix, who was unmarried when appointed, is not extinguished nor affected by her marriage. **Kerr's Cyc. Code Civ. Proc., § 1352.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1639.
- Idaho.** Code Civ. Proc. 1901, sec. 4034.
- Montana.** Code Civ. Proc., sec. 2403.
- Nevada.** Comp. Laws, sec. 2815.
- North Dakota.** Rev. Codes 1905, §§ 8016, 8046.
- Oklahoma.** Rev. Stats. 1903, sec. 1524.
- South Dakota.** Probate Code 1904, § 72.
- Utah.** Rev. Stats. 1898, sec. 3801.
- Washington.** Pierce's Code, §§ 2422, 2434.
- Wyoming.** Rev. Stats. 1899, sec. 4630.

§ 227. Executor of an executor. No executor of an executor shall, as such, be authorized to administer on the estate of the first testator, but on the death of the sole or surviving executor of any last will, letters of administration with the will annexed, of the estate of the first testator, left unadministered, must be issued. **Kerr's Cyc. Code Civ. Proc., § 1353.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1640.
- Colorado.** 3 Mills's Ann. Stats., sec. 4720.

Idaho.* Code Civ. Proc. 1901, sec. 4035.

Kansas. Gen. Stats. 1905, § 2884.

Montana.* Code Civ. Proc., sec. 2404.

Nevada.* Comp. Laws, sec. 2816.

North Dakota. Rev. Codes 1905, § 8016.

Oklahoma.* Rev. Stats. 1903, sec. 1525.

South Dakota.* Probate Code 1904, § 73.

Utah.* Rev. Stats. 1898, sec. 3802.

Washington.* Pierce's Code, § 2424.

Wyoming. Rev. Stats. 1899, sec. 4631.

§ 228. Form. Petition for letters, etc., upon estate de bonis non.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To the Honorable the ____² Court of the County³ of ____, State of ____.

Your petitioner respectfully represents that he is a resident of the county⁴ of ____, state of ____;

That on or about the ____ day of ____, 19____, ____ died in the county⁵ of ____, state of ____, leaving a will; and that said will has been admitted to probate in this court;

That ____ is the person appointed in said will as the executor thereof; that letters testamentary thereunder have issued to the said ____; that he has duly qualified as such executor, but has since resigned,⁶ leaving a part of said estate unadministered; and that it is necessary that an administrator of said estate be appointed with said will annexed;

That the said ____ left real property of said estate unadministered, of the value of ____ dollars (\$____);

That the said ____ left personal property of said estate unadministered, of the value of ____ dollars (\$____).

Wherefore your petitioner prays that letters of administration upon said estate, with the will annexed, issue to him as provided by law. _____, Petitioner.

_____, Attorney for Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3-5. Or, city and county. 6. Or, died, as the case may be.

§ 229. Form. Order appointing administrator (de bonis non).

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Now comes the petitioner, —, by —, his attorney, and proves to the satisfaction of the court that the petition for letters of administration (de bonis non) herein was filed on —, 19—; that on the same day the time for hearing the same was by the clerk duly set for the — day of —, 19—; and that notice of said hearing has been duly given as required by law and by the order of this court; and the matter now coming regularly on for hearing² and no person appearing to contest said petition, the court proceeds to hear the evidence, and thereupon finds that the facts therein alleged are true, and that said petition ought to be granted.

It is therefore ordered and adjudged by the court, That — be appointed administrator³ of all of the estate of said —, deceased, not heretofore administered, and that letters of administration thereon issue to him upon his taking the oath as required by law and giving bond in the sum of — dollars (\$—).

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, if the matter has been continued, say, “and the hearing having been regularly postponed by the court to this day.” 3. Or, administratrix, according to the fact.

§ 230. Letters where person is absent from state, or a minor. Where a person absent from the state, or a minor is named executor — if there is another executor who accepts the trust and qualifies — the latter may have letters testamentary and administer the estate until the return of the absentee or the majority of the minor, who may then be admitted as joint executor. If there is no other executor, letters of administration, with the will annexed, must be granted; but the court may, in its discretion, revoke them on the return of the absent executor or the arrival of the

minor at the age of majority. **Kerr's Cyc. Code Civ. Proc.**, § 1354.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 779, p. 306.
- Arizona.*** Rev. Stats. 1901, par. 1641.
- Idaho.*** Code Civ. Proc. 1901, sec. 4036.
- Kansas.** Gen. Stats. 1905, § 2882.
- Montana.*** Code Civ. Proc., sec. 2405.
- Nevada.** Comp. Laws, sec. 2817.
- New Mexico.** Laws 1901, sec. 3, p. 151.
- North Dakota.** Rev. Codes 1905, § 8016.
- Oklahoma.*** Rev. Stats. 1903, sec. 1526.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1117.
- South Dakota.*** Probate Code 1904, § 74.
- Utah.** Rev. Stats. 1898, sec. 3803.
- Washington.** Pierce's Code, § 2419.
- Wyoming.*** Rev. Stats. 1899, sec. 4632.

§ 231. **Acts of a portion of executors are valid when.** When all the executors named are not appointed by the court, those appointed have the same authority to perform all acts and discharge the trust, required by the will, as effectually for every purpose as if all were appointed and should act together; where there are two executors or administrators, the act of one alone shall be effectual, if the other is absent from the state, or laboring under any legal disability from serving, or if he has given his co-executor or co-administrator authority, in writing, to act for both; and where there are more than two executors or administrators, the act of a majority is valid. **Kerr's Cyc. Code Civ. Proc.**, § 1355.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1642.
- Colorado.** 3 Mills's Ann. Stats., sec. 4747.
- Idaho.*** Code Civ. Proc. 1901, sec. 4037.
- Montana.*** Code Civ. Proc., sec. 2406.
- Nevada.** Comp. Laws, sec. 2818.
- North Dakota.** Rev. Codes 1905, § 8016.
- Oklahoma.*** Rev. Stats. 1903, sec. 1527.
- South Dakota.*** Probate Code 1904, § 75.
- Utah.*** Rev. Stats. 1898, sec. 3910.
- Washington.** Pierce's Code, § 2425.
- Wyoming.*** Rev. Stats. 1899, sec. 4633.

§ 232. Authority of administrators with will annexed. Letters, how issued. Administrators with the will annexed have the same authority over the estates which executors named in the will would have, and their acts are as effectual for all purposes. Their letters must be signed by the clerk of the court, and bear the seal thereof. **Kerr's Cyc. Code Civ. Proc., § 1356.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1643.
Colorado. 3 Mills's Ann. Stats., secs. 4718, 4748.
Idaho.* Code Civ. Proc. 1901, sec. 4039.
Kansas. Gen. Stats. 1905, § 8697.
Montana.* Code Civ. Proc., sec. 2407.
Nevada. Comp. Laws, secs. 2819, 2820.
New Mexico. Comp. Laws 1897, sec. 2064.
Oklahoma. Rev. Stats. 1903, sec. 1528.
South Dakota. Probate Code 1904, § 76.
Utah. Rev. Stats. 1898, sec. 3911.
Washington. Pierce's Code, § 2426.
Wyoming.* Rev. Stats. 1899, sec. 4634.

LETTERS TESTAMENTARY AND OF ADMINISTRATION WITH THE WILL ANNEXED.

- | | |
|---|---|
| 1. Letters testamentary. | (2) Where executors appointed cannot or will not act. |
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1. Letters testamentary.

(1) In general. A man has the right to make such disposition of his property as he chooses, subject only to such limitations as are expressly required by law, and, within the same limitations, he has the absolute right to carry out the provisions of his will. In other words, the executor named in a will has the right to act, unless there is some express provision of law which declares that he has not. And, as a consequence, the testator may lawfully

select any person for this trust who does not fall within one of the classes expressly mentioned and declared to be incompetent: Estate of Bauquier, 88 Cal. 302, 308; 26 Pac. Rep. 178, 532. Letters testamentary issue only as the consequence of the probate of the will: Estate of Warfield, 22 Cal. 51, 66; 83 Am. Dec. 49. The naming of an executor is ordinarily a part of a will, and, in the absence of any objection to his competency, an order admitting the will to probate includes his right to have letters testamentary issued to him: Estate of Richardson, 120 Cal. 344, 346; 52 Pac. Rep. 832. While it is true that the appointment of an executor is only provisional, and requires the approval of the court, for the purpose of administration upon the estate of the testator, yet it is also true that the law allows a man to appoint his executors, subject to its approval, and treats them as entitled to the office until they renounce it; and unless, for some reason, they are incompetent, the appointment makes them representatives of the estate, "so far as relates to acts in which they are merely passive, such as receiving notice of the dishonor of a note." It matters not that the person named in the will may never be actually appointed executor by the court. He may renounce the trust: *Drexler v. McGlynn*, 99 Cal. 143; 33 Pac. Rep. 773.

REFERENCES.

Who may be an executor or administrator: See note 54 Am. Dec. 518-522.

(2) **Application by foreign executor.** A foreign executor has the right to apply for letters testamentary in this state to himself, but he should be required to come here within a reasonable time, and submit himself to the jurisdiction of the court, and personally conduct the settlement of the estate. Where he does so, his non-residence does not disqualify him: *Rice v. Tilton*, 13 Wyo. 420; 80 Pac. Rep. 828, 832; Estate of Harrison, 135 Cal. 7; 66 Pac. Rep. 846; Estate of Brundage, 141 Cal. 538; 75 Pac. Rep. 175; *In re Connors' Estate*, 16 Mont. 465; 41 Pac. Rep. 271; Estate of Kelly, 122 Cal. 379; 55 Pac. Rep. 136; *Heck v. Carey*, 13 Wyo. 154; 78 Pac. Rep. 705. It is not necessary that he be actually in the state when the order for the issuance of letters is made. His application may be made by himself in person or by attorney, and if made by attorney, he is constructively present. If required by the court, he must appear and testify when the penalty of his bond is fixed, and, at any rate, he must appear and qualify within a reasonable time. If he fails to make application for letters, or to appear and qualify within proper time, letters of administration with the will annexed will be issued to some other person. Where, however, he has made application for letters, either in person or by attorney, it is not absolutely necessary that he be actually in the state when the order is made directing the issuance of letters. If a bond is

required, the court may delay for a time fixing the penalty of it, or may fix it by examining on oath other persons, and if the property requires immediate repair, a special administrator may be appointed: *Estate of Brown*, 80 Cal. 381, 384; 22 Pac. Rep. 233. If he fails to petition for the probate of the will and for letters testamentary within the time prescribed by statute, he may be held to have renounced his right to letters, and, unless good cause is shown for the delay, the court may appoint any competent person to act. The statute which provides that if the person named in the will as executor, for a specified time after he has knowledge of the death of the testator and that he is named as executor, fails to petition the proper court for the probate of the will and that letters testamentary be issued to him, he may be held to have renounced his right to letters, and authorizing the court to appoint any other competent person administrator unless good cause for delay is shown, applies to foreign wills as well as to domestic wills: *Rice v. Tilton*, 13 Wyo. 420; 80 Pac. Rep. 828, 831. But, while a foreign executor has the right to apply for letters testamentary in this state to himself, he has no legal right to nominate an administrator with the will annexed: *Estate of Harrison*, 135 Cal. 7, 8; 66 Pac. Rep. 846.

REFERENCES.

Foreign corporation as executor or administrator: See note 24 L. R. A. 291. Right of non-resident to act as executor or administrator: See notes 1 L. R. A. (N. S.) 341-348; 113 Am. St. Rep. 562-565.

2. Jurisdiction of courts. Exclusive jurisdiction over the estate of a decedent, who is a resident of the state, is in the probate court of the county of which the deceased was resident at the time of his death; but, in view of the fact that a decedent may leave estate in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, the court of that county in which application is first made for letters testamentary or of administration has exclusive jurisdiction of the settlement of the estate. Jurisdiction of the proceedings for the settlement of the estate of a deceased person cannot exist in two courts of the state at the same time. There cannot be two valid administrations at the same time and in the same state; and when the probate court has acquired jurisdiction of the subject-matter, that jurisdiction is exclusive: *Dungan v. Superior Court*, 149 Cal. 98; 84 Pac. Rep. 767, 768; *Estate of Griffith*, 84 Cal. 107, 110; 23 Pac. Rep. 528; 24 Pac. Rep. 381. A probate court has no power to appoint an administrator without conforming to the steps prescribed in cases of intestacy: *Estate of Bouyssou*, 3 Cal. App. 39; 84 Pac. Rep. 460.

3. Appointment of executor by court. A trust company appointed as executor of a will need not necessarily be appointed by the court,

though named in the will, unless it amply secures those interested in the estate from loss: *Estate of Kilborn* (Cal. App.), 89 Pac. Rep. 985, 987. If the person named as executor in the will does not come within the inhibited class, the court has no right to refuse his application: *Holladay v. Holladay*, 16 Or. 147; 19 Pac. Rep. 81, 83. While the court is authorized to refuse to appoint an executor named in a will, for want of integrity, yet his appointment will be refused by the court only upon clear and convincing evidence establishing such disqualifying fact: *In re Bauquier*, 88 Cal. 302, 313; 26 Pac. Rep. 178, 532.

4. Objections to appointment. The only objections that can properly be made to the granting of letters testamentary to the executors named in the will, upon the grounds of incompetency, must be for one or more of the reasons stated in the statute; and if the persons named in the will do not come within either of the classes of persons mentioned in the statute, and declared thereby to be incompetent, they have the right to the appointment, unless they have renounced, or have failed to apply for the probate of the will, or for letters: *Rice v. Tilton*, 13 Wyo. 420; 80 Pac. Rep. 828, 830. The court may, under the statute, and upon objections, decline to appoint an executor, although named in the will; and if objections are made to the appointment of a trust company as co-executor, based upon facts tending to show that its financial condition and its securities on deposit are not such as to afford ample protection to the estate, it is within the power of the court, notwithstanding the certificate of the bank commissioners (which is not conclusive evidence of the fact of solvency), to inquire into the financial condition of the company, and if it should appear that the assets are insufficient as security for the faithful performance of his trust, to refuse the appointment. Those sections of the general law which give to the court authority to require additional security from an executor, when it is made to appear that the original undertaking is insufficient for any reason, apply to the equivalent of the bond given by a corporation; and even though a court may, in the first instance, appoint a corporation as executor without bond, yet, at any time during the administration of the trust, under these sections, it may require further and additional security, if satisfied that the interests of the estate demand it: *Estate of Kilborn* (Cal. App.), 89 Pac. Rep. 985, 987.

5. Failure to apply or to qualify. Effect of. The object of the statute, both with respect to the issuance of letters testamentary and as to the issuance of letters of administration, is the same, namely, to secure the prompt settlement of an estate. The preference in the one case is given by reason of the express wish of the testator, and in the other by reason of relation of interest in the

estate; and neither should be disregarded, providing the person so designated, either by the testator or the statute, proceeds with diligence to discharge the duties of the trust; but, upon his failure to do so, the right of preference is lost, and the others interested in the estate have the right to come in: *Rice v. Tilton*, 13 Wyo. 420; 80 Pac. Rep. 828, 832. It does not follow, however, that a widow who fails to apply for letters on her husband's estate within the time prescribed by statute cannot afterwards be appointed administratrix: *Ramp v. McDaniel*, 12 Or. 108; 6 Pac. Rep. 456. An executor derives his authority from the will; and confirmation by the court, followed by the filing of a bond, is equivalent to taking out letters, the letters being but the authentic evidence of the power conferred by the will: *Bank of Montreal v. Buchanan*, 32 Wash. 480; 73 Pac. Rep. 482, 484. Under the probate law of California, no such officer as an executor *de son tort* is recognized. Hence if a person is named in the will as a co-executor, but refuses or neglects to qualify, and a sale is afterwards made to him by the executrix of certain property belonging to the estate, the fact that he was named in the will as executor, and actually applied for letters, would not constitute him a trustee for the estate at the time the contract of sale was made: *Bowden v. Pierce*, 73 Cal. 459, 463; 14 Pac. Rep. 302; 15 Pac. Rep. 64.

6. Letters of administration with will annexed.

(1) *In general.* The appointment of an administrator with the will annexed is to be made in the manner provided for the granting of letters of administration in cases of intestacy. If the court denies probate to the will, it is not authorized to appoint an administrator with the will annexed: *Estate of Bouyssou*, 1 Cal. App. 657, 658; 82 Pac. Rep. 1066. The naming of an executor is not essential to the validity of a will; and a decedent whose will is entitled to be admitted to probate does not die intestate. In such a case the granting of letters of administration with the will annexed is not limited to the order prescribed by statute in cases where a party dies intestate: *Estate of Barton*, 52 Cal. 538, 540. The testator is presumed to have understood that, in the case of the death of the party named as executor, without any other provision in the will supplying its place, the probate court would be authorized to appoint an administrator with the will annexed, who would be thereby invested with all the powers of the executor named in the will, subject only to such special supervision and limitations as are imposed by the statute itself. The effect is the same as if the testator had incorporated these provisions in express terms into the will: *Kidwell v. Brummigan*, 32 Cal. 436, 441. An adverse claim made by a person does not render him incompetent to act as an administrator with the will annexed. His bond as administrator with the will annexed affords ample protection to

devises, legatees, and others interested in the estate: *Rice v. Tilton*, 13 Wyo. 420; 80 Pac. Rep. 828, 832.

(2) **Where executors appointed cannot or will not act.** If executors have been appointed by the decedent, and cannot act, or will not act, or are not allowed to act, then the same persons, in the same order, are entitled to letters of administration with the will annexed. Where the choice of the decedent fails, the law will enforce its choice: *Rice v. Tilton*, 13 Wyo. 420; 80 Pac. Rep. 828, 832; *Estate of Garber*, 74 Cal. 338, 340; 16 Pac. Rep. 233; *Estate of Li Po Tai*, 108 Cal. 484, 488; 41 Pac. Rep. 486; 39 Pac. Rep. 30; *Estate of Richardson*, 120 Cal. 344, 346; 52 Pac. Rep. 832. And the same is true of cases where the executor dies before the will has been probated or letters have been issued: *Estate of McDonald*, 118 Cal. 277, 279; 50 Pac. Rep. 399.

(3) **Right to nominate. Non-residents. Preference.** While the statute authorizes the issuance of letters testamentary to a non-resident executor, it does not entitle him to letters of administration, or give him the right to nominate an administrator with the will annexed: *Estate of Brundage*, 141 Cal. 538, 541; 75 Pac. Rep. 175; and if he make no application for letters testamentary, a resident son of the decedent is entitled to letters as against the nominee of such executor, and the court has no discretion in the matter: *Estate of Brundage*, 141 Cal. 538, 541; 75 Pac. Rep. 175; but where the executor joins in the petition of his nominee, upon the filing of an authenticated copy of the will, and requests his appointment, the court does have a discretionary power to appoint him, and is not legally bound to appoint the public administrator: *Estate of Harrison*, 135 Cal. 7, 8; 66 Pac. Rep. 846. So if the executor fails to apply for letters testamentary, but requests the appointment of a nominee, the appointment is placed in the discretion of the court, and it may appoint the public administrator instead of the nominee: *Estate of Richardson*, 120 Cal. 344, 346; 52 Pac. Rep. 852. If an executrix fails for four years to apply for letters testamentary, and dies before making application therefor, the public administrator is entitled to letters, in preference to a sister of the deceased executrix: *Estate of McDonald*, 118 Cal. 277, 280; 50 Pac. Rep. 399. Where an application for appointment as executor was denied under a law which declared that an executor who was absent from or resided out of the state was incompetent, but this disqualification was omitted in a subsequent statute, which took effect after the application was denied, and the matter is pending on appeal at the time of such statutory change, the case may be remanded, with directions to dismiss the application for the appointment as executor without prejudice to the making of a new application dependent upon the law as it exists: *In re Connors' Estate*, 16 Mont. 465; 41 Pac.

Rep. 271. Where the person named as executor in a will cannot, for any reason, be appointed to take charge of the community estate, an administrator thereof should be appointed, to which appointment the surviving spouse, or the person he or she might nominate, would have preference: *Smith v. Ferry*, 6 Wash. 285; sub nom. *In re Hill's Estate*, 33 Pac. Rep. 585, 587.

(4) **Right to letters. Foreign wills.** The provisions of the statute relating to the probate of foreign wills are not to be construed independently of the other provisions of the statute relating to the right of administration, as between persons interested in the will. That section of the statute which provides that "letters of administration with the will annexed must be issued as designated and provided for the grant of letters in cases of intestacy," is not restricted to any class of wills, and certainly must include foreign wills in its provisions: *Estate of Coan*, 132 Cal. 401, 403; 64 Pac. Rep. 691. On the probate of a foreign will in this state, in the absence of a petition by the executor named in the will, letters of administration must be granted to a person interested in the will, who applies for them: *Estate of Bergin*, 100 Cal. 376; 34 Pac. Rep. 867. One who lives in this state, and is an assignee of part of the interest of a non-resident sole devisee and executor of the will, is entitled to letters, as being a person interested in the will: *Estate of Engle*, 124 Cal. 292; 56 Pac. Rep. 1022. If no statutory objection can be made to the granting of letters testamentary to a person named as executor in a foreign will, he has the right to the appointment, unless he has renounced or failed to apply for the probate of the will and letters testamentary: *Rice v. Tilton*, 13 Wyo. 420; 80 Pac. Rep. 828, 830. If a foreign executor fails to make application for letters testamentary in this state, he has no power or right to nominate an administrator with the will annexed: *Estate of Brundage*, 141 Cal. 538, 541; 75 Pac. Rep. 175. But in default of application for letters testamentary by the executor, or by a devisee resident in this state, who is entitled to act as administrator, there is no statutory provision which requires the court to appoint the nominee of such executor or of any resident devisee: *Estate of Richardson*, 120 Cal. 344, 346; 52 Pac. Rep. 832. If, however, a foreign executor joins in the petition of his nominee, and requests the latter's appointment, the court has a discretionary power to appoint such nominee: *Estate of Harrison*, 135 Cal. 7, 8; 66 Pac. Rep. 846. A court may appoint an administrator of the estate of a non-resident deceased, where the only assets of said estate consist of a right of action against a resident of this state, or in case there are no assets at all. If there should be nothing which the administrator could legally do, it could harm nobody. But if there should be something which the administrator ought to do, then the appointment would be necessary: *In re Tasanen's Estate*, 25

Utah, 396; 71 Pac. Rep. 984, 986. But, in Washington, where eleven years have elapsed after a testator's death, and his estate has been finally settled in another state by a court of competent jurisdiction, and he left no personal estate in Washington, but did leave an equitable title to real estate, which, however, had vested in the devisees, and their rights had become absolute under the statute, it was held that there was no necessity for any administration in Washington: *Murphy v. Murphy*, 42 Wash. 142; 84 Pac. Rep. 646, 648. On the probate of a foreign will in this state, in the absence of a petition by the executor named in the will, letters of administration must be granted to a person interested in the will, who applies for them, and a petition of the public administrator for the issuance of letters of administration to himself should be denied: *Estate of Bergin*, 100 Cal. 376, 378; 34 Pac. Rep. 867. In this case it was said that "whether or not the general provisions of the code about public administrators refer only to the estates of persons dying in their counties, and to domestic wills, must be considered an open question": *Estate of Bergin*, 100 Cal. 376, 378; 34 Pac. Rep. 867. So if the devisee under a foreign will is interested in the will, within the meaning of the statute, so as to entitle him to letters of administration as against the public administrator, it follows that his assignee is likewise entitled to letters, in preference to the public administrator: *Estate of Engle*, 124 Cal. 292, 293; 56 Pac. Rep. 1022.

(5) **To be issued when. Order of appointment.** If a decedent has left a will entitled to probate, he does not die intestate, within the meaning of the statute which prescribes the order in which the persons therein designated are entitled to an estate of a person dying intestate, and in such cases the granting of letters with the will annexed is not limited to the order prescribed in the statute: *Estate of Barton*, 52 Cal. 538, 540; *Estate of McDonald*, 118 Cal. 277, 279; 50 Pac. Rep. 399. Hence where an executrix died four years after the death of decedent, without having applied for letters testamentary, the public administrator is entitled to letters of administration with the will annexed upon the estate, and the court has no discretion to refuse such letters to him, and to grant them to the sister of the deceased executrix, although she offers to waive the commissions to which she would be entitled in the interest of the estate: *Estate of McDonald*, 118 Cal. 277, 280; 50 Pac. Rep. 399. Where the administration of an estate has become vacant by the revocation of the letters of administration with the will annexed, and the estate has not been fully administered, it is the duty of the court to appoint an administrator with the will annexed to complete the administration; and the court has no right to refuse to make such appointment on the ground that the heirs of the deceased have parted with their interest in the property of the estate: *Estate of Pina*, 112 Cal. 14, 16; 44 Pac. Rep. 332; *Estate of Strong*, 119

Cal. 663, 667; 51 Pac. Rep. 1078. The statute which provides that "if the sole executor or all the executors are incompetent, or renounce, or fail to apply for letters, or appear and qualify, letters of administration with the will annexed must be issued as designated and provided for the grant of letters as in cases of intestacy," refers only to cases where an executor has been named in the will: *Estate of Von Buncken*, 120 Cal. 343; 52 Pac. Rep. 819.

(6) **Who are not entitled to.** In the event that no executor is appointed in the will, the public administrator, as against a legatee, is not entitled to letters of administration with the will annexed: *Estate of Von Buncken*, 120 Cal. 343; 52 Pac. Rep. 819. In the case of a partnership estate where there were unsettled matters between the partners, growing out of the partnership relation, at the time of the death of one of the partners, the surviving partner is not entitled to letters of administration with the will annexed: *Estate of Garber*, 74 Cal. 338, 340; 16 Pac. Rep. 233.

7. **Validity and effect of appointment.** Letters testamentary issued to one person are unauthorized and void where the order of the court directed the letters to be issued to another person: *Estate of Frey*, 52 Cal. 658, 661. After letters testamentary have been issued, the court has no power afterwards to appoint a special administrator of the estate, unless the executor or executrix is first suspended or removed: *Schroeder v. Superior Court*, 70 Cal. 343; 11 Pac. Rep. 651. But the appointment of an administrator with the will annexed supersedes, per se, all former administrations of the estate: *McCanley v. Harvey*, 49 Cal. 497, 505.

8. **Appeal.** Where a will has been refused probate in the lower court, but the appellate court directs the will to be admitted to probate, the lower court will not be directed to issue letters of administration with the will annexed to the petitioner, unless it has been found as a fact by the probate court that he is a proper person to receive such letters. That matter must be left open for the further consideration of the court below: *Estate of Wood*, 36 Cal. 75, 82. If the executor named in the will fails to apply for letters testamentary, the exercise of the court's discretion in appointing some other person administrator with the will annexed will not be disturbed, where no abuse of discretion is shown: *Rice v. Tilton*, 13 Wyo. 420; 80 Pac. Rep. 828, 832. In a controversy between two persons to be appointed executors of an estate, the judgment of the supreme court settling the matter should be carried into effect by the probate court, notwithstanding the death of one of the persons before the last-named court acts on the matter: *Estate of Pacheco*, 29 Cal. 224.

CHAPTER II.

FORM OF LETTERS.

- § 233. Form of letters testamenary.
- § 234. Form. Oath of executor or executrix.
- § 235. Form. Clerk's certificate that letters testamentary have been recorded.
- § 236. Form of letters of administration with the will annexed.
- § 237. Form. Oath of administrator with the will annexed.
- § 238. Form. Clerk's certificate that letters of administration with the will annexed have been recorded.
- § 239. Form of letters of administration.
- § 240. Form. Oath of administrator or administratrix.
- § 241. Form. Clerk's certificate that letters of administration have been recorded.

OATH, AND SEAL TO LETTERS.

- 1. Oath required.
- 2. Necessity of seal to letters.
- 3. Effect of omitting seal.

§ 233. Form of letters testamentary. Letters testamentary must be substantially in the following form: State of California, county, or city and county of _____. The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the superior court of the county, or city and county of _____, C. D., who is named therein as such, is hereby appointed executor. Witness, G. H., clerk of the superior court of the county, or city and county of _____, with the seal of the court affixed the _____ day of _____, A. D., 18____. (Seal.) By order of the court. G. H., Clerk. **Kerr's Cyc. Code Civ. Proc.**, § 1360.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 798, p. 309.
- Arizona.** Rev. Stats. 1901, par. 1644.
- Colorado.** 3 Mills's Ann. Stats., sec. 4718.
- Idaho.*** Code Civ. Proc. 1901, sec. 4038.
- Montana.*** Code Civ. Proc., sec. 2420.
- Nevada.** Comp. Laws, sec. 2821.

North Dakota. Rev. Codes 1905, § 8053.

Oklahoma. Rev. Stats. 1903, sec. 1529.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1136.

South Dakota. Probate Code 1904, § 77.

Utah.* Rev. Stats. 1898, sec. 3804.

Washington. Pierce's Code, §§ 2427, 2431.

Wyoming. Rev. Stats. 1899, sec. 4657.

§ 234. Form. Oath of executor or executrix.

[Title of court.]

[Title of estate.]

{ No. ____ Dept. No. ____
[Title of form.]

State of _____,
County ¹ of _____, } ss.

I do solemnly swear that I will support the constitution of the United States and the constitution of the state of _____, and that I will faithfully discharge the duties of executor ² of the last will of _____, deceased, according to law.

Subscribed and sworn to before me this _____ day of _____, 19____.

_____, Deputy County Clerk of the County ³ of _____.

Explanatory notes. 1. Or, City and County. 2. Or, executrix. 3. Or, City and County. The oath is to be attached to the letters, and the letters must be recorded: See § 275, post.

§ 235. Form. Clerk's certificate that letters testamentary have been recorded.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Office of the County Clerk.

County ² of _____, ss.

I, _____, county clerk of the county ³ of _____, and ex officio clerk of the _____⁴ court thereof, do hereby certify the foregoing to be a full, true, and correct copy of the letters testamentary in the matter of the estate of _____, deceased, now on file and of record in my office; and I further certify that the same have not been revoked or vacated, but are still of full force and effect.

Witness my hand and the seal of said court this ____
day of ____, 19____.

[Seal]

By ____, Clerk.
____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2, 3. Or, City and County.
4. Title of court.

§ 236. Form of letters of administration with the will annexed. Letters of administration, with the will annexed, must be substantially in the following form: State of California, county [or city and county] of _____. The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the superior court of the county, or city and county of ____, and there being no executor named in the will (or as the case may be), C. D. is hereby appointed administrator with the will annexed. Witness, G. H., clerk of the superior court of the county, or city and county of ____, with the seal of the court affixed, the ____ day of ____, A. D. 18____. (Seal.) By order of the court. G. H., Clerk. **Kerr's Cyc. Code Civ. Proc., § 1361.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1645.

Colorado. 3 Mills's Ann. Stats., sec. 4718.

Idaho.* Code Civ. Proc. 1901, sec. 4040.

Montana. Code Civ. Proc., sec. 2421.

Nevada. Comp. Laws, sec. 2822.

Oklahoma. Rev. Stats. 1903, sec. 1530.

South Dakota. Probate Code 1904, § 78.

Utah.* Rev. Stats. 1898, sec. 3805.

Washington. Pierce's Code, § 2432.

Wyoming. Rev. Stats. 1899, sec. 4658.

§ 237. Form. Oath of administrator with the will annexed.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

State of ____,
County² of ____, } ss.

I do solemnly swear that I will support the constitution of the United States and the constitution of the state of ____,

and that I will faithfully perform, according to law, the duties of administrator ³ with the will annexed of the estate of _____, deceased.

Subscribed and sworn to before me this _____ day of _____, 19____, _____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Or. administratrix. This oath is to be attached to the letters, and the letters must be recorded: See § 275, post.

§ 238. Form. Clerk's certificate that letters of administration with the will annexed have been recorded.

[Title of court.]

[Title of estate.]	{ No. _____ ¹ Dept. No. _____
	{ [Title of form.]
State of _____,	
County ² of _____, } ss.	

I, _____, county clerk of the county ³ of _____, and ex officio clerk of the _____⁴ court thereof, do hereby certify the foregoing to be a full, true, and correct copy of the letters of administration with the will annexed in the matter of the estate of _____, deceased, now on file and of record in my office; and I further certify that the same have not been revoked or vacated, but are still of full force and effect.

Witness my hand and the seal of said court this _____ day of _____, 19____.

[Seal]

_____, Clerk.
By _____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2, 3. Or, City and County. 4. Title of court.

§ 239. Form of letters of administration. Letters of administration must be signed by the clerk, under the seal of the court, and substantially in the following form: State of California, county, or city and county of _____. C. D. is hereby appointed administrator of the estate of A. B., deceased. (Seal.) Witness, G. H., clerk of the superior court of the county, or city and county of _____, with the seal thereof affixed, the _____ day of _____, A. D. 18____. By order of the court. G. H., Clerk. **Kerr's Cyc. Code Civ. Proc., § 1362.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 799, p. 309.**Arizona.*** Rev. Stats. 1901, par. 1646.**Colorado.** 3 Mills's Ann. Stats., sec. 4718.**Idaho.*** Code Civ. Proc. 1901, sec. 4060.**Montana.*** Code Civ. Proc., sec. 2422.**Nevada.** Comp. Laws, sec. 2838.**North Dakota.** Rev. Codes 1905, § 8055.**Oklahoma.** Rev. Stats. 1903, sec. 1531.**Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1137.**South Dakota.** Probate Code 1904, § 79.**Utah.** Rev. Stats. 1898, sec. 3820.**Washington.** Pierce's Code, § 2438.**Wyoming.** Rev. Stats. 1899, sec. 4659.**§ 240. Form. Oath of administrator or administratrix.**

[Title of court.]

[Title of estate.]

{ No. _____ Dept. No. _____
[Title of form.]State of _____,
County ¹ of _____, } ss.

I do solemnly swear that I will support the constitution of the United States and the constitution of the state of _____, and that I will faithfully discharge the duties of administrator ² of the estate of _____, deceased, according to law.

Subscribed and sworn to before me this _____ day of _____, 19____, _____, Deputy County Clerk.

Explanatory notes. 1. Or, City and County. 2. Or, administratrix. This oath is to be attached to the letters, and the letters must be recorded: See § 275, post.

§ 241. Form. Clerk's certificate that letters of administration have been recorded.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.]State of _____,
County ² of _____, } ss.

I, _____, county clerk of the county ² of _____, and ex officio clerk of the _____⁴ court thereof, do hereby certify

the foregoing to be a full, true, and correct copy of the letters of administration in the matter of the estate of —, deceased, now on file and of record in my office; and I further certify that the same have not been revoked or vacated, but are still of full force and effect.

Witness my hand and the seal of said court this — day of —, 19—.

[Seal]

By —, Deputy Clerk.

Explanatory notes. 1. Give file number. 2, 3. Or, City and County.
4. Title of court.

OATH, AND SEAL TO LETTERS.

1. Oath required.
2. Necessity of seal to letters.
3. Effect of omitting seal.

1. **Oath required.** No person can fill the position of executor or administrator until he has qualified according to law, and no recognition by the probate court can make him an officer de facto: Pryor v. Downey, 50 Cal. 388, 399; 19 Am. Rep. 656; Estate of Hamilton, 34 Cal. 464, 469. If a person has been named in the will as executor, he is not a trustee for the estate until he qualifies, although he has actually applied for letters. His refusal or neglect to qualify is a disclaimer of the trust: Bowden v. Pierce, 73 Cal. 459, 463; 14 Pac. Rep. 302; 15 Pac. Rep. 64. Where the estimated value of the estate was forty-five thousand dollars, it was objected that the executor did not properly qualify, so as to entitle him to enter upon the discharge of his trust; but the court held that the objection could not prevail, since the will fixed the amount of the bond at twenty thousand dollars, and the bond in that sum was executed and approved by the county court. This provision of the will was said to be reasonable, and the bond designated having been given, it was deemed unnecessary to require the executor to take the oath prescribed in cases where the undertaking is wholly dispensed with: In re Conser's Estate, 40 Or. 138; 66 Pac. Rep. 607, 609.

2. **Necessity of seal to letters.** It is not necessary to affix a seal of the court to any other matter contained on the sheet or page upon which the letters of administration are written, but it is necessary to affix one to the letters, and the affixing of a seal upon the paper on which the letters are written is a substantial compliance with the law: Sharp v. Dye, 64 Cal. 9, 11. The probate seal of a probate judge adopted as the seal of the probate court is entitled to full credit as such: Ward v. Moorey, 1 Wash. Ter. 104.

3. Effect of omitting seal. The purpose of the seal is to authenticate the letters, but where the court has recognized one as administrator, the fact that the seal has been omitted from the letters of administration, although the letters recite that the seal was affixed, cannot be made the basis for a collateral attack. The absence from the letters of the impress of the seal does not impair their effect, in a collateral action, as evidence of the administrator's authority: *Dennis v. Bint*, 122 Cal. 39; 68 Am. St. Rep. 17; 54 Pac. Rep. 378, 380.

CHAPTER III.

LETTERS OF ADMINISTRATION. TO WHOM AND THE ORDER
IN WHICH THEY ARE GRANTED.

- § 242. Order of persons entitled to administer estate. Partner not to administer.
- § 243. Preference of persons equally entitled.
- § 244. In discretion of court to appoint administrator when.
- § 245. When minor or incompetent is entitled, who must be appointed.
- § 246. Who are incompetent to act as administrators.
- § 247. Married woman may be administratrix.

§ 242. Order of persons entitled to administer estate. Partner not to administer. Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate or some portion thereof; and they are, respectively, entitled thereto in the following order:

1. The surviving husband or wife, or some competent person whom he or she may request to have appointed.
2. The children.
3. The father and mother.
4. The brothers.
5. The sisters.
6. The grandchildren.
7. The next of kin entitled to share in the distribution of the estate.
8. The public administrator.
9. The creditors.
10. Any person legally competent.

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate. This section shall apply to the relatives of the previously deceased spouse of

decedent when entitled to succeed to some portion of the estate under subdivision eight of section thirteen hundred and eighty-six of the Civil Code. **Kerr's Cyc. Code Civ. Proc.** (**Kerr's Stats. and Amdts.**, p. 493), § 1365.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, secs. 774, 776, p. 305.

Arizona. Rev. Stats. 1901, par. 1647.

Colorado. 3 Mills's Ann. Stats., sec. 4694.

Idaho. Code Civ. Proc. 1901, sec. 4041.

Kansas. Gen. Stats. 1905, § 2886.

Montana. Code Civ. Proc., sec. 2430.

Nevada. Comp. Laws, sec. 2823.

New Mexico. Comp. Laws 1897, secs. 1963, 1964.

North Dakota. Rev. Codes 1905, §§ 8021, 8022, 8046.

Oklahoma. Rev. Stats. 1903, sec. 1532.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 1112, 1114.

South Dakota. Probate Code 1904, § 80.

Utah. Rev. Stats. 1898, secs. 3812, 3815.

Washington. Pierce's Code, § 2433.

Wyoming. Rev. Stats. 1899, sec. 4635.

§ 243. **Preference of persons equally entitled.** Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole to those of the half blood. **Kerr's Cyc. Code Civ. Proc.**, § 1366.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1648.

Idaho.* Code Civ. Proc. 1901, sec. 4042.

Montana.* Code Civ. Proc., sec. 2431.

Nevada.* Comp. Laws, sec. 2824.

North Dakota. Rev. Codes 1905, § 8028.

Oklahoma.* Rev. Stats. 1903, sec. 1533.

South Dakota.* Probate Code 1904, § 81.

Utah. Rev. Stats. 1898, sec. 3813.

§ 244. **In discretion of court to appoint administrator when.** When there are several persons equally entitled to the administration, the court may grant letters to one or more of them; and when a creditor is claiming letters the court may,

in its discretion, at the request of another creditor, grant letters to any other person legally competent. **Kerr's Cyc. Code Civ. Proc.**, § 1367.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1649.
Idaho.* Code Civ. Proc. 1901, sec. 4043.
Montana. Code Civ. Proc., sec. 2432.
Nevada. Comp. Laws, sec. 2825.
North Dakota. Rev. Codes 1905, § 8028.
Oklahoma.* Rev. Stats. 1903, sec. 1534.
South Dakota.* Probate Code 1904, § 82.
Utah. Rev. Stats. 1898, sec. 3813.
Wyoming. Rev. Stats. 1899, sec. 4636.

§ 245. When minor or incompetent is entitled, who must be appointed. If any person entitled to administration is a minor or an incompetent person, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court. **Kerr's Cyc. Code Civ. Proc.**, § 1368.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1650.
Colorado. 3 Mills's Ann. Stats., sec. 4698.
Idaho. Code Civ. Proc. 1901, sec. 4044.
Montana. Code Civ. Proc., sec. 2433.
North Dakota. Rev. Codes 1905, § 8022.
Oklahoma. Rev. Stats. 1903, sec. 1535.
South Dakota. Probate Code 1904, § 83.
Utah. Rev. Stats. 1898, secs. 3813, 3815.

§ 246. Who are incompetent to act as administrators. No person is competent or entitled to serve as administrator or administratrix who is:

1. Under the age of majority.
2. Not a bona fide resident of the state.
3. Convicted of an infamous crime.
4. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity. **Kerr's Cyc. Code Civ. Proc.**, § 1369.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 797, p. 309.
Arizona. Rev. Stats. 1901, par. 1651.
Idaho.* Code Civ. Proc. 1901, sec. 4045.
Kansas. Gen. Stats. 1905, § 2902.
Montana. Code Civ. Proc., sec. 2434.
Nevada. Comp. Laws, sec. 2826.
New Mexico. Comp. Laws 1897, sec. 1959; Laws 1901, p. 154, sec. 16, as amended Laws 1903, p. 56.
North Dakota. Rev. Codes 1905, §§ 8022, 8046.
Oklahoma. Rev. Stats. 1903, sec. 1536.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1135.
South Dakota. Probate Code 1904, § 84.
Utah. Rev. Stats. 1898, sec. 3815.
Washington. Pierce's Code, § 2488.
Wyoming. Rev. Stats. 1899, sec. 4637.

§ 247. Married woman may be administratrix. A married woman may be appointed administratrix. When an unmarried woman appointed administratrix marries, her authority is not thereby extinguished. **Kerr's Cyc. Code Civ. Proc., § 1370.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Arizona.** Rev. Stats. 1901, par. 1652.
Idaho. Code Civ. Proc. 1901, sec. 4046.
Montana. Code Civ. Proc., sec. 2435.
Nevada. Comp. Laws, sec. 2827.
North Dakota. Rev. Codes 1905, §§ 8022, 8046.
Oklahoma. Rev. Stats. 1903, sec. 1537.
South Dakota. Probate Code 1904, § 85.
Utah. Rev. Stats. 1898, sec. 3816.
Washington. Pierce's Code, § 2434.
Wyoming. Rev. Stats. 1899, sec. 4638.

CHAPTER IV.

PETITION AND CONTEST FOR LETTERS, AND ACTION THEREON.

- § 248. Applications, how made.
- § 249. Form. Petition for letters of administration.
- § 250. Form. Petition by corporation for letters of administration.
- § 251. Form. Petition for letters, etc., to others than those entitled.
- § 252. When granted.
- § 253. Notice of application. Day of hearing to be set by clerk.
- § 254. Form. Notice of hearing of petition for letters of administration.
- § 255. Contesting application. Hearing.
- § 256. Form. Affidavit of posting of notice of hearing of application for letters of administration. (By deputy county clerk.)
- § 257. Form. Affidavit of posting of notice of hearing of application for letters of administration. (By any person over twenty-one years of age.)
- § 258. Form. Objections to appointment of administrator.
- § 259. Form. Order that application for letters and contest for letters be heard together.
- § 260. Hearing of proofs and issuance of letters.
- § 261. Form. Order appointing administrator.
- § 262. Evidence of notice.
- § 263. Grant to any applicant.
- § 264. What proofs must be made before granting letters of administration.
- § 265. Request in writing. Letters may issue to whom.
- § 266. Form. Request for another's appointment as administrator.

LETTERS OF ADMINISTRATION.

- | | |
|---|--|
| 1. Granting or refusing of administration in general. | 8. Priority. Preference. |
| 2. Jurisdiction of courts. | 9. Right to nominate. Letters to others than those entitled. |
| 3. Preliminary proof. | (1) In general. |
| 4. Letters on estate of minor. | (2) Non-residents. |
| 5. Petition for letters. | 10. Letters where several are equally entitled. |
| (1) In general. | 11. Discretion of court. |
| (2) Application by creditors. | 12. Notice and hearing. |
| (3) Construction of statute. | 13. Contest of application. |
| (4) Statement of facts. | (1) In general. |
| (5) Sufficiency of petition. | (2) What questions are involved. |
| (6) To be granted in what court and county. | (3) Who may appear and contest. |
| 6. Order of appointment. | (4) Allegations. Proof. Presumption. |
| 7. Who are entitled to letters. | |

- | | |
|--|--|
| 14. Waiver of right. Delay. | 20. Competency. Disqualification to act. |
| 15. Validity of appointment and letters. | (1) In general. |
| 16. Collateral attack. | (2) Want of understanding. |
| 17. Order granting letters. Effect of. | (3) Drunkenness. |
| 18. Vesting of appointee with office. | (4) Improvidence. |
| 19. Who are not entitled to appointment. | (5) Want of integrity. |
| | 21. Non-residents. |
| | 22. Appeal. |

§ 248. **Applications, how made.** Petitions for letters of administration must be in writing, signed by the applicant or his counsel, and filed with the clerk of the court, stating the facts essential to give the court jurisdiction of the case, and when known to the applicant, he must state the names, ages, and residences of the heirs of the decedent, and the value and character of the property. If the jurisdictional facts exist, and are proved at the hearing but are not fully set forth in the petition, the decree or order of administration and subsequent proceedings are not void on account of such want of jurisdictional averments. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 493), § 1371.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 781, p. 306.
Arizona. Rev. Stats. 1901, par. 1653.
Idaho. Code Civ. Proc. 1901, sec. 4047.
Montana. Code Civ. Proc., sec. 2440.
Nevada. Comp. Laws, sec. 2828.
New Mexico. Comp. Laws 1897, sec. 1942.
North Dakota. Rev. Codes 1905, §§ 7934, 8024.
Oklahoma. Rev. Stats. 1903, sec. 1538.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1119.
South Dakota. Probate Code 1904, § 86.
Utah. Rev. Stats. 1898, sec. 3817.
Washington. Pierce's Code, § 2435.
Wyoming. Rev. Stats. 1899, sec. 4646.

§ 249. **Form. Petition for letters of administration.**

[Title of court.]

[Title of estate.]

{ Department No. ____
 { [Title of form.]

To the Honorable ____, Judge of the ____ Court of the County ¹ of ____, State of ____.

The petition of ____, of said county,² respectfully shows:

Probate — 23

That _____ died on or about the _____ day of _____, 19____, in the county ³ of _____, state of _____;

That said deceased, at the time of his ⁴ death, was a resident of the county ⁵ of _____, state of _____;

That said deceased left estate in the county ⁶ of _____, state of _____, consisting of _____ ⁷ property;

That the value, character, and annual revenue of said property are as follows, to wit: _____; ⁸

That the estate and effects for or in respect to which letters of administration are hereby applied for do not exceed the value of _____ dollars (\$_____); ⁹

That the names, ages, and residences of the next of kin of said deceased, and whom your petitioner is advised and believes, and therefore alleges, to be the heirs at law of said deceased, are as follows, viz.:

Names.	Ages.	Residences.
_____	_____	_____
_____	_____	_____

That due search and inquiry have been made to ascertain if said deceased left any will and testament, but none has been found, and, according to the best knowledge, information, and belief of your petitioner, said deceased died intestate;

That your petitioner is a son ¹⁰ of said deceased, one of his heirs at law, and entitled to share in the distribution of his estate, if said deceased died intestate, and therefore, as your petitioner is advised and believes, is entitled to letters of administration upon said estate. ¹¹

Wherefore your petitioner prays that a day of court may be appointed for hearing this application; that the clerk of this court be directed to give due notice thereof by posting notices according to law; and that, upon said hearing and the proofs to be adduced, letters of administration of said estate may be issued to your petitioner.

Dated _____, 19____. _____, Petitioner.

_____, Attorney for Petitioner.

Explanatory notes. 1-3. Or, City and County. 4. Or, her. 5, 6. Or, city and county. 7. Real and personal, or either, as the case may be. 8. Give details. 9. State amount. 10. Or according to the fact.

11. In case the public administrator applies for letters, say, "That your petitioner is the public administrator of said county [or city and county]; that decedent left no known heirs"; or, "That no party entitled to administer has applied for letters; and that your petitioner is entitled to letters of administration."

§ 250. Form. Petition by corporation for letters of administration.

[Title of court.]

[Title of estate.]

{ Department No. ____
[Title of form.]

The petition of the ____ Company respectfully shows:

That petitioner is a corporation organized and existing under the laws of the state of ____, and is authorized by its articles of incorporation to act as executor, administrator, guardian, assignee, receiver, depository, or trustee, and has a paid-up capital of not less than ____ thousand dollars (\$____), of which ____ thousand dollars (\$____) has been actually paid in, in cash, and has deposited with the treasurer of said estate for the benefit of its creditors the further sum of ____ thousand dollars (\$____), in bonds and securities, in compliance with the provisions of law;¹ which said bonds and securities are now held by said treasurer, in his official capacity, for the uses and purposes aforesaid, and that petitioner has complied with all the requirements of said act, and has procured from the board of bank commissioners of the state of ____ a certificate of authority stating that it has complied with the requirements of said act and is authorized to act as executor, administrator, guardian, assignee, receiver, depository, or trustee.²

Explanatory notes. 1. Designate the act giving authority. 2. Proceed as in an ordinary petition for letters of administration by an individual: "That ____ died," etc.

§ 251. Form. Petition for letters, etc., to others than those entitled.

[Title of court.]

[Title of estate.]

{ Department No. ____
[Title of form.]

[This form is the same as the ordinary petition for letters of administration (see § 249), except the last paragraph

before the prayer. In the place of said last paragraph substitute the following:]

That the person entitled to letters of administration on said estate, to wit, —, declines to act as administrator¹ thereof, and has made and filed herein a written request that your petitioner, a competent person, be appointed in his stead as such administrator;² and that said request is annexed hereto and made a part hereof, the same as if incorporated herein.

Explanatory notes. 1, 2. Or, administratrix.

§ 252. **When granted.** Letters of administration may be granted by the court at any time appointed for the hearing of the application, or at any time to which the hearing is continued or postponed. **Kerr's Cyc. Code Civ. Proc.**, § 1372.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 1654.

Idaho. Code Civ. Proc. 1901, sec. 4048.

Montana.* Code Civ. Proc., sec. 2441.

Oklahoma. Rev. Stats. 1903, sec. 1539.

South Dakota. Probate Code 1904, § 87.

Wyoming. Rev. Stats. 1899, sec. 4647.

§ 253. **Notice of application. Day of hearing to be set by clerk.** When a petition praying for letters of administration is filed, the clerk of the court must set the petition for hearing by the court, and give notice thereof by causing notices to be posted in at least three public places in the county, one of which must be at the place where the court is held, containing the name of the decedent, the name of the applicant, and the time at which the application will be heard. Such notice must be given at least ten days before the hearing. **Kerr's Cyc. Code Civ. Proc.**, § 1373.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1655.

Idaho. Code Civ. Proc. 1901, sec. 4049.

Montana. Code Civ. Proc., sec. 2442.

Nevada. Comp. Laws, sec. 2828.

North Dakota. Rev. Codes 1905, § 8024.

Oklahoma. Rev. Stats. 1903, sec. 1540.
South Dakota. Probate Code 1904, § 88.
Utah. Rev. Stats. 1898, sec. 3818.
Washington. Pierce's Code, § 2437.
Wyoming. Rev. Stats. 1899, sec. 4648.

§ 254. Form. Notice of hearing of petition for letters of administration.

[Title of court.]

[Title of estate.] (No. ____¹ Dept. No. ____
 } [Title of form.]

Notice is hereby given, That ____ has filed with the clerk of the ____² court of the county³ of ____, state of ____, a petition praying for the issuance to him of letters of administration upon the estate of ____, deceased; and that the hearing of said petition will be had before the ____⁴ court, at the court-house in the county⁵ of ____, on the ____ day of ____, 19____, at ____ o'clock in the forenoon⁶ of said day, at which time and place all persons interested in said estate are notified to appear and contest the same, if they choose.

Dated ____, 19____. By ____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, city and county. 4. Title of court. 5. Or, city and county. 6. Or, afternoon.

§ 255. Contesting application. Hearing. Any person interested may contest the petition, by filing written opposition thereto, on the ground of the incompetency of the applicant, or may assert his own rights to the administration and pray that letters be issued to himself. In the latter case the contestant must file a petition and give the notice required for an original petition, and the court must hear the two petitions together. **Kerr's Cyc. Code Civ. Proc., § 1374.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1656.
Idaho.* Code Civ. Proc. 1901, sec. 4050.
Montana.* Code Civ. Proc., sec. 2443.
Nevada. Comp. Laws, sec. 2829.
North Dakota. Rev. Codes 1905, § 8025.

Oklahoma.* Rev. Stats. 1903, sec. 1541.

South Dakota.* Probate Code 1904, § 89.

Utah. Rev. Stats. 1898, sec. 3819.

Wyoming. Rev. Stats. 1899, sec. 4649.

§ 256. **Form. Affidavit of posting of notice of hearing of application for letters of administration. (By deputy county clerk.)**

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

State of _____,
County² of _____, } ss.

_____, deputy county clerk of said county,³ being duly sworn, says: That he is, and at all times hereinafter named was, a deputy county clerk of said county,⁴ a male citizen of the United States, over the age of twenty-one years, and not interested in the estate of _____, deceased; that he is competent to be a witness in the matter of said estate; and that on the _____ day of _____, 19____, at the request and under the direction of the clerk of said court, he posted three notices, of which the annexed is a copy, in three of the most public places in said county,⁵ to wit, one at the place at which the court is held,⁶ one at _____,⁷ and one at _____.⁸

Subscribed and sworn to before me this _____ day of _____, 19____. _____, County Clerk.

Explanatory notes. 1. Give file number. 2-5. Or, City and County. 6. Designating it. 7. As, at the United States post-office, etc. 8. As, at the city hall. This affidavit should be attached to the notice.

§ 257. **Form. Affidavit of posting of notice of hearing of application for letters of administration. (By any person over twenty-one years of age.)**

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

State of _____,
County² of _____, } ss.

_____, of said county, being duly sworn, deposes and says: That he is, and at all times hereinafter mentioned was, a

white male citizen of the United States, over the age of twenty-one years, and not interested in said estate; that he is competent to be a witness in the matter of said estate; and that on the ____ day of ____, 19__, at the request and under the direction of the clerk of said court, he duly posted exact and true copies of the within notice in three of the most public places within said county³ of ____, to wit, one copy at ____,⁴ in said county, one at ____,⁵ and one at the court-house where said ____⁶ court of the county⁷ of ____ is held.⁸

Subscribed and sworn to before me this ____ day of ____, 19__.

By ____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2, 3. Or, City and County.

4. As, at the United States post-office in the town or city of ____.

5. As, at the city hall, etc. 6. Title of court. 7. Or, city and county.

8. Stating location of court-house. This affidavit should be attached to the notice.

§ 258. Form. Objections to appointment of administrator.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

The petition of ____, praying that letters of administration on the estate of ____, deceased, be granted to him, the said ____, having been filed herein, —

Now comes ____, a son² of said deceased, and files this, his written opposition to the granting of said petition, and for reasons why the said petitioner should not be appointed alleges:

That said petitioner, ____, is under the age of majority;

That said petitioner, ____, is not a bona fide resident of this state;

That said petitioner, ____, has been convicted of an infamous crime, to wit, the crime of ____;³ and that said conviction was had in the court of the county of ____, state of ____, on the ____ day of ____, 19__;

That said petitioner is incompetent to perform the duties of administrator of said estate because of his want of understanding, in this, ____; ⁴

That said petitioner is incompetent to perform the duties of administrator of said estate because of drunkenness;

That said petitioner is incompetent to perform the duties of administrator of said estate because of improvidence in this, ____; ⁵

That said petitioner is incompetent to perform the duties of administrator of said estate because of his want of integrity, in this, ____; ⁶

That said contestant is entitled, after petitioner, to letters of administration on said estate; and that he has filed in this court his application to be appointed administrator of said estate.

Wherefore contestant prays that this contest and said application be heard together; that the application of said ____ for letters of administration be denied; and that letters issue to this contestant. _____, Petitioner.

_____, Attorney for Petitioner.

Explanatory notes. 1. Give file number. 2. Or, according to the fact. 3. Name the crime. 4. State facts showing want of understanding; as, lack of knowledge of the English language, etc. 5. State facts showing improvidence. 6. State facts showing want of integrity. Concerning objections, see also § 225, ante.

§ 259. Form. Order that application for letters and contest for letters be heard together.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

It is ordered that the application of ____ for letters of administration upon the estate of ____, deceased, and the contest of ____, opposing the petition of the said ____, and the petition of said contestant, ____, asserting his own rights to the administration, and asking that letters of administration be granted to him upon said estate, be set for hearing, at the court-room of this court, at ____² on the ____ day of ____, 19__, at the hour of ____ o'clock,

in the forenoon * of said day, and that the same be heard together.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. State location of court-room. 3. Or, afternoon, as the case may be.

§ 260. Hearing of proofs and issuance of letters. On the hearing, it being first proved that notice has been given as herein required, the court must hear the allegations and proofs of the parties, and order the issuing of letters of administration to the party best entitled thereto. **Kerr's Cyc. Code Civ. Proc., § 1375.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1657.

Idaho.* Code Civ. Proc. 1901, sec. 4051.

Montana.* Code Civ. Proc., sec. 2444.

Nevada. Comp. Laws, sec. 2830.

Oklahoma.* Rev. Stats. 1903, sec. 1542.

South Dakota.* Probate Code 1904, § 90.

Wyoming. Rev. Stats. 1899, sec. 4650.

§ 261. Form. Order appointing administrator.

[Title of court.]

[Title of estate.]

{ No. —¹ Dept. No. —
[Title of form.]

Now comes the petitioner, —, by —, his attorney, and proves to the satisfaction of the court that the petition for letters of administration herein was filed on —, 19—; that on the same day the time for hearing the same was by the clerk duly set for the — day of —, 19—; and that notice of said hearing has been duly given as required by law,² and it appearing that petitioner is legally competent, and no person appearing to contest said petition, the court proceeds to hear the evidence, and thereupon finds that the facts therein alleged are true, and that said petition ought to be granted.

It is therefore ordered and adjudged by the court, That said — died on the — day of —, 19—; that he left estate in the said state of —, and was then a resident

of the county * of —, in said state; that — be appointed administrator of the estate of said —, deceased; and that letters of administration thereon issue to him upon his taking the oath required by law, and giving bond in the sum of — dollars (\$—). —, County Clerk.

Entered —, 19—.

By —, Deputy.⁴

Explanatory notes. 1. Give file number. 2. If the matter has been continued, say: "and the hearing having been regularly continued to this time." 3. Or, city and county. 4. See note § 77, *ante*.

§ 262. Evidence of notice. An entry in the minutes of the court, that the required proof was made and notice given, shall be conclusive evidence of the fact of such notice. **Kerr's Cyc. Code Civ. Proc.**, § 1376.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1658.

Idaho.* Code Civ. Proc. 1901, sec. 4052.

Montana. Code Civ. Proc., sec. 2445.

Nevada.* Comp. Laws, sec. 2831.

Oklahoma.* Rev. Stats. 1903, sec. 1543.

South Dakota. Probate Code 1904, § 91.

§ 263. Grant to any applicant. Letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear and claim the issuing of letters to themselves. **Kerr's Cyc. Code Civ. Proc.**, § 1377.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1659.

Idaho.* Code Civ. Proc. 1901, sec. 4053.

Montana.* Code Civ. Proc., sec. 2446.

Nevada. Comp. Laws, sec. 2832.

North Dakota. Rev. Codes 1905, § 8028.

Oklahoma.* Rev. Stats. 1903, sec. 1544.

South Dakota.* Probate Code 1904, § 92.

Utah. Rev. Stats. 1898, sec. 3814.

Wyoming. Rev. Stats. 1899, sec. 4651.

§ 264. **What proofs must be made before granting letters of administration.** Before letters of administration are granted on the estate of any person who is represented to have died intestate, the fact of his dying intestate must be proved by the testimony of the applicant or others; and the court may also examine any other person concerning the time, place, and manner of his death, the place of his residence at the time, the value and character of his property, and whether or not the decedent left any will, and may compel any person to attend as a witness for that purpose. **Kerr's Cyc. Code Civ. Proc., § 1378.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1660.

Colorado. 3 Mills's Ann. Stats., sec. 4694.

Idaho.* Code Civ. Proc. 1901, sec. 4054.

Montana.* Code Civ. Proc., sec. 2447.

Nevada. Comp. Laws, sec. 2833.

North Dakota. Rev. Codes 1905, § 8027.

Oklahoma.* Rev. Stats. 1903, sec. 1545.

South Dakota.* Probate Code 1904, § 93.

§ 265. **Request in writing.** Letters may issue to whom. Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court. When the person entitled is a non-resident of the state, affidavits, taken ex parte before any officer authorized by the laws of this state to take acknowledgments and administer oaths out of this state, may be received as prima facie evidence of the identity of the party, if free from suspicion, and the fact is established to the satisfaction of the court. **Kerr's Cyc. Code Civ. Proc., § 1379.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 1661.

Idaho. Code Civ. Proc. 1901, sec. 4055.

Montana.* Code Civ. Proc., sec. 2448.

Nevada. Comp. Laws, sec. 2834.

North Dakota. Rev. Codes 1905, § 8026.

Oklahoma. Rev. Stats. 1903, sec. 1546.

South Dakota. Probate Code 1904, § 94.

Utah. Rev. Stats. 1898, sec. 3812.

Wyoming.* Rev. Stats. 1899, sec. 4652.

§ 266. Form. Request for another's appointment as administrator.

[Title of court.]

[Title of estate.]

{ Department No. ____
[Title of form.]

To the Honorable the ____¹ Court of the County² of ____,
State of ____.

The undersigned, the surviving wife of ____, deceased, is entitled to letters of administration upon his estate, but declines to undertake such administration, waives her right to be appointed administratrix of said estate, and respectfully requests this court to appoint, in her stead, as such administratrix,³ ____, a resident of the county⁴ of ____, state of ____, a competent person to serve as such administratrix,⁵ but who is not entitled to receive said letters of administration except at the request of the person so entitled as aforesaid, and whose petition for letters of administration of said estate is herewith presented and filed at the request of the undersigned. ____ (Widow of ____, deceased.)

Explanatory notes. 1. Title of court. 2. Or, City and County. 3. Or, administrator. 4. Or, city and county. 5. Or, administrator.

LETTERS OF ADMINISTRATION.

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| 1. Granting or refusing of administration in general. | 8. Priority. Preference. |
| 2. Jurisdiction of courts. | 9. Right to nominate. Letters to others than those entitled. |
| 3. Preliminary proof. | (1) In general. |
| 4. Letters on estate of minor. | (2) Non-residents. |
| 5. Petition for letters. | 10. Letters where several are equally entitled. |
| (1) In general. | 11. Discretion of court. |
| (2) Application by creditors. | 12. Notice and hearing. |
| (3) Construction of statute. | 13. Contest of application. |
| (4) Statement of facts. | (1) In general. |
| (5) Sufficiency of petition. | (2) What questions are involved. |
| (6) To be granted in what court and county. | (3) Who may appear and contest. |
| 6. Order of appointment. | (4) Allegations. Proof. Presumption. |
| 7. Who are entitled to letters. | |

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| 14. Waiver of right. Delay. | 20. Competency. Disqualification to act. |
| 15. Validity of appointment and letters. | (1) In general. |
| 16. Collateral attack. | (2) Want of understanding. |
| 17. Order granting letters. Effect of. | (3) Drunkenness. |
| 18. Vesting of appointee with office. | (4) Improvidence. |
| 19. Who are not entitled to appointment. | (5) Want of integrity. |
| | 21. Non-residents. |
| | 22. Appeal. |

1. Granting or refusing of administration in general. Under the statute of Idaho, it is not absolutely necessary that administration be had of an estate of an intestate, when there are no debts against such estate, and heirs have made a satisfactory distribution of the assets of such estate among themselves: *Gwinn v. Melvin*, 9 Ida. 202; 72 Pac. Rep. 961. If the court denies probate to a will, it is not authorized to appoint an administrator, unless the proceedings therefor are in conformity with the steps prescribed in cases of intestacy: *Estate of Bouysou*, 3 Cal. App. 39; 84 Pac. Rep. 460. Whatever the law may be in other jurisdictions, there is nothing in the probate law of California which would, either expressly or by implication, exempt the property of an estate from the requirement of administration. The whole subject-matter of dealing with the assets of deceased persons is one of statutory regulation, and the policy and intent of the statute of that state very clearly contemplates that the property of decedents, left undisposed of at death (except in the instance of the homestead, acquired under certain circumstances as provided for in the statute), shall, for the purpose of ascertaining and protecting the rights of creditors or heirs, and properly transmitting the title of record, be subjected to the process of administration in the probate court. Indeed, there is no other method provided by the statute whereby the existence of creditors or heirs of decedent may be conclusively established. And such administration may be initiated and had at the instance of any person entitled under the law to administer upon the estate: *Estate of Strong*, 119 Cal. 663, 665; 51 Pac. Rep. 1078. No administration of the personal estate of an intestate is necessary when there are no creditors. The heirs, in such case, may divide the assets of the estate among themselves, in kind or otherwise, by mutual agreement. When so divided, each will become the owner in severalty of the portions so received: *Brown v. Baxter* (Kan.), 94 Pac. Rep. 155, 574.

REFERENCES.

Validity of grants of administration: See notes 81 Am. St. Rep. 535-562; 79 Am. Dec. 65-67. Dispensing with administration of estate: See note 112 Am. St. Rep. 729-731. Necessity of administration in devolution of decedent's personalty: See note 15 L. R. A. 491. In-

validity of agreement to administer and distribute a decedent's estate, without obtaining letters of administration: See note 12 L. R. A. (N. S.) 613. When and how the granting of letters of administration may be prevented: See note 46 Am. Dec. 437-440. Administration in general: See note § 378, post. Widow's right to administer on the estate of her deceased husband: See note 93 Am. Dec. 685, 686. Collateral impeachability of findings as to jurisdictional facts on which administration of a decedent's estate is founded: See note 18 L. R. A. 242-244.

2. Jurisdiction of courts. Where a resident of one county of a state dies in another county of the same state, with property or business matters requiring immediate attention, it is doubtless true that the probate court of the latter county has jurisdiction over the estate of that county for the purpose of appointing a special administrator to conserve the property until an executor or general administrator is appointed by the court which has jurisdiction to administer the entire estate; but the appointment of such special administrator does not give such court jurisdiction to issue letters of general administration, or in any way to interfere with the exercise of general jurisdiction by the court of the county where the decedent resided or had his abode. The residence or place of abode of the decedent in the state fixes the jurisdiction of the court for the purpose of granting general letters: *In re Long's Estate*, 39 Wash. 557; 81 Pac. Rep. 1007, 1008. Where a non-resident dies within the state, leaving personal property, the probate court of the county where he died, leaving property therein, has jurisdiction to grant administration upon his estate. The rule, in this country, is universal, that an administration may be granted in any state or territory where unadministered property of a deceased person is found, or real property subject to the claim of any creditor of the deceased, and that probate of the will of any deceased person may be granted in any state where he leaves personal or real property: *Bliler v. Boswell*, 9 Wyo. 57; 59 Pac. Rep. 798, 801. In Oregon, the county court has exclusive jurisdiction to grant and revoke letters testamentary and of administration: *Ramp v. McDaniel*, 12 Or. 108; 6 Pac. Rep. 456, 460. Until the removal of an administrator already appointed, no new administrator can be appointed. It is not therefore error to refuse letters of administration where there is already a duly appointed and qualified administrator: *Estate of Keane*, 56 Cal. 407, 409. Where the statute requires the jurisdictional facts to be set forth in the petition, and a petition containing such facts has been filed, the probate court acquires jurisdiction of the matter, notwithstanding the applicant, at the time of filing such petition, has failed to make the affidavit required by the statute concerning the names and places of residence of the heirs of deceased, and that deceased died without a will. It was not the intention of the

legislature that the affidavit should contain the facts essential to giving the court jurisdiction of the case. This is clear where the same statute unmistakably provides that the jurisdictional facts shall be set forth in the petition: *McLean v. Roller*, 33 Wash. 166; 73 Pac. Rep. 1123, 1125. The jurisdiction of a probate court, in Kansas, to appoint an administrator, does not depend upon the existence of debts due from the estate, nor upon the evidence of assets which can be legally applied to the payment of such debts: *Nickel v. Vagel* (Kan.), 92 Pac. Rep. 1105. It is the duty of the probate court, in the appointment of an administrator, to ascertain and determine whether one who is an applicant therefor is a suitable person to administer the estate, and if it is found that he is not a suitable person, and there is substantial evidence to support the finding, the appellate court will not disturb an order made thereon refusing to appoint such applicant: *Brown v. Dunlap*, 70 Kan. 668; 79 Pac. Rep. 145. Where applications are made in different counties upon conflicting claims as to the fact of residence, the superior court of the county in which a petition is first filed has exclusive jurisdiction to determine the question of residence, and the courts of other counties must abide the determination of that court, which is reviewable only upon appeal; and if another court assumes to take jurisdiction of the estate, a public administrator, who has made application for letters of administration, and the next of kin of decedent, have such an interest as will entitle them to maintain a writ of prohibition to prevent the exercise of jurisdiction by such last-named court: *Dungan v. Superior Court*, 149 Cal. 98; 84 Pac. Rep. 767, 769.

3. Preliminary proof. To the granting of general and original administration upon the estate of a deceased person, intestacy is a prerequisite. An allegation of decedent's intestacy should be made in the petition, and the court should have reason to believe the statement true; but, while the statute requires the court to demand proof that decedent died intestate before granting letters of administration, yet it does not require that the court shall find and adjudge in that inquiry that decedent died intestate. The proof of that fact should be by the best known and obtainable evidence at the time, and should negative the proposition that decedent left a will. It should be shown that such proof was made before granting of letters of administration. Yet, while the law requires inquiry to be made as to whether decedent made a will, and makes the right to grant letters of general administration dependent upon the fact that, according to the proof attainable, decedent left no will, it does not require that the court shall solemnly determine by judgment that decedent died intestate, because the statute leaves the question open for the propounding of a will at any time, and the admission of a will to probate, *ipso facto*, supersedes and vacates the granting of letters of general

administration: *In re Davis' Estate*, 11 Mont. 196; 28 Pac. Rep. 645, 648, 649. While proof must be made of intestacy and death, if there is no contest, sworn declarations, made before a notary public of another state, are admissible to prove such facts, even where no commissions issued from the court to take depositions, and no notice was given or interrogatories prepared: *In re Leiter's Estate*, 19 Mont. 474; 48 Pac. Rep. 753, 755, 756. It is the object of the law, that administration shall never be granted until the death of the person, and then only one administration within the state: *Beckett v. Selover*, 7 Cal. 215, 236; 68 Am. Dec. 237. A decedent whose will is entitled to be admitted to probate does not die intestate, within the meaning of a statute prescribing the order in which letters of administration shall be granted: *Estate of Barton*, 52 Cal. 538, 540. For the purpose of founding administration, a simple contract debt is assets where the debtor resides, even if a bill of exchange or promissory note has been given for it, and without regard to the place where it was found payable: *McCully v. Cooper*, 114 Cal. 258, 262; 55 Am. St. Rep. 66; 46 Pac. Rep. 82; 35 L. R. A. 492. While a claim for damages for death by wrongful act is not a general asset of the estate under the statutes of Wyoming, it is a sufficient asset of the estate for the purpose of appointing an administrator. Hence a claim for damages for death by wrongful act being, under the statutes of Wyoming, at least a special asset of the estate, the right given by the Wyoming statute to recover damages for death by wrongful act can be enforced in the state of Utah, through the medium of an administrator appointed by the courts of that state. This question has been squarely presented and decided by the courts of the last-named state on the ground that such right of action is transitory: *Utah Sav. & T. Co. v. Diamond C. & C. Co.*, 26 Utah, 299; 73 Pac. Rep. 524; *In re Lowham's Estate*, 30 Utah, 436; 85 Pac. Rep. 445, 446. Where a special administrator has been appointed, issues as to an accounting made by him should be determined before the appointment of the regular administrator: *French v. Superior Court*, 3 Cal. App. 304; 85 Pac. Rep. 133, 134.

4. Letters on estate of minor. Letters of administration may be granted upon the estate of a minor, as well as upon that of an adult: *City of Horton v. Trompeter*, 53 Kan. 150; 35 Pac. Rep. 1106; *Wheeler v. St. Joseph etc. R. R. Co.*, 31 Kan. 640; 3 Pac. Rep. 297. Thus where the deceased was eight years of age, and resident of the state, owning property of the value of \$2.25 at the time of her death, it was held that, upon proper application by the father of the deceased, the probate court had the right to grant letters of administration: *City of Horton v. Trompeter*, 53 Kan. 150; 35 Pac. Rep. 1106.

REFERENCES.

Necessity and priority of administration upon the estate of minors; See note 7 Am. & Eng. Ann. Cas. 861.

5. Petition for letters.

(1) **In general.** An application for letters of administration upon the estate of a decedent must be in writing, signed by the applicant or his counsel, and filed with the clerk of the court, stating the facts essential to give the court jurisdiction of the case. The filing of a proper petition with the clerk of the court constitutes the making of the application. The application necessarily precedes the hearing: *Dungan v. Superior Court*, 149 Cal. 98; 84 Pac. Rep. 767, 769. In Idaho, a proceeding for the appointment of an administrator is an "action": *Gwinn v. Melvin*, 9 Ida. 202; 72 Pac. Rep. 961. A co-administrator may be appointed to act with the administratrix with the latter's consent, and the fact that he is misnamed "special administrator" does not vitiate the appointment: *Lethbridge v. Lauder*, 13 Wyo. 9; 76 Pac. Rep. 682, 684. A statute providing that the clerk shall collect from the petitioner for letters of administration or of guardianship certain sums, depending upon the appraised value of the estate, up to a designated amount, beyond which the rate shall be the same without reference to value, is violative of the constitution, and therefore invalid. In such a statute there is a manifest inequality in the rates fixed for estates falling in the different classes: *Hansen v. Miller* (Mont.), 94 Pac. Rep. 197, 198. In Washington, where the husband, upon the death of his wife, is the only person interested in community property, and there are no debts, it has been held that he has a right to make a special contract with relation to the payment of a person's services, before agreeing to recommend him for an appointment as administrator: *In re Field's Estate*, 33 Wash. 63; 73 Pac. Rep. 768, 770. Where the decedent left a will, it is clearly proper for the court to postpone the hearing of an application for letters of administration upon his estate, until the validity of the will has been determined in proceedings brought for that purpose: *Estate of Edwards* (Cal.), 97 Pac. Rep. 23, 25. A petition for letters of administration upon the estate of a decedent who left a will should be dismissed, where the applicant shows no disposition to wait until the validity of the will has been determined: *Estate of Edwards* (Cal.), 97 Pac. Rep. 23, 25.

(2) **Application by creditors.** The term "creditors," as used in the statute concerning the respective right to letters of administration, where a person has died intestate, relates only to such as were creditors of the deceased at the time of his death, or to holders of obligations created by the deceased himself. The evident purpose of such a statute is to give to those who are materially interested in the preservation and application of the assets of the estate as creditors an opportunity to administer when the other persons described in the statute do not exist, or for some reason have not sought the appointment as administrator. A creditor for funeral expenses, therefore, is

not entitled to letters of administration. Such a claimant is specially protected by statute. His claim is the first that can be paid; and there does not exist the same reason for conferring the right to administer upon such a claimant as that which exists in favor of other creditors: *In re Sullivan's Estate*, 25 Wash. 430; 65 Pac. Rep. 793, 795. If a creditor petitions for the appointment of another person as an administrator of an estate, the petitioner's right to be appointed as a "principal creditor" of the estate is thereby waived in writing. When he asks, in writing, for the appointment of another, he thereby waives his statutory right: *In re Sullivan's Estate*, 25 Wash. 430; 65 Pac. Rep. 793, 796. As between a sixty-thousand-dollar creditor of an estate and other creditors, the claim of each of whom is less in amount than one hundred dollars, the former must be considered a "principal creditor," and entitled to letters of administration, in preference to the others, though all are of the same degree and rank as creditors: *In re Sullivan's Estate*, 25 Wash. 430; 65 Pac. Rep. 793, 795.

(3) **Construction of statute.** Under the statute which designates the order in which letters of administration shall be issued, and which prescribes that the relatives of the deceased shall be entitled to administer "only when they are entitled to succeed to his personal estate, or some portion thereof," brothers of the decedent are entitled to administration only when they are entitled to "succeed" to the estate, or some portion thereof, in the sense in which that word is used in the statutes respecting the descent of or succession to property. Thus where they take personal property by devise and bequest under a will, they do not "succeed" to it. The statute contemplates only cases where a person dies intestate, and when a party takes personal property by succession: *Estate of Wakefield*, 136 Cal. 110, 112; 68 Pac. Rep. 499.

(4) **Statement of facts.** The application for letters of administration must be in writing, signed by the applicant, and must state the facts essential to give the court jurisdiction of the case. Jurisdictional facts are the death and the residence of the deceased: *Beckett v. Selover*, 7 Cal. 215, 233; 68 Am. Dec. 237; *Estate of Griffith*, 84 Cal. 107, 110; 23 Pac. Rep. 528; 24 Pac. Rep. 381. The death of the deceased and his last residence must be alleged in the petition: *Beckett v. Selover*, 7 Cal. 215, 233; 68 Am. Dec. 237; *Haynes v. Meeks*, 10 Cal. 110, 118; 70 Am. Dec. 703. These are foundational facts, upon which all the subsequent proceedings of the court must rest: *Haynes v. Meeks*, 10 Cal. 110, 118; 70 Am. Dec. 703. There can be no valid administration upon the estate of a living person: *Stevenson v. Superior Court*, 62 Cal. 60, 61. It is also necessary for the petition to allege the existence of those matters concerning which

no presumption of law can be indulged. There is no presumption that a petitioner for letters of administration is a resident of the state, or that he is of any particular age. As to these matters, it is therefore necessary to allege and prove them. But where the presumptions are in favor of the petitioner, and against the existence of any of the other disqualifications, it is neither necessary to allege matters in aid of such presumptions, nor does the law cast upon the petitioner the burden of proving them: *Estate of Gordon*, 142 Cal. 125, 131; 75 Pac. Rep. 672. The petition for letters of administration need not set forth the fact that there are no other applications for letters pending: *In re Long's Estate*, 39 Wash. 557; 81 Pac. Rep. 1007, 1008. On application for letters of administration, the amount and the value of the estate are not jurisdictional facts: *Lucas v. Todd*, 28 Cal. 182, 186.

(5) **Sufficiency of petition.** An application to procure letters of administration on the estate of a decedent is a pleading, and the rules in regard to admissions in pleading apply to it: *Duff v. Duff*, 71 Cal. 513, 522; 12 Pac. Rep. 570. As the application or petition must state the facts essential to give jurisdiction, it may in some cases be necessary to state that the deceased left property in the county in which the application is made; but it is sufficient that the value and character of the property, when known to the applicant, be stated, where the statute requires no further statement regarding the property. Neither, in such a case, need the real property belonging to or claimed by the estate of a decedent be described in the petition for letters of administration: *Duff v. Duff*, 71 Cal. 513, 521; 12 Pac. Rep. 570. The amount and the value of the estate are not jurisdictional facts: *Lucas v. Todd*, 28 Cal. 182, 186. No precise form of petition for letters of administration is prescribed by the statute, and though it is always safe to follow the words of the statute literally, yet it is not absolutely necessary, but equivalent words will answer: *Beckett v. Selover*, 7 Cal. 215, 233; 68 Am. Dec. 237. Thus it is sufficient, in describing the residence of the deceased, to say that he was "late a resident of" a designated county. While this does not follow the exact language of the statute, yet the term "late" seems to be fully as strong as the words of the statute, and, from the connection in which it is found, the evident meaning is that the deceased was last a resident of the county named: *Beckett v. Selover*, 7 Cal. 215, 233; 68 Am. Dec. 237; and see *Townsend v. Gordon*, 19 Cal. 188, 206. Where a person has not been heard from for many years, and is presumed to be dead, it is sufficient, as to his residence at the time of his disappearance, to allege, in a petition for letters of administration, that he was "heretofore a resident of the above-named county and territory," and that he mysteriously disappeared some time during a designated month of a particular year, and more than seven years ago: *Scott v. McNeal*, 5 Wash. 309; 31 Pac. Rep. 873. It

is also good practice to state in the petition all facts upon which petitioner relies to entitle him to letters in preference to other persons: *Lucas v. Todd*, 28 Cal. 182, 186. But, while it is true that a person is not entitled to letters of administration, who comes within any of the disqualifications prescribed by the statute, yet it is only necessary for a petitioner to allege in his petition the existence of matters concerning which no presumption of law is indulged in his favor: *Estate of Gordon*, 142 Cal. 125; 75 Pac. Rep. 672, 674.

(6) **To be granted in what court and county.** Letters of administration must be issued in the county of last residence; that is, in the county in which the decedent died: *Beckett v. Selover*, 7 Cal. 215, 233; 68 Am. Dec. 237. If a petition for letters of administration has been filed in one county, in which the existence of property therein is alleged, the superior court of another county, while such proceeding is pending in the former county, has no right to assume jurisdiction for the purpose of granting letters of administration in the latter county: *Dungan v. Superior Court*, 149 Cal. 98; 84 Pac. Rep. 767, 769. But the appointment of a special administrator in one county does not preclude the probate court of another county, in which application for general letters of administration is first filed, from taking jurisdiction for the purposes of general administration: *Estate of Damke*, 133 Cal. 433, 435; 65 Pac. Rep. 888. If, under one statute, the public administrator, as to temporary care of the estate, stands ahead of all other classes of persons named in the statute prescribing the order in which administration shall be granted, if the judge chooses to put the estate into his hands, but does not direct the public administrator to take charge of the estate, which he may properly refuse to do, then the public administrator is disposed of in the premises, and the judge must go on to appoint a special administrator other than the public administrator from the classes of persons named in the statute prescribing the order in which administration shall be granted, and may appoint such special administrator from persons other than the public administrator, although the public administrator appears in the list of persons who are entitled, in a certain order, to letters of administration: *State v. Judge of Second Dist. Court*, 10 Mont. 401; 25 Pac. Rep. 1053, 1055. When the petition for letters of administration is based upon the statutory right to administer, the statute prescribing the order in which letters of administration shall be granted applies, and if the petitioner is not incompetent by reason of some statutory disqualification, the court has no discretion to deny his application. The right of a competent relative is absolute: *Estate of Li Po Tai*, 108 Cal. 484, 488; 41 Pac. Rep. 486; 39 Pac. Rep. 30.

6. Order of appointment. The California statute which prescribes the order in which administration shall be granted simply designates

by classes, generally, who are entitled to administer, and prescribes the preferential order in which the classes are so entitled, but it makes no distinction among members of a class on account of minority. Another statute of the state, however, makes minority a general and absolute disqualification in all cases and as to all classes, except so far as it has removed the disability of a minor, and placed him, through his guardian, in the same category as if the minority did not exist. Under such statute, a minor cannot serve as an administrator, but his guardian, as his representative, may. Hence the court may appoint the guardian of a minor brother of the deceased as administrator, whose appointment is desired by two adult brothers, to the exclusion of a third adult brother: *Estate of Turner*, 143 Cal. 438, 441; 77 Pac. Rep. 144. The granting of letters of administration out of the order provided for in the statute is erroneous, but not a nullity: *Ramp v. McDaniel*, 12 Or. 108; 6 Pac. Rep. 456, 460. Any other of the "next of kin," in a statute regulating the right to administer upon the estates of deceased persons, "who would be entitled to share in the distribution of the estate," must be construed to mean the next of kin capable of inheriting, or who would be entitled to distribution if there were no nearer kindred: *Anderson v. Potter*, 5 Cal. 63. Section 1365 of the Code of Civil Procedure of California, prescribing the order in which certain persons are entitled to administer, has been so amended as to apply to the relatives of the previously deceased spouse of decedent, "when entitled to succeed to some portion of the estate." Prior to such amendment, the section applied only to the relatives of the deceased. Under this section, the brothers are fourth in order of precedence, and the next of kin are seventh; and as the amended section applies equally "to the relatives of the previously deceased spouse of the decedent," the order of precedence must necessarily so apply. The order prescribed by the statute must therefore be followed, and this gives the brothers precedence of the next of kin, whether they be "relatives" of decedent or of the deceased spouse: *Estate of Hill*, 6 Cal. App. Dec. 753, 754 (May 27, 1908).

7. **Who are entitled to letters.** The term "relatives," as used in the statute prescribing the order in which letters of administration shall be granted, is employed in its generic sense, so as to include expressly the husband and wife in the same category with the other relatives therein enumerated; and the right of the widow to letters depends upon the fact whether she is entitled to inherit any of her husband's property; if she is not entitled to succeed to any portion of his estate, neither she nor her nominee is entitled to letters of administration: *Estate of Davis*, 106 Cal. 453, 455; 39 Pac. Rep. 756. A widow is not disqualified to act as an administratrix of her husband's estate from the fact that she does not apply for letters of administration therefor

within the time prescribed by statute after the death of her husband. Such a provision is to be construed rather as a rule of evidence than as a positive rule of law, and while the court may appoint others in such a case, yet the widow is not disqualified, and, if appointed, may act: *Ramp v. McDaniel*, 12 Or. 108; 6 Pac. Rep. 456, 461. The marriage of a surviving widow does not prevent her from becoming an administratrix. After the death of the husband or wife, the survivor has the right to marry. Such marriage is not within the contravention of any statute, nor is it against public policy. In the absence of a statutory provision, such marriage does not deprive the party so marrying from the right to hold property, administer upon an estate, or to do any other lawful act. If the husband dies, it is true that the survivor is not the wife of deceased. She could not be the wife of her husband after his death. She is his widow, but she was, during his life, his wife, and as his wife she survived him. When the legislature used the words "surviving husband or wife," it intended to designate the survivor of the spouses, and to give such survivor the right to administer or to name some person to administer: *Estate of Dow*, 132 Cal. 309, 310; 64 Pac. Rep. 402. Under the present California statute, a married woman may be appointed an executrix or administratrix; and if a married woman is appointed an executrix or administratrix, and afterwards marries, her authority is not extinguished. As to former cases concerning the extinguishment of her authority by marriage, see *Schroeder v. Superior Court*, 70 Cal. 343; 11 Pac. Rep. 651; *Estate of Allen*, 78 Cal. 581; 21 Pac. Rep. 426; *McMillan v. Hayward*, 94 Cal. 357; 29 Pac. Rep. 774; *Cosgrove v. Pitman*, 103 Cal. 268; 37 Pac. Rep. 232. A statute which provides that if the person entitled to letters is a minor, letters must be issued to his guardian, or any other person entitled to the letters of administration, in the discretion of the court, applies to minors generally, rather than to a surviving husband or wife under the age of majority, yet old enough to contract the marital relation. As to minors sustaining such marital relationship, the statute giving the right to nominate is special and controls: *In re Steward's Estate*, 18 Mont. 595; 46 Pac. Rep. 806, 807. The brothers of the decedent are entitled to letters of administration only when they are entitled to succeed to the estate, or some portion thereof: *Estate of Wakefield*, 136 Cal. 110, 112; 68 Pac. Rep. 499.

8. Priority. Preference. The widow has a paramount right to letters of administration, where her competency is not disputed: *Estate of Turner*, 142 Cal. 549, 552; 77 Pac. Rep. 1099. The surviving widow, though remarried to another man, has a right to letters, superior to that of the son of a decedent: *Estate of Dow*, 132 Cal. 309, 310; 64 Pac. Rep. 402. Where a section of the code places children of the deceased in the list of persons entitled to administer, but another section thereof provides that, of several persons claiming and

equally entitled to administer, males must be preferred to females, and relatives of the whole to those of the half blood, a son is entitled to letters of administration to the exclusion of a daughter; and letters should be directed to be issued to the son alone: *Estate of Coan*, 132 Cal. 401, 402; 64 Pac. Rep. 691. The assignee of the daughter's interest acquires no greater right in the administration than she had: *Estate of Brundage*, 145 Cal. 538; 75 Pac. Rep. 175. A son who parted with all his rights as the heir of his mother, after her death, and before the death of the father, is not entitled to administer upon his mother's estate in preference to his sister: *Estate of Edson*, 143 Cal. 607, 608; 77 Pac. Rep. 451. An adopted illegitimate daughter is entitled to letters of administration as against a nephew: *Estate of Heaton (Cal.)*, 73 Pac. Rep. 186. A public administrator does not, by virtue of his office, or by filing a petition for letters of administration upon the estate of a decedent, acquire any vested right to letters of administration: *Estate of McLaughlin*, 103 Cal. 429, 430; 37 Pac. Rep. 410. As against the public administrator, the nominee of the father and mother of a deceased person is entitled to letters of administration: *Estate of Bedell*, 97 Cal. 339, 343; 32 Pac. Rep. 323. The public administrator is entitled to letters, in preference to creditors: *Estate of McKinnon*, 64 Cal. 226; 30 Pac. Rep. 437. The public administrator is preferred to one who bases his claim upon the written request of a son of the deceased, who is residing in a foreign country: *Estate of Beech*, 63 Cal. 458. The public administrator has a better right to letters of administration than the nominee of a married daughter of the intestate: *Estate of Kelly*, 57 Cal. 81. As against a relative of the deceased, who is not entitled to share in the distribution of his estate, the public administrator has a preferred right to letters of administration: *Estate of Eggers*, 114 Cal. 464, 466; 46 Pac. Rep. 380; and see *Estate of Healy*, 122 Cal. 162; 54 Pac. Rep. 736; 66 Pac. Rep. 175, 176. As between the public administrator and the nominee of brothers of the decedent, who are not entitled to administer as heirs at law of the deceased, and who are merely devisees of a deceased mother, who is the sole heir at law of a deceased sister, preference in the issuance of letters should be given to the public administrator: *Estate of Wakefield*, 136 Cal. 110, 112; 68 Pac. Rep. 499. Brothers "of the previously deceased spouse of decedent," who are "entitled to succeed to some portion of the estate," are entitled to letters of administration upon decedent's estate, in preference to the nephews of decedent: *Estate of Hill*, 6 Cal. App. Dec. 753, 755 (May 27, 1908).

9. Right to nominate. Letters to others than those entitled.

(1) **In general.** A surviving husband or wife is always interested in the estate, and, generally, immediately dependent upon it, and the policy of the law plainly is, that he or she shall have the administra-

tive control, if desired. Therefore such person, or his nominee, if a fit person, and not incompetent, has the absolute right to letters of administration. Special provision is made for the appointment of the nominee by the surviving husband or wife, irrespective of whether they are themselves entitled to administration, while in other cases it is only the nominee of one who is himself competent to serve that can be considered: *Estate of Dorris*, 93 Cal. 611, 613; 29 Pac. Rep. 244; *Estate of Bedell*, 97 Cal. 339; 32 Pac. Rep. 323. A competent person named by the widow of a deceased person, although she has remarried, is entitled to letters of administration, in preference to a son of the decedent: *Estate of Dow*, 132 Cal. 309; 64 Pac. Rep. 402; see *Estate of Allen*, 78 Cal. 581; 21 Pac. Rep. 426. The fact that a surviving husband has been convicted of a felony does not deprive him of his right to nominate a person to act as administrator of his deceased wife's estate: *McLean v. Roller*, 33 Wash. 166; 73 Pac. Rep. 1123, 1124. A surviving wife may nominate a competent person to act as administrator of her deceased husband's estate, though she herself is disqualified by her minority: *In re Stuart's Estate*, 18 Mont. 595; 46 Pac. Rep. 806. The appointment of a surviving widow as administrator of her husband's estate, after notice and hearing, as provided by statute, is conclusive as to the matters therein adjudged, one of which is that the applicant was the surviving wife, and the order of appointment is therefore conclusive as against a subsequent application of another, who claimed that she was also the surviving wife of the intestate: *Estate of Aldrich*, 147 Cal. 343; 81 Pac. Rep. 1011, 1012. After letters of administration have been granted, upon the original application therefor, to a brother of the deceased, the surviving wife, though she has a prior right to have such letters revoked, and to obtain letters of administration for herself, cannot confer such right of priority upon a nominee. The right to have letters issued to the nominee is the right of the widow, and not of the nominee: *Estate of Shiels*, 120 Cal. 347, 349; 52 Pac. Rep. 808. The mere fact of requesting the appointment of another does not, however, as a matter of law, estop the surviving spouse from revoking his or her request, and consenting that the estate be administered by the administrator then in office, at any time before the court has acted upon such request: *Estate of Shiels*, 120 Cal. 347, 348; 52 Pac. Rep. 808. In general, there is not the same reason for favoring other persons entitled to administer in certain cases as there is with respect to a surviving husband or wife. Some of them may not even be interested in the estate. Hence they are only entitled to nominate, when they are the persons entitled to administer, and then the nomination is submitted to the discretion of the court, which may, if there is good reason for so doing, refuse to confirm the nominee, and appoint the person next entitled: *Estate of Dorris*, 93 Cal. 611, 613; 29 Pac. Rep. 244. The right of persons entitled to administer on an estate to

have, upon their written request, letters of administration issued to persons not entitled to administer, exists only where there is a vacancy in the administration: *Estate of Carr*, 25 Cal. 585, 586; *Estate of Healy*, 122 Cal. 162; 54 Pac. Rep. 736; 66 Pac. Rep. 175, 176. The object of the statute is to allow to those entitled the aid and assistance of others who may be more competent to attend to such business: *Estate of Kirtlan*, 16 Cal. 161, 165. In cases other than that of a surviving spouse, it is only the nominee of one who is himself competent to serve as administrator who can be considered: *Estate of Bedell*, 97 Cal. 339; 32 Pac. Rep. 323. The nominee of the father and mother of a decedent is entitled to letters of administration, in preference to the public administrator. The nominee of any person entitled to administration upon an estate has a preferred right to the administration over a person belonging to any subsequent class mentioned in the statute prescribing the order in which letters of administration shall be granted: *Estate of Bedell*, 97 Cal. 339, 341; 32 Pac. Rep. 323. Nephews and nieces of the decedent do not have the absolute right of nomination and revocation of letters secured to the first five classes enumerated in the statute prescribing the order in which letters of administration should be granted. The rights of their nominee are secured only by another statute, under which his appointment by the court is discretionary: *Estate of Healy*, 122 Cal. 162, 166; 54 Pac. Rep. 736; 66 Pac. Rep. 175, 176. The surviving husband or wife of a deceased person is entitled to nominate a suitable person for administrator: *In re Stevenson*, 72 Cal. 164, 165; 13 Pac. Rep. 404; *Estate of Cotter*, 54 Cal. 215, 217.

(2) **Non-residents.** A resident son of the deceased, competent to act as administrator of the estate with the will annexed, is entitled to letters as against the nominee of a non-resident executor and of non-resident children, heirs, and legatees of the deceased person: *Estate of Brundage*, 141 Cal. 538, 540; 75 Pac. Rep. 175. The public administrator has the prior right to letters of administration with the will annexed as against the appointee of a foreign executor, who has renounced his right to letters testamentary, and who is not the surviving husband or wife of the deceased: *Estate of Garber*, 74 Cal. 338; 16 Pac. Rep. 233. Upon the principle that if parties who are entitled to the estate are not in a position to administer it themselves, then the trust should be committed to their nominee, who has their confidence, and whose services are to be paid for from their funds, it is the duty of the court to appoint the nominee of an alien relative, instead of appointing a creditor of the deceased, where such alien relative requests the appointment of a certain person, and no nearer relative makes such application: *In re Owens' Estate*, 30 Utah, 351; 85 Pac. Rep. 277, 279. If a non-resident is incapable of administering on an estate, it is not competent for him to nominate an

administrator: *Estate of Muersing*, 103 Cal. 585; 37 Pac. Rep. 520. The public administrator is preferred to the nominee of a non-resident heir: *Estate of Beech*, 63 Cal. 458; *Hutchings v. Clark*, 64 Cal. 228; 30 Pac. Rep. 804. A resident of the state, whose appointment as administrator is requested by the brothers and sisters of the deceased, residing in a foreign country, should receive letters of administration, instead of the public administrator: *In re Watson's Estate*, 31 Mont. 438; 78 Pac. Rep. 702, 703. The surviving husband or wife of a deceased person, though incompetent to serve on account of non-residence, is, nevertheless, entitled to nominate a suitable person for administrator. The fact that, by reason of non-residence, a surviving spouse cannot act in the capacity of administrator does not deprive him or her of the right to name some one who can: *Estate of Cotter*, 54 Cal. 215, 217; *Estate of Stevenson*, 72 Cal. 164; 13 Pac. Rep. 404; *Estate of Dorris*, 93 Cal. 611, 613; 29 Pac. Rep. 244. If the person making the written request is not himself "entitled" to administration, either because incompetent or because another applicant with a better claim is entitled, the nominee cannot be considered by the court. Thus a non-resident executor, while entitled to letters testamentary upon application, is not entitled to letters of administration, and his written request therefor is ineffectual for any purpose. So where non-resident children, heirs and legatees, are incompetent, by reason of their non-residence, they are not entitled to letters of administration, and their request to have an administrator appointed is also ineffectual for any purpose: *Estate of Brundage*, 141 Cal. 538; 75 Pac. Rep. 175, 176. The petition of a distributee, who is legally incapable of administering upon the estate, is addressed to the mere discretion of the court, and is of no legal consequence whatever: *Estate of Morgan*, 53 Cal. 243, 245. A non-resident father, though the next of kin of the decedent, is incompetent to nominate an administrator. Being incompetent himself of administering, it is not competent for him to nominate an administrator: *Estate of Muersing*, 103 Cal. 583; 37 Pac. Rep. 520, 521. Unless a person is a bona fide resident of the state, he is not competent to serve as administrator. He may, however, if incompetent by non-residence only, request the appointment of a resident, and letters may be issued to such resident; but if such resident wishes to take advantage of the statute which provides that no person other than the surviving husband or wife, child, father, mother, brother, or sister of the intestate may subsequently obtain the revocation of letters, for the reason that he or she is better entitled to them, and seeks to have letters already granted revoked, and himself appointed as administrator, he must make it appear that at least one of the heirs and next of kin who requested him to obtain the revocation of the administrator's letters, and asks letters for himself, is the widow, child, father, mother, brother, or sister of the decedent. If he fails to do this,

he does not bring himself within the statute which confers the right to revoke letters already issued, upon the ground that those nominating him are better entitled to administer than is the administrator: *In re Craigie's Estate*, 24 Mont. 37; 60 Pac. Rep. 495, 497.

10. **Letters where several are equally entitled.** If all parties applying for letters of administration are equally qualified and competent, the one who has the prior right, as a matter of statutory construction, is entitled to the appointment: *In re Nickals' Estate*, 21 Nev. 462; 34 Pac. Rep. 250. Thus a brother and a sister of the deceased are not equally entitled to administration, and the son alone should be appointed: *Estate of Coan*, 132 Cal. 401, 403; 64 Pac. Rep. 691.

11. **Discretion of court.** If all the parties applying for letters of administration are equally qualified and competent, the court has no discretion, but must appoint the applicant who, under the statute, has the prior right: *In re Nickals' Estate*, 21 Nev. 462; 34 Pac. Rep. 250, 251; *Estate of Coan*, 132 Cal. 401; 64 Pac. Rep. 691; *Estate of McDonald*, 118 Cal. 277; 50 Pac. Rep. 399; *Estate of Brundage*, 141 Cal. 538; 75 Pac. Rep. 175. Under a statute which provides that "administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court," the court has a discretionary power to grant administration to any competent person who otherwise would not be entitled thereto at the written request of a person who would be so entitled. The only conditions necessary for invoking the discretion of the court are, that there be a written request from some one who, if he applied, would himself be entitled to receive letters of administration, and that the person for whom the request is made be a competent person: *Estate of Bedell*, 97 Cal. 339, 342; 32 Pac. Rep. 323; *Estate of Dorris*, 93 Cal. 611, 613; 29 Pac. Rep. 244. The court has discretion to appoint the guardian of a minor brother of decedent as administrator, who is a nominee of two adult brothers, to the exclusion of a third adult brother: *Estate of Turner*, 143 Cal. 438, 444; 77 Pac. Rep. 144. The Nevada statute, providing that letters of administration shall issue to the guardian of a minor instead of the minor himself, refers to the guardian appointed in that state, and not to one appointed in another state: *In re Nickals' Estate*, 21 Nev. 462; 34 Pac. Rep. 250. A public administrator, by filing a petition for letters of administration upon the estate of a decedent, acquires no such vested right to letters upon the estate as will justify him in interfering with the power of the court to exercise its discretion in granting letters to the guardian of a competent person: *In re McLaughlin*, 103 Cal. 429, 431; 37 Pac. Rep. 410. An exercise of the court's discretion in refusing to appoint the nominee of nieces and

nephews of a decedent, and in appointing the public administrator, who is next entitled, on the ground that it would be for the best interests of the estate that the public administrator shall be appointed, will not be disturbed on appeal, where no abuse of discretion is shown: *Estate of Healy*, 122 Cal. 162, 166; 54 Pac. Rep. 736; 66 Pac. Rep. 175, 176. The words, "letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court," employed in a statute dealing with the right of a minor to apply, through his guardian, for letters, are construed as limiting the discretion to other persons of the same class to which the minor would belong if he were an adult, and not as conferring discretion to appoint a person of an inferior class in preference to his guardian: *Estate of Turner*, 143 Cal. 438, 442; 77 Pac. Rep. 144. A recommendation that a party be appointed administrator of an estate is addressed to the mere discretion of the court, and is of no legal consequence whatever, where he is legally incapable of receiving the appointment: *Estate of Morgan*, 53 Cal. 243, 245. Although a person may be estopped from making any claim to letters of administration, yet the court has power, upon removing an administrator for neglect, mismanagement, or incompetency, to grant letters to the person so estopped: *Estate of Pico*, 56 Cal. 413, 420.

12. Notice and hearing. Upon an application for letters of administration, the jurisdictional facts must exist and proper notice be given. A failure to give notice of hearing of the petition for letters of administration is fatal to the jurisdiction of the court: *Beckett v. Selover*, 7 Cal. 215, 237; 68 Am. Dec. 237. But it is not necessary to give any other notice of the application than that prescribed by the statute: *Estate of Griffith*, 84 Cal. 107, 109; 23 Pac. Rep. 528; 24 Pac. Rep. 381. Where the law merely requires that a certain notice shall be posted, the posting of such notice is sufficient. Thus if a public administrator of one county applies for letters of administration, it is not necessary to send notice to the public administrator of any other county: *Estate of Griffith*, 84 Cal. 107, 109; 23 Pac. Rep. 528; 24 Pac. Rep. 381. A petition and notice, and a finding that due notice of the hearing had been posted in three public places, as required by the statute, is sufficient to give the probate court jurisdiction, although it was not shown where such notices were posted: *Scott v. McNeal*, 5 Wash. 309; 31 Pac. Rep. 873, 874. A notice of the hearing of a petition for letters of administration, posted on July 12th, and giving notice of the hearing on July 22d, is sufficient as a ten-day notice, under the statute: *Bates v. Howard*, 105 Cal. 173, 182; 38 Pac. Rep. 715. If a widow files a petition for letters of administration, and it and other petitions for letters have been set for hearing on a certain date, and the widow subsequently files an amended petition, but which states no jurisdictional fact, and the widow consents to the hearing, a court may, where all contesting parties are in court, hear all the

petitions at the time fixed: *Estate of Turner*, 142 Cal. 549, 553; 77 Pac. Rep. 1099. Under a statute which authorizes the precise manner of giving notice, and prescribing a longer notice than ten days, the court does not acquire any jurisdiction, where it was required that the notice of an application for the appointment of an administrator be published in two issues of a newspaper for a period of at least a week prior to September 28th, and by mailing a copy of the notice to the heirs, and the notice was first published on September 20th, and the second and last insertion was on September 27th, being the date prior to the time set for the hearing, and no notice was mailed. This is not a compliance nor a substantial compliance with the order of the court directing the "precise manner" in which the notice should be given. The order providing that the publication should be for a period of at least one week prior to the hearing was not complied with: *In re Bunting's Estate (Utah)*, 84 Pac. Rep. 109, 111. It is a well-established rule of law that the domicile or permanent residence of a minor is the same as that of a parent, and, upon an application for letters of administration, the presumption is, that the minor children and heirs of a deceased person were residents of the place of decedent's residence at the time of his death: *In re Bunting's Estate (Utah)*, 84 Pac. Rep. 109, 111. If an application or petition has been made to a court for the appointment of an administrator, the court to which the petition or application is presented must assume jurisdiction thereof, through its designated officer, the clerk of the court, by appointing a time "for the hearing of the application" and giving the prescribed notice: *Dungan v. Superior Court*, 149 Cal. 98; 84 Pac. Rep. 767, 769.

13. Contest of application.

(1) **In general.** There is a distinction between proceedings in contests against the probate of wills and an application for letters of administration. In the former case the contestant is the plaintiff and the petitioner is the defendant; but on an application for letters of administration the grounds of opposition to the petition are nothing more than an answer, to which no replication is required: *Estate of Wooten*, 56 Cal. 322, 325. It is not necessary that the contestant of a petition for letters of administration shall be competent to assert the right to administer himself, or that he be entitled to nominate the appointee: *Estate of Graves*, 6 Cal. App. Dec. 716, 718 (May 15, 1908). In a contest for letters of administration, the question as to whether a person is a bona fide resident of the state or not, is a mixed question of law and fact, to be determined by the court: *Estate of Wied*, 120 Cal. 634, 638; 53 Pac. Rep. 30. Under a constitutional provision that the right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy, parties who petition for letters of administration are not entitled to a jury

trial, as such a petition is not a "case at law," as that term is understood and construed by the courts: *In re McClellan's Estate* (S. D.), 107 N. W. Rep. 681, 684. For various questions of evidence in proceedings for the appointment of an administrator, see *In re McClellan's Estate* (S. D.), 107 N. W. Rep. 681; 111 N. W. Rep. 540.

REFERENCES.

Power of court to appoint co-administrator against consent of persons entitled to administration: See note 4 Am. & Eng. Ann. Cas. 550.

(2) **What questions are involved.** Questions of heirship and degree of kinship are necessarily involved in every contest between relatives for letters of administration, and if, in such contests, the trial court erroneously holds that the particular facts are relevant and pertinent to the main inquiry, either as a matter of pleading or proof, such ruling amounts to no more than to a mere error reviewable and correctable through the ordinary remedy of appeal. Hence, upon rival applications for letters of administration, a writ of prohibition will not lie to prevent a court, which has acquired jurisdiction, from admitting evidence as to such questions: *Johnston v. Superior Court*, 4 Cal. App. 90; 87 Pac. Rep. 211, 212.

(3) **Who may appear and contest.** On the application of a nephew for letters of administration, persons entitled to be preferred may appear and contest the application, or assert their own rights on that ground: *Lucas v. Todd*, 28 Cal. 182, 186. The objection that one could not have been legally appointed administrator for the reason that forty days had not elapsed since the decedent's death, during which period a preference right is given to certain heirs and next of kin, cannot be raised by one who does not claim to belong to any of the classes for whom such preference right is given: *In re Long's Estate*, 39 Wash. 557; 81 Pac. Rep. 1007, 1008. In a contest between the public administrator and a creditor of an estate as to which shall administer, the court has discretionary power to appoint the public administrator, if his appointment is requested by the other creditors: *Estate of Doak*, 46 Cal. 573, 574. In a contest for letters of administration, the public administrator is a "person interested," and may appear and contest the appointment of another petitioner. Any one asserting a right to administer may appear in such a contest. This is a different "interest" from that which is contemplated in the statute concerning contests of wills: *Estate of Healy*, 122 Cal. 162, 163; 54 Pac. Rep. 736; 66 Pac. Rep. 175, 176. But a public administrator, who has been illegally appointed in one county, is not a party in interest entitled to oppose the appointment of an administrator in another county, in which jurisdiction has already attached. He is not himself an applicant for letters in the latter county, but is merely

opposing any action by the court. In such a case he is not himself seeking an appointment, and is not therefore affected by the grant of letters of administration to any one else: *Estate of Davis* (Cal.), 87 Pac. Rep. 17, 18.

(4) Allegations. Proof. Presumption. One who contests the competency of a petitioner for letters of administration must allege and prove facts showing that petitioner is incompetent to act. All that the petitioner is required to show, in order to establish his right to letters, is, that he is an heir at law. On showing that he is a resident, and of the age of majority, in addition to his right, his competency is established. As to these matters the law raises no presumption, and they must be established by proof; but as to the existence of any other matters which might disqualify the petitioner, the law does raise a presumption, in his favor, of their non-existence. Hence any person who contests the petitioner's right on the ground of the incompetency of the applicant must allege his grounds of incompetency, and necessarily the burden of proof is upon him to establish his allegations in that respect. A finding of the court, in a contest for the issuance of letters of administration, as to matters which are outside of the issues, such as improvidence, lack of capacity, or understanding of the petitioner, is unwarranted: *Estate of Gordon*, 142 Cal. 125, 132; 75 Pac. Rep. 672. In a contest for letters of administration, it is the duty of the court to ascertain and determine which of the two parties petitioning is entitled to letters of administration, and, as such, it has power, and it is its duty, to decide and pass upon all questions necessary to be decided in order to reach a proper conclusion upon the ultimate issue to be determined: *Estate of Warner* (Cal. App.), 92 Pac. Rep. 191, 193.

14. Waiver of right. Delay. The right to letters of administration, as well as any other right, may be waived in favor of a competent person, and where such waiver has been made, the party making it is estopped from afterwards withdrawing his assent and waiver, or renunciation: *Estate of Kirtlan*, 16 Cal. 161, 165; *Estate of Keane*, 56 Cal. 407, 409; but a surviving widow of the deceased is not estopped from revoking her request to have another appointed, and consenting to the continuance in office of an acting administrator at any time before the court has acted upon her request: *Estate of Shields*, 120 Cal. 347, 348; 52 Pac. Rep. 808. Where a person is entitled to letters of administration, a written request by him for the appointment of a nominee is a waiver and relinquishment of his right to administration in favor of the nominee, and is not rendered ineffective by his subsequent request for the appointment of the public administrator. Having once waived and relinquished his right to administration in favor of another, the court is not required to pay attention to the subsequent request: *Estate of Bedell*, 97 Cal. 339,

343; 32 Pac. Rep. 323. Under statutes giving to certain persons the preference right to letters of administration, and limiting the time within which such preferred persons may apply, it is generally held that such preference is lost by failure to apply within the time fixed by the statute: *Rice v. Tilton*, 13 Wyo. 420; 80 Pac. Rep. 828, 832; *McLean v. Roller*, 33 Wash. 166; 73 Pac. Rep. 1123; *In re Sutton's Estate*, 31 Wash. 340; 71 Pac. Rep. 1012. Thus the preference to letters testamentary, given to persons named as executors in the will, is forfeited by their failure to apply for the probate of the will, or for letters testamentary within the time fixed by the statute: *Rice v. Tilton*, 13 Wyo. 420; 80 Pac. Rep. 828, 832. They are not rendered incompetent by the delay, but simply lose their preference right; and unless they come into the state within a reasonable time, and submit themselves to the jurisdiction of the court, and personally conduct the settlement of the estate, the court, in its discretion, may appoint any other competent person to act: *Rice v. Tilton*, 13 Wyo. 420; 80 Pac. Rep. 828, 832. So where the nominee of a surviving husband fails to present his application for letters of administration until after the expiration of forty days from the intestate's death, his laches is a waiver of the appointee's right, and the court may appoint any suitable person, in its discretion, to administer the estate: *McLean v. Roller*, 33 Wash. 166; 73 Pac. Rep. 1123, 1124; and the same is true where a husband neglected, for nearly three years after the death of his wife, to petition for his appointment as administrator of her estate: *In re Sutton's Estate*, 31 Wash. 340; 71 Pac. Rep. 1012. A creditor waives his right to administer upon the estate of his deceased debtor, where he has no other interest in the estate than that of creditor, by agreeing to wait for payment for a few weeks, at the expiration of which time the heirs are to pay his bills: *In re Farnham's Estate*, 41 Wash. 570; 84 Pac. Rep. 602, 603. Under the statute of Idaho, if application for administration of the estate of an intestate is not made within four years from the date the applicant's right accrues to make such application, the statute of limitations is a bar to such appointment, if properly pleaded in the proceeding for such appointment: *Gwinn v. Melvin*, 9 Ida. 202; 72 Pac. Rep. 961, 962. Under the provisions of the statutes of Kansas, a creditor of decedent, having a claim which he wishes to establish against the estate, may, if the widow or next of kin refuse to take out letters of administration, obtain letters for himself or for other persons after fifty days from the death of decedent; and he cannot, without any good cause or reason therefor, defer making such application until the statute of limitations has run, and then claim that during all of the time from the death of the debtor to the appointment of the administrator the statute of limitations is suspended on account of the non-appointment of such administrator. If a creditor would save his claim against the estate of a decedent from the bar of the statute, he must exercise reasonable diligence, if the widow or next of kin refuse to take out letters of administration, to obtain letters of

administration for himself or some other person: *Bauserman v. Charlott*, 46 Kan. 480; 26 Pac. Rep. 1051, 1052.

15. Validity of appointment and letters. There cannot be two administrations on the same estate, in the same state, at the same time. Hence the appointment of a new administrator while another one is in office is a nullity: *Haynes v. Meeks*, 20 Cal. 288; *Estate of Hamilton*, 34 Cal. 464. The existence of an administrator in one county precludes the appointment of an administrator of the same estate in another county: *Oh Chow v. Brockway*, 21 Or. 440; 28 Pac. Rep. 384; *Estate of Griffith*, 84 Cal. 107; 23 Pac. Rep. 528. Jurisdiction to appoint a special administrator over the estate does not empower the court to appoint a general administrator: *Estate of Damke*, 133 Cal. 430, 432; 65 Pac. Rep. 889. Letters of administration granted to a minor are not void, nor will the removal of the administratrix from the state operate, ipso facto, as a revocation of the letters. Neither the fact of minority nor of her removal will constitute a defense in an action prosecuted by her as administratrix: *Missouri etc. Ry. Co. v. McWherter*, 59 Kan. 345; 53 Pac. Rep. 135. Where a brother of decedent has been appointed administrator of his estate, but afterwards becomes insane, and is sent to the asylum, such fact does not create an entire vacancy in the administration of the estate. The administrator becomes incapable of executing the trust for the time being, and if, during that time, the widow of a deceased petitions for letters, she would doubtless receive them; but when the incapacity of the administrator is removed by a certificate of discharge from the asylum, and he has again entered upon the discharge of his duties as administrator, and has been recognized by the court and others, the petition of the widow for letters comes too late: *Estate of Moore*, 68 Cal. 281, 284; 9 Pac. Rep. 164. Although the probate court does not have jurisdiction to set aside an order discharging an administrator after the lapse of the term in which the order was entered, yet a petition to administer upon unadministered assets of the estate gives the court jurisdiction to order an administration and distribution of the same: *Otero v. Otero* (Ariz.), 90 Pac. Rep. 601, 603. If letters of administration are issued in one county, and application for them is also made in another county, the court of the latter county should hold the proceedings before it in abeyance until the question of conflict of jurisdiction between them is settled by the judgment of the court which first acquired jurisdiction over the administration of the estate: *Estate of Damke*, 133 Cal. 430; 65 Pac. Rep. 889; *Dungan v. Superior Court*, 149 Cal. 98; 84 Pac. Rep. 767. Between courts of co-equal authority, that one which first obtains jurisdiction will be permitted to pursue it to the end, to the exclusion of all others, and it will not permit its jurisdiction to be impaired or subverted by a resort to some other tribunal: *Ewing v. Mallison*, 65 Kan. 484; 70 Pac. Rep. 369, 370. The appointment of an administrator, though

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erroneous, is not necessarily void: In re Owen's Estate (Utah), 91 Pac. Rep. 283, 285. The order of a court appointing an administrator, which order recites that proof of notice was made, though in fact it was made without the mailing of notice to the executor named in the will, as required by statute, is merely voidable, and will be presumed valid until set aside in a direct proceeding for that purpose: Rice v. Tilton, 14 Wyo. 101; 82 Pac. Rep. 577, 579. If a blank form is used in petitioning for letters of administration, but a blank space is left where the name of the decedent should be, in the allegation as to his death, such omission is not fatal, where the meaning of the petition is apparent from other parts thereof: Ma-goon v. Ami, 8 Haw. 191, 193. Where the statute authorizes the grant of administration to one or more of several classes of persons, and an administratrix is duly appointed, and an administrator executes a bond and takes the prescribed oath of office as such administrator, and is recognized throughout the proceedings as one of the administrators of the estate, the acts of the administratrix, as such, are good in any event, and the fact that the administrator acted with her, though no petition for his appointment may have been filed and no notice given, could not have the effect of rendering her acts, as such administratrix, without jurisdiction: Blackman v. Mulhall (S. D.), 104 N. W. Rep. 250, 254. Letters of administration which are dated and issued by the clerk on Christmas Day are not void: Glendenning v. McNutt, 1 Ida. 592.

REFERENCES.

Letters of administration are void for want of jurisdiction when: See note 33 Am. Dec. 239-243. Appointment of administrator de bonis non after final settlement of estate: See note 5 Am. & Eng. Ann. Cas. 497.

16. Collateral attack. The action of a probate court in appointing an administrator and issuing letters of administration is judicial in its nature, and is not open to collateral attack, unless the court acted without jurisdiction: Ewing v. Mallison, 65 Kan. 484; 70 Pac. Rep. 369. When letters of administration are issued, such letters will be held to be prima facie evidence of all facts necessary for the validity of such letters. Letters of administration can be attacked collaterally only when the probate court, for some reason, has no jurisdiction to make the appointment: Ewing v. Mallison, 65 Kan. 484; 70 Pac. Rep. 369, 371. Every presumption, not upset by the record itself, is to be indulged in support of the regularity and validity of the order appointing an administrator. This presumption of regularity applies alike to the orders and decrees of the probate courts, as well as to proceedings of courts of general jurisdiction: McKenna v. Cosgrove, 41 Wash. 332; 83 Pac. Rep. 240. It is clear that an order granting letters of special administration cannot be held void in a collateral proceeding because it does not show the removal,

suspension, or resignation of the prior administrator. In addition to the general presumption of regularity attaching to the orders of the court, the statute expressly dispenses with the necessity of a showing of facts essential to jurisdiction by recital in the order or decree. And, in the absence of a showing to the contrary, it must be presumed that the facts existed authorizing the court to appoint the special administrator: *Lethbridge v. Lauder*, 13 Wyo. 9; 76 Pac. Rep. 682, 685. A decree appointing an administrator is a judicial determination of that matter, subject only to be reversed, set aside, or modified on appeal, and cannot be collaterally attacked on the ground that he did not give a bond in twice the value of the personal property of the estate, as required by the statute: *Abrook v. Ellis* (Cal. App.), 92 Pac. Rep. 396, 398. Neither can the authority of an administrator be attacked in a collateral proceeding because his oath was not taken until after the letters were issued, and was then taken before a notary public, particularly where the statutory oath was taken before the proper officer prior to trial: *Gallagher v. Holland*, 20 Nev. 164; 18 Pac. Rep. 834, 835. Nor can the validity of his appointment be attacked collaterally because of irregular service of the notice of the hearing of the application for letters: *Chilton v. Union Pac. Ry. Co.*, 8 Utah, 47; 29 Pac. Rep. 963. In a collateral attack upon the appointment of an administrator, it may be presumed that a petition was in fact filed and notice given, where it does not affirmatively appear that no petition for the appointment was filed and that no notice was given: *Blackman v. Mulhall* (S. D.), 104 N. W. Rep. 250, 254. It is generally held that an order by the proper court granting letters testamentary or of administration without the statutory notice will not make the order void ab initio, but that such defect is an irregularity merely, for which the letters may be revoked; and the order is not subject to collateral attack: *Rice v. Tilton*, 14 Wyo. 101; 82 Pac. Rep. 577, 579. The general rule is, that, as between courts of concurrent and co-ordinate jurisdiction, the court that first obtains possession of the controversy must be allowed to dispose of it without interference from the co-ordinate court: *Ewing v. Mallison*, 65 Kan. 484; 70 Pac. Rep. 369, 371. The determination of a court as to the residence of the deceased in the county where the application is made, although it may be erroneous, is immune against a collateral attack: *Estate of Griffith*, 84 Cal. 107, 110; 23 Pac. Rep. 528; 24 Pac. Rep. 381. But the place of residence, like the question of death, or the existence of an estate to be administered, is a jurisdictional fact, and it is not concluded by the decision of the court that such fact does exist, but it may be inquired into in a proper collateral proceeding for the purpose of showing want of jurisdiction in the court making the determination: *Ewing v. Mallison*, 65 Kan. 484; 70 Pac. Rep. 369, 372. Of course, where there is a want of jurisdiction, the appointment of an administrator of an estate is subject to collateral attack. The probate court of a county has

no jurisdiction over the estate of a deceased resident to appoint an executor or administrator, unless the deceased was, at the time of his death, an inhabitant or resident of the county in which the appointment was made. Jurisdiction vests in the probate court of the county of the residence of the deceased at the time of his death: *Ewing v. Mallison*, 65 Kan. 484; 70 Pac. Rep. 369, 373.

REFERENCES.

Collateral impeachability of findings as to jurisdictional facts on which administration of a decedent's estate is founded: See note 18 L. R. A. 242-244. Collateral attack on decree granting letters testamentary or of administration: See note 4 Am. & Eng. Ann. Cas. 1117.

17. Order granting letters. Effect of. Immediately upon the issuance of letters of administration, the administrator is entitled to have the possession of the estate of deceased, to the end that the rents and profits, and if need be, the proceeds of the property itself, be applied to the payment of debts and charges, and the balance, if any, distributed, and by him delivered to the parties entitled. The grant of letters by the probate court is conclusive upon other courts as to the necessity of administration: *Page v. Tucker*, 54 Cal. 121, 123. An order appointing an administrator, based upon a petition which states jurisdictional facts, is an adjudication that such facts existed: *Estate of Griffith*, 84 Cal. 107, 109; 23 Pac. Rep. 528; 24 Pac. Rep. 381. Letters of administration are prima facie proof of the death of decedent: *Brown v. Elwell*, 17 Wash. 442; 49 Pac. Rep. 1068, 1069. A surety on an executor's bond is estopped to deny the order appointing the executor, where the bond contains a recital that by an order of the probate court, duly made and entered, the person named as executor was appointed executor: *Moore v. Earl*, 91 Cal. 632; 27 Pac. Rep. 1087, 1088.

REFERENCES.

Validation of acts of executor de son tort by subsequent grant to him of letters of administration: See note 5 Am. & Eng. Ann. Cas. 58.

18. Vesting of appointee with office. The order for the appointment of an administrator, the qualification of the appointee, and the issuing of letters to him, are all necessary proceedings to invest such appointee with the office of administrator: *Pryor v. Downey*, 50 Cal. 388, 399; 19 Am. Rep. 656; *Estate of Hamilton*, 34 Cal. 464, 469. In an action against an administrator, the presumption is, after verdict, that the administrator qualified immediately upon receiving his letters: *Aiken v. Coolidge*, 12 Or. 244; 6 Pac. Rep. 712, 714. No person can fill the position of administrator, except after due appointment and qualification. No recognition by the probate court could make one an administrator de facto. The order for the appointment, the qualification of the appointee, and the issuance of letters to

him, are all necessary proceedings to vest such appointee with the office of administrator: *Pryor v. Downey*, 50 Cal. 388, 399; 19 Am. Rep. 656. An administrator would have to establish his official character, if denied, by the production of his letters with the oath of office administered, or of his certified copy of the record thereof, which the statute requires to be made: *Estate of Hamilton*, 34 Cal. 464, 469.

19. **Who are not entitled to appointment.** A public administrator, by filing his petition for letters of administration, does not acquire any interest in the estate, nor any right to fees to be thereafter earned. Nor does the fact that expenses incurred by him in advancing certain sums of money for filing the petition and redeeming lands from a tax sale entitle him to the appointment: *State v. Woody*, 20 Mont. 413; 51 Pac. Rep. 975, 976. Under a statute which entitles a creditor to letters, if none of the relatives of a deceased person apply therefor, an officer of a corporation, which is a creditor of the decedent, is not a creditor, and is entitled to the appointment: *In re Owens' Estate*, 30 Utah, 351; 85 Pac. Rep. 277, 278, 280. A daughter of a deceased person is not entitled to letters of administration as against her brother: *Estate of Brundage*, 141 Cal. 538, 543; 75 Pac. Rep. 175; *Estate of Coan*, 132 Cal. 401; 64 Pac. Rep. 691. So an illegitimate child is not entitled to administer on the estate of his father, as against the father's brother: *Estate of Pico*, 52 Cal. 84, 85. The appointee of the guardian of a minor heir is not entitled to letters of administration: *Estate of Woods*, 97 Cal. 428, 429; 32 Pac. Rep. 516. A son, who has conveyed all his interest in the estate of his deceased mother, is not entitled to administer upon her estate, in preference to his sister: *Estate of Edson*, 143 Cal. 607; 77 Pac. Rep. 451. An illegitimate son of the deceased is not entitled to letters of administration on his estate, as against a brother of the decedent: *Estate of Pico*, 52 Cal. 84, -85. If a wife dies, leaving a surviving husband, who is entitled to the whole estate, her nephew, who is not entitled to any portion thereof, is not entitled to letters of administration thereon: *In re Carmody*, 88 Cal. 616, 620; 26 Pac. Rep. 373. A person is not entitled to be appointed as the administrator of an estate by reason of the fact that he advanced money for filing a petition for letters and redeeming lands from a tax sale. An applicant is not entitled to letters because of the fact that he has paid out his own money in an unsuccessful attempt to attain them: *State v. Woody*, 20 Mont. 413; 51 Pac. Rep. 975, 976. A surviving partner, where the partnership existed at the time of the death of the intestate, is precluded from acting as administrator of the estate of such intestate: *Cornell v. Gallagher*, 16 Cal. 367, 368. So a person who was at one time in partnership with the testator is ineligible to be appointed administrator of the estate, where it appears that there were unsettled matters growing out of the relation at the time of the death of the decedent: *In re Garber*, 74 Cal. 338, 340; 16 Pac. Rep. 233.

20. Competency. Disqualification to act.

(1) **In general.** A surviving husband, or wife, child, father, mother, or brother, is "competent" to obtain letters of administration as against another person to whom letters have been granted, if not addicted to drunkenness, imprudence, or want of integrity or understanding: *Estate of Pacheco*, 23 Cal. 476, 480. The mere fact that an applicant for letters of administration is not next of kin to the deceased does not incapacitate him from holding the office of administrator. On the contrary, a stranger is legally competent, though others are entitled to priority: *Estate of Kirtlan*, 16 Cal. 161, 165. The applicant for letters of administration is not disqualified by the fact that he is a public administrator, and is a creditor of or has a demand against the estate. The statute which requires that the public administrator shall not be interested in the expenditures of any estate "he administers" does not state a rule of disqualification: *Estate of Muersing*, 103 Cal. 585, 586; 37 Pac. Rep. 520. One holding an adverse claim to the estate of a deceased person is not by statute disqualified to act as administrator. The statute prescribes the grounds of disqualification, and the courts have no right to add to the disqualification prescribed by the legislature: *Estate of Brundage*, 141 Cal. 538, 540; 75 Pac. Rep. 175; *Estate of Muersing*, 103 Cal. 585; 37 Pac. Rep. 520. While it is true that a person, who comes within any of the disqualifications prescribed by statute, is not entitled to letters of administration, yet it is necessary for a petitioner to allege in his petition the existence of those matters only concerning which no presumption of law is indulged in his favor. Where such presumption exists, it is neither necessary to allege matters in aid of such presumption, nor does the law cast upon the petitioner the burden of proving them. If no issue is tendered to the proceeding as to improvidence, lack of capacity, or understanding of the petitioner, a finding of the court upon these matters is outside of the issues and must be disregarded: *Estate of Gordon*, 142 Cal. 125, 131, 133; 75 Pac. Rep. 672. As to what extent the disqualification of a person by reason of his minority has been removed by the California statute, see *Estate of Turner*, 143 Cal. 438, 441; 77 Pac. Rep. 144. The minor's disability has been removed, at least to the extent of conferring the right on his guardian to be appointed administrator: *Estate of Turner*, 143 Cal. 438, 441; 77 Pac. Rep. 144. A brother's prejudice against his sister does not disqualify him from acting as administrator: *Estate of Bauquier*, 88 Cal. 478; 26 Pac. Rep. 373.

(2) **Want of understanding.** The fact that an applicant for letters of administration is of great age, and cannot read or write, and cannot speak English, does not show any want of "understanding," within the meaning of a statute which makes one incompetent to execute the duties of the trust by reason of "drunkenness, improvidence, or want of integrity or understanding." This misfortune

may render it difficult for him to perform some of his duties properly, but it does not render it impossible: *Estate of Pacheco*, 23 Cal. 476, 480. Proof that the applicant cannot speak the English language, and is not familiar with the constitution of the state, does not show a lack of "understanding," particularly where the other evidence shows that he is a man of great intelligence and education: *Estate of Li Po Tai*, 108 Cal. 484, 489; 41 Pac. Rep. 486; 39 Pac. Rep. 30. Nor is the applicant disqualified by want of "understanding," where there is nothing to denote any lack of understanding on his part, but, on the contrary, he is charged with an alleged design to defraud certain heirs of rightful shares of the estate, and that he entered into an alleged conspiracy with others to carry out that fraudulent purpose: *Root v. Davis*, 10 Mont. 228, sub nom. *In re Davis' Estate*, 25 Pac. Rep. 105, 107.

(3) **Drunkenness.** The applicant is not incompetent by reason of alleged drunkenness, where the testimony as to his habit of using intoxicating liquors is to the effect that his use of the same is temperate. However reprehensible that habit may be, as regarded from a moral point of view, it is not within the province of the court to deny letters of administration to an applicant on the ground of mere use of intoxicants. The drunkenness contemplated by the statute undoubtedly is excessive, inveterate, and continued use of intoxicants to such an extent as to render the subject of the habit an unsafe agent to intrust with the care of property or the transaction of business: *Root v. Davis*, 10 Mont. 228, sub nom. *In re Davis' Estate*, 25 Pac. Rep. 105, 106.

(4) **Improvidence.** Nor is the applicant for letters of administration disqualified by reason of "improvidence," where there is no evidence to show that he possesses, or has exhibited in reference to property, the characteristics which constitute improvidence, such as carelessness, indifference, prodigality, wastefulness, or negligence in reference to the care, management, and preservation of property in charge; and particularly where the evidence, on the contrary, does show that he has been engaged extensively in business; that he has been intrusted with the custody, care, and expenditure of large sums of moneys, and the superintendence of undertakings of importance, involving large expenses; and that in none of these matters is it shown that he was wanting in foresight, care, and diligence in the management and preservation of the property committed to his charge: *Root v. Davis*, 10 Mont. 228, sub nom. *In re Davis' Estate*, 25 Pac. Rep. 105, 107.

(5) **Want of integrity.** The rights of a widow to letters of administration of the estate of her deceased husband cannot be questioned on the ground that during the life of her husband she was

unfaithful to her marital vows. Evidence that she was an unfaithful wife does not prove her "lack of integrity," within the meaning of the statute: *Estate of Newman*, 124 Cal. 688, 693; 57 Pac. Rep. 686; 45 L. R. A. 780. Neither is the applicant disqualified by reason of "want of integrity," on the ground that he has committed perjury, where the facts do not show that he has committed such a crime. Nor does the fact that the applicant's son has a claim adverse to the interest of the heirs of the estate disqualify the applicant from taking the office of administrator, on the theory that the father would be likely to favor his son's claim. This fact has no bearing upon the applicant's integrity. A man of the utmost upright character and of the strictest integrity, and free from all disqualifying conditions prescribed in the statute, may have a son who claims an interest adverse to other claimants of an estate. It would be clearly unlawful to set aside the father's right to letters of administration upon such a pretense as that: *Root v. Davis*, 10 Mont. 228, sub nom. *In re Davis' Estate*, 25 Pac. Rep. 105, 114. An applicant for letters of administration is not wanting in integrity because of a charge that he has entered into a conspiracy with others to carry out a design to defraud certain heirs of rightful shares of the estate, where no conspiracy is shown: *Root v. Davis*, 10 Mont. 228, sub nom. *In re Davis' Estate*, 25 Pac. Rep. 105, 114. The phrase "want of integrity," as used in the statute, means soundness of moral principle and character, as shown by a person's dealings with others, in the making and performance of contracts, and in fidelity and honesty in the discharge of trusts. In short, it is used as a synonym for probity, honesty, and uprightness in business relations with others. The fact that an applicant for letters of administration claims property as his own, which the other legatees insist belongs to the estate, does not, of itself, and without some reference to the honesty of the claim, show a want of integrity: *Estate of Bauquier*, 88 Cal. 302, 307; 26 Pac. Rep. 178, 532. The fact that a husband claims the entire estate of his deceased wife as his own, where she died without issue, or direct or collateral kindred, does not show a want of integrity, or disqualification to act as administrator: *In re Carmody*, 88 Cal. 616, 620; 26 Pac. Rep. 373.

21. Non-residents. No person is competent or entitled to serve as administrator or administratrix who is not a bona fide resident of the state: *Estate of Cotter*, 54 Cal. 215, 217; *Estate of Beech*, 63 Cal. 458; *Hutchings v. Clark*, 64 Cal. 228; 30 Pac. Rep. 804. A non-resident surviving husband or wife of a deceased person is incompetent to serve as the administrator of the decedent's estate: *In re Stevenson*, 72 Cal. 164, 165; 13 Pac. Rep. 404; *Estate of Cotter*, 54 Cal. 215, 217. But a non-resident surviving husband or wife of a deceased person is entitled to nominate a suitable person for administrator: *Estate of Cotter*, 54 Cal. 215, 218. A non-resident father

of the decedent is incompetent to serve as administrator, or to nominate one: *Estate of Muersing*, 103 Cal. 585, 587; 37 Pac. Rep. 520. One who is not competent or entitled to serve as administrator, by reason of non-residence, has no power to nominate an administrator, and the court is bound to disregard his request for the appointment of another: *Estate of Muersing*, 103 Cal. 585, 587; 37 Pac. Rep. 520; *State v. Woody*, 20 Mont. 413; 51 Pac. Rep. 975, 976. The fact, however, that the person who administered upon an estate was a non-resident is not such a fraud as will avoid the administration proceedings. That a person applying for letters is a non-resident is good ground for opposing his appointment, and good ground for removing him after he has been appointed. But his acts as administrator, when once appointed, are neither void nor voidable, and cannot be set aside for that reason. This is so, even where the acts are attacked during the progress of the administration, and, for a much stronger reason, it is not ground for setting them aside on collateral attack after the administration has been closed: *Meikle v. Cloquet* (Wash.), 87 Pac. Rep. 841, 843. Upon the application of a widow for letters of administration on her husband's estate, the question as to whether she is a resident of this state depends upon her intention to remain here, and the fact of such residence, notwithstanding that she came to this state because her husband left an estate, and that if he had not left such an estate she would not have come. If, being here, it is her intention to remain here, and make this her future home, she thereby becomes a resident of this state: *Estate of Newman*, 124 Cal. 688, 693; 57 Pac. Rep. 686; 45 L. R. A. 780.

REFERENCES.

Right of non-resident to act as executor or administrator: See notes 113 Am. St. Rep. 562-565; 1 L. R. A. (N. S.) 341-348. Foreign letters of administration: See note 9 L. R. A. 244-251. Right of alien or non-resident to act as executor or administrator: See note 3 Am. & Eng. Ann. Cas. 988.

22. Appeal. One who has the right to contest the issuance of letters of administration to another has the right to appeal from the decree entered against him: *Estate of Damke*, 133 Cal. 433; 65 Pac. Rep. 888; *Estate of Coan*, 132 Cal. 401, 403; 64 Pac. Rep. 691. An appeal from an order made upon a motion for a new trial in probate matters will be entertained. Thus where the respondents filed a written opposition to the appointment of the appellant as executrix, pleading that she was incompetent to receive the appointment, and she filed a written answer thereto, denying the facts alleging her incompetency, this presented issues of fact, which the court was authorized to re-examine upon motion for a new trial; and its order upon such motion is appealable: *Estate of Bauquier*, 88 Cal. 302, 315; 26 Pac. Rep. 178, 532. An order, or that part of it vacating

an order appointing an administrator, is appealable: *Estate of Bouysou*, 1 Cal. App. 657; 82 Pac. Rep. 1066. No appeal lies from an order appointing a special administrator: *Estate of Carpenter*, 73 Cal. 202; 14 Pac. Rep. 677. A defective notice of appeal from an order appointing an administrator, which has been treated as sufficient throughout the proceedings, and acted upon, cannot be objected to for the first time in the appellate court: *Estate of Damke*, 133 Cal. 433; 65 Pac. Rep. 888. A court in which the petition for letters of administration is first filed has exclusive jurisdiction to determine the question as to the residence of the decedent, and courts of other counties must abide the determination of that court, which is reviewable only upon appeal; and the court, upon appeal, will not review the conclusions of the trial court as to facts essential to its jurisdiction, concerning which such court was vested with the power to hear and determine, at the instance of a party who appeared in that court in the action or proceeding, and has omitted there in any way to urge his objection, but proceeded therein upon the theory that the court had jurisdiction: *Estate of Latour*, 140 Cal. 414, 425; 73 Pac. Rep. 1070; 74 Pac. Rep. 441. After the appellate court dismisses an appeal from an order refusing to grant letters of administration, it has no power to appoint an administrator. Its jurisdiction is appellate only: *Territory v. Mix*, 1 Ariz. 52; 25 Pac. Rep. 528, 529. An appeal lies from an order granting or denying letters of administration; and either a public administrator or non-resident heirs may take such an appeal, as they are "persons interested": *Estate of Graves* (Cal. App.), 96 Pac. Rep. 792, 793. Though an application for letters of administration is defective, it will be assumed, in the absence of any showing to the prejudice of letters to others, that the application was amended to correspond with the proof which established all of the facts necessary: *In re Long's Estate*, 39 Wash. 557; 81 Pac. Rep. 1007, 1008. The judgment of the court upon appeal from an order refusing to appoint a nominee of nephews or nieces, and in appointing the public administrator, who is next entitled, will not be disturbed on appeal, where no abuse of discretion is shown: *Estate of Healy*, 122 Cal. 162, 165; 54 Pac. Rep. 736; 66 Pac. Rep. 175, 176. The judgment of the supreme court as to a probate matter, as well as other matters, becomes the law of the case unless conditions on which it was founded are so changed as to render its enforcement impracticable: *Estate of Pacheco*, 29 Cal. 224. A notice appealing from all orders made by a probate court on a certain day covers any appealable order made on said day: *Estate of Pacheco*, 29 Cal. 224, 226. A judgment of the supreme court, that two persons are entitled to be appointed to administer upon an estate, should be carried into effect, though one of them dies before the probate court acts on the matter: *Estate of Pacheco*, 29 Cal. 224, 226; 23 Cal. 476, 481. As to consolidation, on appeal, of proceedings for the appointment of an administrator, see *In re McClellan's Estate* (S. D.), 107 N. W. Rep. 681.

CHAPTER V.

REVOCATION OF LETTERS, AND PROCEEDINGS THEREFOR.

- § 267. Revocation of letters of administration.
- § 268. Form. Petition for revocation of letters of administration in favor of one having a prior right.
- § 269. Form. Notice of hearing of petition to revoke letters, and for letters of administration to issue to one having a prior right, and to show cause.
- § 270. When petition filed, citation to issue.
- § 271. Form. Citation to show cause why letters of administration should not be revoked, and relative be appointed instead.
- § 272. Hearing of petition for revocation.
- § 273. Form. Order revoking letters of administration, and appointing a person having a prior right.
- § 274. Prior rights of relatives entitle them to revoke prior letters.

REVOCATION OF LETTERS.

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| 1. Petition for revocation. | 7. Who cannot obtain. |
| 2. Province of court. | 8. Letters may be revoked when. |
| 3. Statutory priority. | 9. Burden of proof. |
| 4. Appointment is valid until set aside. | 10. Letters not to be revoked when. |
| 5. What operates as a revocation. | 11. Appeal. |
| 6. Who may obtain. | |

§ 267. **Revocation of letters of administration.** When letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother, or sister of the intestate, any one of them who is competent, or any competent person at the written request of any one of them, may obtain the revocation of the letters, and be entitled to the administration, by presenting to the court a petition praying the revocation, and that letters of administration may be issued to him. **Kerr's Cyc. Code Civ. Proc., § 1383.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 1662.

Idaho.* Code Civ. Proc. 1901, sec. 4056.

Montana.* Code Civ. Proc., sec. 2460.

Nevada. Comp. Laws, sec. 2835.

North Dakota. Rev. Codes 1905, § 8030.

Oklahoma. Rev. Stats. 1903, sec. 1547.

South Dakota.* Probate Code 1904, § 95.

Utah. Rev. Stats. 1898, sec. 3837.

Wyoming.* Rev. Stats. 1899, sec. 4653.

§ 268. Form. Petition for revocation of letters of administration in favor of one having a prior right.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.]

To the Honorable the ____² Court of the County³ of ____,
State of ____.

Now comes ____, of the county⁴ of ____, state of ____,
and respectfully presents this his petition, showing:

That ____ died on or about the ____ day of ____, 19____,
in the said county⁵ of ____, state of ____;

That said ____, at the time of his death, was a resident
of the said county⁶ and state, and left estate in said county⁷
and state, consisting of real and personal property;

That the character and probable value of said real prop-
erty are as follows, to wit, ____;⁸ and that the character
and probable value of said personal property are as fol-
lows, to wit, ____;⁹

That the heirs at law of said deceased are as follows, to
wit:¹⁰

Names.

Relationship.

That on the ____ day of ____, 19____, this court made an
order, which was duly entered, appointing ____, a creditor¹¹
of decedent, as administrator of the estate of said deceased;
that, in pursuance of said order, letters of administration
were issued to the said ____, as such administrator; that
said ____ duly qualified and received said letters, and
thereupon assumed the duties of such administrator, and is
now administering said estate;

That your petitioner is the surviving husband¹² of said
deceased, is competent, and has a right to letters of adminis-
tration prior to that of said ____, who has been appointed
administrator as aforesaid.¹³

Your petitioner therefore prays that the letters of administration heretofore issued to the said _____ be revoked, and that letters of administration upon the estate of said _____, deceased, be issued to your petitioner.

_____, Attorney for Petitioner. _____, Petitioner.

Explanatory notes. 1. Give file number. 2. Give title of court. 3-7. Or, City and County. 8, 9. State whether separate or community property, and give description, location of property, and probable value. 10. Give names and relationship. 11. Or as the case may be. 12. Or, wife, child, father, mother, brother, or sister. 13. Or, that the surviving husband, or wife, child, father, mother, brother, or sister of the intestate, according to the fact, has requested, in writing, that your petitioner, a competent person, petition for the revocation of said letters, and pray for the issuance of letters to him, the said _____

§ 269. Form. Notice of hearing of petition to revoke letters, and for letters of administration to issue to one having a prior right, and to show cause.

[Title of court.]

[Title of estate.]

{ No. _____ Dept. No. _____
[Title of form.]

_____, a relative ² of _____, deceased, having filed in this court a petition praying that letters of administration upon the estate of _____, deceased, heretofore issued to _____, be revoked, and that such letters be issued to petitioner, who claims a prior right thereto, —

Notice is hereby given that the matter will be heard on _____,³ the _____ day of _____, 19____, at the court-room of said court,⁴ in the county ⁵ of _____, state of _____, at _____ o'clock in the forenoon ⁶ of that day, and all persons interested in said estate are notified to appear then and there, and show cause, if any they can, why petitioner's prayer should not be granted. _____, Clerk of the _____ Court.

By _____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. State what relative. 3. Day of week. 4. Give number of department, if any. 5. Or, city and county. 6. Or, afternoon.

§ 270. When petition filed, citation to issue. When such petition is filed, the clerk must, in addition to the notice provided in section thirteen hundred and seventy-three, issue

a citation to the administrator to appear and answer the same at the time appointed for the hearing. **Kerr's Cyc. Code Civ. Proc.**, § 1384.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1663.

Idaho.* Code Civ. Proc. 1901, sec. 4057.

Montana.* Code Civ. Proc., sec. 2461.

Nevada. Comp. Laws, sec. 2836.

Oklahoma. Rev. Stats. 1903, sec. 1548.

South Dakota.* Probate Code 1904, § 96.

Utah. Rev. Stats. 1898, sec. 3837.

Wyoming. Rev. Stats. 1899, sec. 4654.

§ 271. Form. Citation to show cause why letters of administration should not be revoked, and relative be appointed instead.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

The People of the State of ____.

To ____, Administrator of the Estate of ____, Deceased,
Greeting.

By order of this court, you, the said ____, administrator of the estate of ____, deceased, are hereby cited to appear before the ____² court of the county³ of ____, state of ____, at the court-room thereof,⁴ on ____,⁵ the ____ day of ____, 19__, at ____ o'clock in the forenoon⁶ of said day, and show cause, if any you can, why your letters of administration should not be revoked, and ____, a relative of the said deceased, be appointed as such administrator in your stead.

In testimony whereof, I, ____, clerk of the ____⁷ court aforesaid, have hereunto set my hand and affixed the seal of said court this ____ day of ____, 19__.

[Seal]

____, Clerk of the ____ Court.

By ____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Give title of court. 3. Or, city and county. 4. Give number of department, if any, and location of court-room. 5. Day of week. 6. Or, in the afternoon. 7. Give title of court.

§ 272. **Hearing of petition for revocation.** At the time appointed, the citation having been duly served and returned, the court must proceed to hear the allegations and proofs of the parties; and if the right of the applicant is established, and he is competent, letters of administration must be granted to him, and the letters of the former administrator revoked. **Kerr's Cyc. Code Civ. Proc.**, § 1385.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1664.

Idaho.* Code Civ. Proc. 1901, sec. 4058.

Montana.* Code Civ. Proc., sec. 2462.

Nevada. Comp. Laws, sec. 2836.

Oklahoma.* Rev. Stats. 1903, sec. 1549.

South Dakota.* Probate Code 1904, § 97.

Utah. Rev. Stats. 1898, sec. 3837.

Wyoming. Rev. Stats. 1899, sec. 4655.

§ 273. **Form. Order revoking letters of administration, and appointing a person having a prior right.**

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.] }

It being shown to the court that ____ has heretofore been appointed administrator of the estate of ____, deceased; that letters of administration have been issued to the said ____, and that he is now the duly qualified and acting administrator of said estate, but that on the ____ day of ____, 19____, ____, the surviving husband ² of said decedent, filed a petition in this court, asking that the letters of administration issued to the said ____ be revoked, and that letters be issued to the said ____ by reason of his relationship and prior right to letters of administration; and it appearing that notice of such application for the revocation of letters of administration and of application for letters of administration was duly given; that a citation to ____, the said administrator, to appear and answer the said petition at the time and place appointed for the hearing has been served and returned as provided by law and by the direction of this court; and the matter now coming on regularly to be

heard,³ the court proceeds to hear the allegations and proofs of the parties, and finds that the said petitioner, —, is the husband⁴ of said decedent, and by reason of such relationship has a right to letters of administration prior to that of the said —, the administrator aforesaid, —

It is therefore ordered and adjudged, That the letters of administration heretofore issued to the said —, as administrator of the estate of —, deceased, be, and they are hereby, revoked, and that letters of administration upon said estate be issued to —, the said petitioner, upon his taking the oath required by law, and filing a bond in the sum of — dollars (\$—) with sureties to be approved by the judge of this court.

Dated —, 19—. —, Judge of — Court.

Explanatory notes. 1. Give file number. 2. Or, wife, child, father, mother, brother, or sister of the intestate, according to the fact. 3. Or, if the matter has been continued, say, "and the matter having been continued by order of the court to this date." 4. Or, wife, etc., as the fact may be.

§ 274. Prior rights of relatives entitle them to revoke prior letters. The surviving husband or wife, when letters of administration have been granted to a child, father, brother, or sister of the intestate; or any of such relatives, when letters have been granted to any other of them, may assert his prior right, and obtain letters of administration, and have the letters before granted revoked in the manner prescribed in the three preceding sections. **Kerr's Cyc. Code Civ. Proc.**, § 1386.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 1665.

Idaho.* Code Civ. Proc. 1901, sec. 4059.

Montana.* Code Civ. Proc., sec. 2463.

Nevada. Comp. Laws, sec. 2837.

North Dakota. Rev. Codes 1905, § 8030.

Oklahoma. Rev. Stats. 1903, sec. 1550.

South Dakota.* Probate Code 1904, § 98.

Utah. Rev. Stats. 1898, sec. 3837.

Wyoming. Rev. Stats. 1899, sec. 4656.

REVOCATION OF LETTERS.

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| 1. Petition for revocation. | 7. Who cannot obtain. |
| 2. Province of court. | 8. Letters may be revoked when. |
| 3. Statutory priority. | 9. Burden of proof. |
| 4. Appointment is valid until set aside. | 10. Letters not to be revoked when. |
| 5. What operates as a revocation. | 11. Appeal. |
| 6. Who may obtain. | |

1. **Petition for revocation.** It is sufficient, in a petition for the revocation for letters of administration, for the petitioner to allege merely his age, residence, and heirship of the decedent. This establishes his competency without any specific allegation as to the non-existence of all other matters, which, under the statute, might otherwise disqualify him. The statute which provides that the petitioner for revocation of letters shall allege or prove his competency does not deal with a matter of pleading or proof. It simply declares a right; that is, that one who otherwise would be entitled to letters may have letters which were previously issued revoked, if he is competent to act as administrator. There is no presumption that a person is a resident of the state, or of any particular age; and as to these matters it is therefore necessary for the petitioner to allege and prove them; but the presumptions are in his favor against the existence of any of the other disqualifications: *Estate of Gordon*, 142 Cal. 125, 133; 75 Pac. Rep. 672. If such a petition fails to show that the jurisdictional facts did not exist, it must be presumed, for the purposes of the application, that they did exist; and this applies to all necessary facts to give jurisdiction, including notice and residence: *Estate of Griffith*, 84 Cal. 107, 109; 23 Pac. Rep. 528; 24 Pac. Rep. 381. A failure to demur to the petition to set aside the appointment of an administrator is a waiver of the objection that the petitioner had no legal capacity to sue: *In re Tasanen's Estate*, 25 Utah, 396; 71 Pac. Rep. 984, 985.

REFERENCES.

For various questions concerning newly discovered evidence on a petition for the revocation of letters of administration, see *In re McClellan's Estate* (S. D.), 111 N. W. Rep. 540.

2. **Province of court.** If letters of administration have been granted to some person other than husband or wife or child of the decedent, it makes no difference whether there was a will or not, if one of the persons preferred by the law asks that the administrator, with or without the will annexed, be removed and himself appointed. His request should be granted by the court, if he is legally competent to discharge the trust: *Estate of Li Po Tai*, 108 Cal. 484, 488; 41 Pac. Rep. 486; 39 Pac. Rep. 30. And where the court has removed an administrator for neglect, mismanagement, and incompetency, it has

the power to grant letters to the proper party: *Estate of Pico*, 56 Cal. 413, 420; but it has no power to appoint a special administrator of the estate, until after the executrix thereof has been suspended or removed: *Schroeder v. Superior Court*, 70 Cal. 343; 11 Pac. Rep. 651. Where the court had no jurisdiction to grant letters of administration upon an estate, it has power to revoke its appointment of the administrator, on a petition asking for his removal, where the want of jurisdiction to make such appointment appears from the record: *Henkle v. Slate*, 40 Or. 349; 68 Pac. Rep. 399, 400. So the court has power, on motion, to set aside the appointment of a special administrator, as having been inadvertently made: *Raine v. Lawlor*, 1 Cal. App. 483; 82 Pac. Rep. 688, 689. And where the interests of the estate require it, the probate judge has ample power to remove a wasteful administrator or executor and to revoke his powers: *In re Baldrige*, 2 Ariz. 299; 15 Pac. Rep. 141, 143.

3. Statutory priority. A statute which provides that when letters have been granted "to any other person than the surviving husband, or wife, child, father, mother, brother, or sister, of the intestate," any one of such persons may obtain the revocation of the letters and be entitled to the administration, evidently deals with classes of persons who are given, respectively, statutory priority in their rights to letters of administration. It does not allow the former decree to be reviewed or assailed, but merely permits it to be superseded by a person of another and superior capacity. It refers to a case where letters have been granted to one not claiming, or having been adjudicated, to be one of the persons mentioned in such section, as, for instance, where the public administrator, or a creditor, or some other person legally competent, but not enumerated in said section, has been appointed. It does embrace a case where the one appointed had applied as one of the persons enumerated in the said section, and had been adjudicated by the court to be the surviving husband or wife, or one of the other persons enumerated therein: *Estate of Aldrich*, 147 Cal. 343; 81 Pac. Rep. 1011, 1012. In California, when the petition for revocation of letters is based upon the statutory right to administer, and where the petitioner is not incompetent by reason of some statutory disqualification, section 1383 of the Code of Civil Procedure of that state applies, and the court has no discretion to deny his petition. Section 1354 of said code, giving the court discretionary power to remove or to retain an administrator with the will annexed, in the cases therein specified, does not apply, where the petition for the removal of the administrator with the will annexed is based upon the right to administer conferred upon the petitioner by the statute: *Estate of Li Po Tai*, 108 Cal. 484, 488; 41 Pac. Rep. 486; 39 Pac. Rep. 30. Prior to 1880 there was no provision, if letters had once been issued, for their revocation at the instance of a nominee of the rela-

tives named in the statute; but in that year the legislature amended the statute by giving to the nominee of these relatives the right to obtain administration and to have the former letters revoked: *Estate of Shiels*, 120 Cal. 347, 349; 52 Pac. Rep. 808.

4. Appointment is valid until set aside. The appointment of a second administrator before the first one is removed is voidable. The original appointment, though erroneous, is valid until set aside in some appropriate proceeding: *Estate of Griffith*, 84 Cal. 107; 23 Pac. Rep. 528; 24 Pac. Rep. 381; *Schroeder v. Superior Court*, 70 Cal. 343; 11 Pac. Rep. 651; *Estate of Hamilton*, 34 Cal. 464; *Haynes v. Meeks*, 20 Cal. 288.

REFERENCES.

Validity of acts done by an executor or administrator under letters testamentary or of administration afterwards revoked or held invalid: See note 21 L. R. A. 146-157.

5. What operates as a revocation. The appointment of an administrator with the will annexed supersedes, per se, all former administrations of the estate: *McCauley v. Harvey*, 49 Cal. 497, 505; but the removal of an administratrix from the state does not operate, ipso facto, as a revocation of the letters: *Railway Co. v. McWherter*, 59 Kan. 345, sub nom. *Missouri etc. Ry. Co. v. McWherter*, 53 Pac. Rep. 135.

6. Who may obtain. The only parties authorized under the statute to obtain the revocation of letters are the wife, child, father, mother, or brother of the intestate, and such persons are authorized to have the letters revoked only by presenting a petition "praying for the revocation" and that letters of administration may be issued to him or her, or to the nominee of relatives who have the right to letters of administration: *Estate of Carr*, 25 Cal. 585, 587; *Estate of Shiels*, 120 Cal. 347, 349; 52 Pac. Rep. 808; *Estate of Kirtlan*, 16 Cal. 161, 165. It is to be borne in mind that a stranger is legally competent to act as administrator, though others are entitled to priority; but when letters have been granted to any other person than the surviving husband or wife, brother, etc., any one of them may obtain the revocation of the letters by presenting a petition to the probate court: *Estate of Kirtlan*, 16 Cal. 161, 165; and a prior right to letters of administration of an estate may be asserted at any time against one who has obtained a grant of letters by virtue of a secondary right. The assertion of a prior right to letters is expressly provided for in the statute; and if the right be established, and the applicant is found to be competent, the letters of the former administrator must be revoked, and a grant of letters of administration made to the applicant, unless he has waived his right and consented

to the former appointment: *Estate of Wooten*, 56 Cal. 322, 327; and a person is "competent" unless disqualified under the statute: *Estate of Pacheco*, 23 Cal. 476. The policy of the law is to give a right to the surviving husband or wife, not only to administer, but also to have a person appointed on request. So fully does the law carry out this policy, that, if letters have been granted to a child, father, brother, or sister of the intestate, the surviving husband or wife may assert his or her prior right, and obtain letters of administration and have the prior letters revoked: *Estate of Dow*, 132 Cal. 309, 310; 64 Pac. Rep. 402. If letters testamentary have been issued to an executor during his minority, and he has made an application to have them revoked, and the application is simply denied, without any reason being assigned, and without any finding of fact, such denial does not imply a finding of incompetency, and does not constitute a prior adjudication of a want of understanding as against a subsequent right to be appointed, provided he is found to possess the statutory competency: *Estate of Li Po Tai*, 108 Cal. 484, 489; 41 Pac. Rep. 486; 39 Pac. Rep. 30. Letters of administration, issued without authority, may be set aside by the court in which they are issued, upon its own motion, or such action may be taken at the instance of any one interested in the administration; and where an action has been brought by the administrator against a railroad company to recover damages for an injury alleged to have caused the death of the intestate, the company has sufficient interest to make it a competent party to institute proceedings for a revocation of letters of administration: *Mallory v. Burlington etc. R. R. Co.*, 53 Kan. 557; 36 Pac. Rep. 1059. A relative, who applies within the statutory time, is entitled to letters of administration as against a creditor. If the relative files his petition within the three months after decedent's death, the court errs in appointing a creditor within that time, because the relative has the superior right to the appointment of his nominee, but such appointment is not void for want of jurisdiction. It is simply erroneous, and is therefore voidable. Hence the letters may be revoked or set aside upon an application to the proper court for that purpose, made within the proper time, and by the parties entitled to priority in the issuance of such letters: *In re Owen's Estate* (Utah), 91 Pac. Rep. 283, 285. So far as the appointment of a creditor as administrator of the estate is concerned, an *ex parte* application for the appointment, containing an allegation that the petitioner is the principal creditor of the estate, would perhaps be sufficient to give the court jurisdiction to make the appointment; but, when the regularity of an appointment already made is attacked and sought to be revoked, because issued to the wrong member of a class entitled to administer, the petitioner must affirmatively show, in an issuable form, facts which, if true, give him preference under the law: *Cusick v. Hammer*, 25 Or. 472; 36 Pac. Rep. 525, 526.

7. Who cannot obtain. While a surviving husband or wife, etc., has a right to assert a prior right to letters of administration, and to have letters revoked by presenting a petition, etc., this right does not give to the nominee of the husband or wife, in the instances named in the statute, a right to have the letters revoked and to obtain letters for himself. In such a case the appointment of a nominee of the person entitled to administration is in the discretion of the court. The right to have letters issued to the nominee is the right of the surviving husband or wife, and not of the nominee: *Estate of Shields*, 120 Cal. 347, 349; 52 Pac. Rep. 808; *Estate of Carr*, 25 Cal. 585. The power to procure a revocation of letters, and the appointment of a nominee after letters have been issued to one not in the first five classes enumerated in section 1365 of the Code of Civil Procedure of California, is accorded to the members of those five classes and to their nominees by section 1383 of the same code. But it must be observed that the members of class seven, to which nephews and nieces belong, are not empowered to nominate under said section 1365, nor to secure a revocation of letters under section 1383 of that code. Their rights are wholly embraced within section 1379 of such code, and, under the last-named section, the nephews and nieces of the decedent do not have the absolute right of nomination and revocation of letters, but the appointment rests in the discretion of the court: *Estate of Healy*, 122 Cal. 162, 164; 54 Pac. Rep. 736; 66 Pac. Rep. 175, 176. The statute does not authorize an application by the public administrator of one county for the revocation of letters issued to the public administrator of another county: *Estate of Griffith*, 84 Cal. 107, 110; 23 Pac. Rep. 528; 24 Pac. Rep. 381. One who has no interest in the estate of a deceased person, which the widow is entitled to have set apart to her, is not entitled to file a petition to revoke letters of administration granted to the widow: *Estate of Atwood*, 127 Cal. 427, 429; 59 Pac. Rep. 770.

8. Letters may be revoked when. Where a creditor of the estate of the deceased entered into an agreement with the son-in-law of a sister of the deceased, whereby he agreed with the heirs to wait for the payment of his claim for a few weeks, at the expiration of which time they were to pay his bill, this constituted a waiver of his right to administer upon the estate, at least for a time; and his conduct in violating this agreement and obtaining his own appointment as administrator while the son-in-law and next of kin were attending the funeral of the deceased, in a distant state, should not be countenanced by the court; and where the son-in-law files a petition asking for the revocation of the letters issued to such creditor, and that he be appointed administrator in his stead, the letters are properly revoked, and the court will not review the discretion of the trial court in appointing the successor of the administrator: *In re Farn-*

ham's Estate, 41 Wash. 570; 84 Pac. Rep. 602, 603. It is also proper, on the application of one interested in the estate, to revoke letters testamentary or of administration, where the executor or administrator has become wasteful: *In re Baldrige*, 2 Ariz. 299; 15 Pac. Rep. 141, 143.

9. Burden of proof. Upon the contest of a petition to revoke letters of administration and to issue letters to the petitioner, the onus probandi is on the contestant to show that the petitioner is incompetent to act as administrator. He must allege and prove facts showing that the petitioner is incompetent to act, although such petitioner is of age, and is a resident of the state, and qualified as an heir of the decedent. In the absence of any allegations of incompetency in the answer, a finding that the petitioner is not competent to act is outside of the issues, and unwarranted under the pleadings: *Estate of Gordon*, 142 Cal. 125, 133; 75 Pac. Rep. 672.

10. Letters not to be revoked when. A court cannot revoke letters of administration, simply upon the ground that there was no occasion for administration upon the estate. Hence, where it appeared that decedent died intestate, without any debts, and leaving no property except a certain described piece of real estate, that after the death of said intestate, and before the grant of letters of administration, the heirs conveyed all their right, title, and interest in the property to the petitioner for the revocation of letters of administration, and the court concluded as a matter of law that there was no occasion for letters of administration upon the estate, and made an omnibus order vacating and setting aside its order appointing the administrator, revoking his letters, setting aside his order of sale of real estate, and, generally, all other orders and proceedings in the estate, and directing that the administration upon the said estate cease and determine, and awarding costs of the proceeding against the administrator, such order will be reversed upon appeal. Whatever the law may be in other jurisdictions, there is nothing in our probate law, which, either expressly or by implication, exempts the property of such estate from the requirement of administration: *Estate of Strong*, 119 Cal. 663, 665; 51 Pac. Rep. 1078. If one who is entitled to letters of administration upon an estate waives his right, or refuses to make application therefor, and the court appoints another, but the one entitled afterwards makes application for letters, it is not error to refuse to revoke the letters already granted and to refuse to appoint the applicant: *Estate of Keane*, 56 Cal. 407, 410.

11. Appeal. The following are appealable orders: A denial of a petition to set aside the appointment of an administrator: *In re Tasanen's Estate*, 25 Utah, 396; 71 Pac. Rep. 984, 985; *In re Sut-*

ton's Estate, 31 Wash. 320; 71 Pac. Rep. 1012; Estate of Gordon, 142 Cal. 125, 127; 75 Pac. Rep. 672; an order vacating the appointment of an administrator: Estate of Bouyssou, 1 Cal. App. 657; 82 Pac. Rep. 1066. On appeal from an order vacating an order appointing an administrator, the action of the court in vacating its former decision in the same cause will be presumed to have been legally performed, and to be correct, in the absence from the record of any showing of error: *In re Bouyssou's Estate*, 3 Cal. App. 39; 84 Pac. Rep. 460. On appeal from an order denying a petition for the revocation of letters of administration, the evidence may be reviewed, where the appeal was taken within sixty days after the entry of the order: Estate of Gordon, 142 Cal. 125, 134; 75 Pac. Rep. 672. Where the statute provides for an appeal from the order of revocation of the letters of an administrator or executor, it keeps alive, ad interim, the character of the executor for the purposes of the appeal. But in all other respects the powers and functions of the former executor are suspended when the power of revocation is entered: Estate of Crozier, 65 Cal. 332; 4 Pac. Rep. 109, 110; Estate of More, 86 Cal. 72; 24 Pac. Rep. 846.

CHAPTER VI.

OATHS AND BONDS OF EXECUTORS AND ADMINISTRATORS.

- § 275. Administrator or executor to take oath. Letters and bond to be recorded.
- § 276. Bond of administrators. Form and requirements of. Penalty.
- § 277. Form. Bond given upon qualifying.
- § 278. Form. Acknowledgment, by corporation, of execution of bond.
- § 279. Form. Bond with numerous sureties.
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- § 281. Additional bond, when required.
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- § 285. Several recoveries may be had on same bond.
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- § 287. Form. Justification of sureties.
- § 288. Form. Justification of sureties on additional bond.
- § 289. Form. Examination of surety.
- § 290. Form. Affidavit that bond is insufficient.
- § 291. Citation and requirements of judge on deficient bonds. Additional security.
- § 292. Right ceases when sufficient security not given.
- § 293. When bond may be dispensed with. Order that executor file a bond, though will requires none.
- § 294. Petition showing failing sureties. Further bonds.
- § 295. Form. Petition for further security in case of failing sureties.
- § 296. Form. Order for citation to administrator or executor when sureties are insufficient.
- § 297. Citation to executor, etc., to show cause against such application.
- § 298. Form. Citation to representative when sureties are insufficient.
- § 299. Form. Order that further security be given.
- § 300. Hearing. Further security may be ordered when.
- § 301. Neglecting to obey order.
- § 302. Form. Order revoking letters on failure to give further security.
- § 303. Suspending powers of executor, etc.
- § 304. Further security on court's own motion.
- § 305. Release of surety.
- § 306. Form. Petition of surety to be released.

- § 307. Form. Order for citation, on petition of surety to be released.
- § 308. Form. Citation to administrator to give further security, where surety seeks to be released.
- § 309. Non-liability of new sureties.
- § 310. Form. Order that surety be released.
- § 311. Neglect to give new sureties forfeits letters.
- § 312. Form. Order revoking letters on failure to give new sureties.
- § 313. Applications to be determined at any time.
- § 314. Liability on bond.

BONDS OF EXECUTORS AND ADMINISTRATORS, AND LIABILITY THEREON.

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| <ul style="list-style-type: none"> 1. Administration bonds. <ul style="list-style-type: none"> (1) In general. (2) May be required when. Effect of failure to give. (3) Validity. (4) Joint and several bond. Effect of. (5) Additional bond. Further security. 2. Liability on administration bonds. <ul style="list-style-type: none"> (1) In general. (2) Sureties' liability attaches when. (3) Conclusiveness upon sureties of accounting, distribution, and judgment. (4) Breach of bond. (5) Sureties are liable for what. (6) Liability of sureties for personal debts of executor or administrator. (7) Sureties are not liable for what. (8) Joint liability. Subrogation. Contribution. Reimbursement. | <ul style="list-style-type: none"> (9) Release. Termination of liability. Discharge. In general. (10) What does not release sureties. 3. Action on bonds. <ul style="list-style-type: none"> (1) In general. (2) Successive administrations. Actions against sureties of defaulting administrators and deceased administrators or co-executors. (3) Leave to sue. (4) Restriction upon action against sureties. (5) Parties. (6) Pleadings. (7) Defense. What is and what is not. (8) Evidence. (9) Judgment. (10) Limitations of actions. (11) Appeal. |
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§ 275. Administrator or executor to take oath. Letters and bond to be recorded. Before letters testamentary or of administration are issued to the executor or administrator, he must take and subscribe an oath before some officer authorized to administer oaths, that he will perform, according to law, the duties of executor or administrator, which oath must be attached to the letters. All letters testamentary and of administration issued to, and all bonds executed by executors or administrators, with the affidavits and

certificates thereon, must be forthwith recorded by the clerk of the court having jurisdiction of the estates, in books to be kept by him in his office for that purpose. **Kerr's Cyc. Code Civ. Proc.**, § 1387.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1666.
- Colorado.** 3 Mills's Ann. Stats., secs. 4711, 4815n.
- Idaho.*** Code Civ. Proc. 1901, sec. 4061.
- Montana.*** Code Civ. Proc., sec. 2470.
- Nevada.** Comp. Laws, sec. 2839.
- New Mexico.** Comp. Laws 1897, secs. 1942, 1944, 1966, 1968, 2012.
- North Dakota.** Rev. Codes 1905, §§ 8047, 8048.
- Oklahoma.** Rev. Stats. 1903, sec. 1551.
- South Dakota.*** Probate Code 1904, § 99.
- Utah.*** Rev. Stats. 1898, sec. 3826.
- Washington.** Pierce's Code, §§ 2429, 2439, 2457.
- Wyoming.** Rev. Stats. 1899, secs. 4660, 4662.

§ 276. **Bond of administrators. Form and requirements of. Penalty.** Every person to whom letters testamentary or of administration are directed to issue, must, before receiving them, execute a bond to the state of California, with two or more sufficient sureties, to be approved by the superior court, or a judge thereof. In form, the bond must be joint and several, and the penalty must not be less than twice the value of the personal property, and twice the probable value of the annual rents, profits, and issues of real property belonging to the estate, which values must be ascertained by the superior court, or a judge thereof, by examining on oath the party applying, and any other persons. **Kerr's Cyc. Code Civ. Proc.**, § 1388.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 777, p. 306.
- Arizona.*** Rev. Stats. 1901, par. 1667.
- Colorado.** 3 Mills's Ann. Stats., sec. 4712.
- Idaho.** Code Civ. Proc. 1901, sec. 4062.
- Kansas.** Gen. Stats. 1905, §§ 2877, 2883, 2887, 3079.
- Montana.*** Code Civ. Proc., sec. 2471.
- Nevada.** Comp. Laws, sec. 2840.

New Mexico. Comp. Laws 1897, sec. 1944.

North Dakota. Rev. Codes 1905, § 8049.

Oklahoma. Rev. Stats. 1903, sec. 1553.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1115.

South Dakota.* Probate Code 1904, § 101.

Utah. Rev. Stats. 1898, sec. 3827.

Washington.* Pierce's Code, § 2440.

Wyoming. Rev. Stats. 1899, sec. 4661.

§ 277. Form. Bond given upon qualifying.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Know all men by these presents, That we, _____ as principal, and _____ and _____ as sureties, are held and firmly bound to the state of _____ in the sum of _____ dollars (\$____), lawful money of the United States of America, to be paid to the said state of _____, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that whereas, by an order made on the _____ day of _____, 19____, by the _____ court of the county² of _____, state of _____, the above-bounden _____ was appointed administrator³ of the estate of _____, deceased, and letters of administration⁴ were directed to be issued to him upon his executing a bond according to law in said sum of _____ dollars (\$____).

Now, therefore, if the said _____, as such administrator,⁵ shall faithfully execute the duties of his trust according to law, then this obligation is to be void; otherwise to remain in full force and effect.

Dated, signed, and sealed with our seals this _____ day of _____, 19____.⁶

_____ [Seal]

_____ [Seal]

_____ [Seal]

Explanatory notes. 1. Give file number. 2. Or, city and county. 3. Or, executor. 4. Or, letters testamentary. 5. Or, executor. 6. This bond must be recorded: See § 275, ante.

§ 278. Form. Acknowledgment, by corporation, of execution of bond.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

State of _____,
County² of _____, } ss.

On this _____ day of _____, one thousand nine hundred and _____, before me, _____, a notary public in and for the county³ of _____, state of _____, residing therein, duly commissioned and sworn, personally appeared _____, known to me⁴ to be the president, and _____, known to me⁵ to be the secretary, of the _____, the corporation described in and that executed the above bond, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the said county⁶ of _____, the day and year in this certificate first above written.

_____, Notary Public in and for the County⁷ of _____,
State of _____.

Explanatory notes. 1. Give file number. 2, 3. Or, City and County. 4, 5. Or, proved to me by the testimony of _____, a competent witness on the question of identity. 6, 7. Or, city and county.

§ 279. Form. Bond with numerous sureties.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Know all men by these presents, That I, _____, as principal, am held and firmly bound unto the state of _____ in the sum of one hundred thousand dollars (\$100,000), lawful money of the United States of America, to be paid to the said state of _____, for which payment well and truly to be made I bind myself, and each of my heirs, executors, and administrators, firmly by these presents;

And that we, _____, _____, _____, _____, and _____, as sureties, are severally held and firmly bound, and jointly

with the said — are held and firmly bound, unto the said state of —, in the following sums, respectively, to wit: the said — in the sum of twenty thousand dollars (\$20,000), the said — in the sum of twenty thousand dollars (\$20,000), the said — in the sum of twenty thousand dollars (\$20,000), the said — in the sum of twenty thousand dollars (\$20,000), and the said — in the sum of twenty thousand dollars (\$20,000), lawful money of the United States of America, to be paid to the said state of —, for the payment of which sums well and truly to be made we and each of us, respectively, bind ourselves, and each of our heirs, executors, and administrators, jointly and severally, as aforesaid, firmly by these presents.

The condition of the above obligation is such, that, whereas, by an order of the —² of the county³ of —, state of —, duly made and entered on the — day of —, the above-bounden —, in the matter of the estate of —, deceased, was appointed administrator⁴ of the estate of the said —, deceased, and letters of administration⁵ were directed to be issued to him upon his executing a bond according to law, in the said sum of one hundred thousand dollars (\$100,000), —

Now, therefore, if the said —, as such administrator,⁶ shall faithfully execute the duties of his trust according to law, then this obligation is to be void; otherwise to remain in full force and effect.

Dated, signed, and sealed with our seals this — day of —, 19—.

— [Seal]

— [Seal]

— [Seal]

— [Seal]

— [Seal]

— [Seal]

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, city and county. 4. Or, executor of the last will and testament of —, deceased. 5. Or, letters testamentary. 6. Or, executor. This bond must be recorded: See § 275, ante.

§ 280. Form. Bond with corporation as surety.

[Title of court.]

[Title of estate.]

{	No. _____ ¹	Dept. No. _____
	[Title of form.]	

Know all men by these presents, That we, _____ as principal, and _____ as surety, are held and firmly bound to the state of _____ in the sum of _____ dollars, lawful money of the United States of America, to be paid to the said state of _____, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and successors, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that, whereas, by an order made on the _____ day of _____, 19____, by the _____² court of the county³ of _____, state of _____, the above-bounden _____ was appointed administrator⁴ of the estate of _____, deceased, and letters of administration⁵ were directed to be issued to him upon his executing a bond according to law in the sum above named, —

Now, therefore, if the said _____, as such administrator,⁶ shall faithfully execute the duties of his trust according to law, then this obligation shall be void; otherwise to remain in full force and effect.

In witness whereof, The seal and signature of the said principal is hereto affixed, and the corporate seal and name of the said surety is hereto affixed and attested by its duly authorized officers, at _____, county⁷ of _____, state of _____, this _____ day of _____, 19____. _____ [Seal]

[Corporate seal]

By _____, President.
_____, Secretary.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, city and county. 4. Or, executor. 5. Or, letters testamentary. 6. Or, executor. 7. Or, city and county. Corporations as sureties: See *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1056. Form of acknowledgment by corporation: See *Kerr's Cal. Cyc. Civ. Code*, § 1190.

§ 281. Additional bond, when required. The superior court, or a judge thereof, must require an additional bond whenever the sale of any real estate belonging to an estate

is ordered; but no such additional bond must be required when it satisfactorily appears to the court that the penalty of the bond given before receiving letters, or of any bond given in place thereof, is equal to twice the value of the personal property remaining in or that will come into the possession of the executor or administrator, including the annual rents, profits, and issues of real estate, and twice the probable amount to be realized on the sale of the real estate ordered to be sold. **Kerr's Cyc. Code Civ. Proc.**, § 1389.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1668.
Colorado. 3 Mills's Ann. Stats., sec. 4759.
Idaho.* Code Civ. Proc. 1901, sec. 4063.
Kansas. Gen. Stats. 1905, § 2996.
Montana.* Code Civ. Proc., sec. 2472.
Nevada. Comp. Laws, sec. 2840.
North Dakota. Rev. Codes 1905, § 8050.
Oklahoma. Rev. Stats. 1903, sec. 1554.
South Dakota.* Probate Code 1904, § 102.
Utah.* Rev. Stats. 1898, sec. 3828.
Washington.* Pierce's Code, § 2441.
Wyoming.* Rev. Stats. 1899, sec. 4663.

§ 282. **Form. Additional bond to be given on sale of real estate.**

[Title of court.]

[Title of estate.] { No. ____ Dept. No. ____
 [Title of form.] }

Know all men by these presents, That we, ____ as principal, and ____ and ____ as sureties, are held and firmly bound to the state of ____ in the sum of ____ dollars (\$____), lawful money of the United States of America, to be paid to the said state of ____, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that, whereas an order was made on the ____ day of ____, 19____, by the ____¹ court of the county² of ____, state of ____, authorizing the above-named principal as administrator³

of the estate of ———, deceased, to sell certain real estate belonging to the estate of said deceased, and requiring that an additional bond be executed by said ——— in the sum above named, —

Now, therefore, if the said ———, as such administrator,* shall faithfully execute the duties of his trust according to law, then this obligation to be void; otherwise to remain in full force and effect.

Dated, signed, and sealed with our seals this ——— day of ———, 19——.

———— [Seal]

———— [Seal]

———— [Seal]

Explanatory notes. 1. Title of court. 2. Or, city and county. 3, 4. Or, executor. This bond must be recorded: See § 275, ante.

§ 283. **Conditions of bonds.** The bond must be conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law. **Kerr's Cyc. Code Civ. Proc.**, § 1390.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1669.

Idaho.* Code Civ. Proc. 1901, sec. 4064.

Montana.* Code Civ. Proc., sec. 2473.

Nevada. Comp. Laws, sec. 2840.

Oklahoma.* Rev. Stats. 1903, sec. 1555.

South Dakota.* Probate Code 1904, § 103.

Utah.* Rev. Stats. 1898, sec. 3829.

Washington.* Pierce's Code, § 2442.

Wyoming. Rev. Stats. 1899, sec. 4664.

§ 284. **Separate bonds when more than one administrator.** When two or more persons are appointed executors or administrators, the superior court, or a judge thereof, must require and take a separate bond from each of them. **Kerr's Cyc. Code Civ. Proc.**, § 1391.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1670.

Idaho.* Code Civ. Proc. 1901, sec. 4065.

- Kansas.** Gen. Stats. 1905, § 2888.
Montana.* Code Civ. Proc., sec. 2474.
North Dakota. Rev. Codes 1905, § 8052.
Oklahoma.* Rev. Stats. 1903, sec. 1556.
South Dakota.* Probate Code 1904, § 104.
Utah. Rev. Stats. 1898, sec. 3827.
Washington.* Pierce's Code, § 2443.
Wyoming. Rev. Stats. 1899, sec. 4665.

§ 285. Several recoveries may be had on same bond. The bond shall not be void upon the first recovery, but may be sued and recovered upon from time to time, by any person aggrieved, in his own name, until the whole penalty is exhausted. **Kerr's Cyc. Code Civ. Proc., § 1392.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1671.
Colorado. 3 Mills's Ann. Stats., sec. 4815f.
Idaho.* Code Civ. Proc. 1901, sec. 4066.
Kansas. Gen. Stats. 1905, §§ 3056-3058.
Montana.* Code Civ. Proc., sec. 2475.
Nevada.* Comp. Laws, sec. 2841.
North Dakota.* Rev. Codes 1905, § 8165.
Oklahoma.* Rev. Stats. 1903, sec. 1557.
South Dakota.* Probate Code 1904, § 105.
Utah.* Rev. Stats. 1898, sec. 3830.
Washington.* Pierce's Code, § 2444.
Wyoming. Rev. Stats. 1899, sec. 4666.

§ 286. Bonds, and justification of sureties on. Must be approved. In all cases where bonds or undertakings are required to be given, under this title, the sureties must justify thereon in the same manner and in like amounts as required by section ten hundred and fifty-seven of this code, and the certificate thereof must be attached to and filed and recorded with the bond or undertaking. All such bonds and undertakings must be approved by a judge of the superior court before being filed or recorded. **Kerr's Cyc. Code Civ. Proc., § 1393.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Arizona.** Rev. Stats. 1901, par. 1672.
Idaho. Code Civ. Proc. 1901, sec. 4067.
Probate — 27

Montana. Code Civ. Proc., sec. 2476.

Nevada. Comp. Laws, sec. 2842.

North Dakota. Rev. Codes 1905, § 7992.

Oklahoma. Rev. Stats. 1903, sec. 1558.

South Dakota. Probate Code 1904, § 106.

Utah. Rev. Stats. 1898, sec. 3831.

Washington. Pierce's Code, § 2445.

§ 287. Form. Justification of sureties.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.]

State of _____,
County ² of _____, } ss.

_____ and _____, the sureties named in the above bond, being duly sworn, each for himself says that he is a _____³ holder and resident within said state, and is worth the sum of _____ dollars over and above all his debts and liabilities, exclusive of property exempt from execution. _____

Subscribed and sworn to before me this _____ day of _____, 19____. _____, Notary Public, etc.⁴

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Freeholder or householder. 4. Or other officer taking the oath. As to requisites of undertakings, see **Kerr's Cal. Cyc. Code Civ. Proc.**, § 1057.

§ 288. Form. Justification of sureties on additional bond.

[Title of court.]

[Title of estate.] { No. ____ Dept. No. ____
[Title of form.]

State of _____,
County ¹ of _____, } ss.

_____ and _____, being duly sworn, each for himself says that he is one of the sureties named in the above bond; that he is a resident and householder ² within said state, and is worth the sum of _____ dollars over and above all his debts and liabilities, exclusive of property exempt from execution.

Subscribed and sworn to before me this ____ day of
____, 19____.

____, Notary Public³ in and for the County of ____,
State of ____.

Explanatory notes. 1. Or, City and County. 2. Or, freeholder.
3. Or other officer taking the oath.

§ 289. Form. Examination of surety.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

State of ____,
County² of ____ } ss.

____, being duly sworn, deposes and says:

I am a citizen of the United States of America. I am ____
years of age. I reside in the state of ____ , and have so
resided ____ years and upward. I am ____.³ My dwelling-
house is No. ____ , ____ Street, in ____.⁴ My wife and
family reside with me at that place. My business is that of
____ , and I carry on business as such at No. ____ , ____
Street, in ____.⁵

I own real estate in the county, or city and county, of
____ , state of ____ . It consists of ____.⁶ I paid for that
property the sum of ____ dollars (\$ ____). The land, ex-
clusive of improvements, is worth at least ____ dollars
(\$ ____). The improvements are worth at least ____ dol-
lars (\$ ____). The premises are insured for ____ dollars
(\$ ____).

By the policy of insurance any loss which may accrue is
made payable to ____ . The conveyance of the land and
premises above mentioned was from ____ , and was recorded
in the office of the recorder of the county⁷ of ____ about
____.⁸ That conveyance is, to my best knowledge and recol-
lection, an ____⁹ deed. It conveyed the premises to me
in my own right. It is made to me in my individual name,
and the title is now, and ever since I purchased the property
has remained, in my individual name, and I do not hold said
property, or any part of it, or any share or interest of any

kind in it, in trust for or in any wise for the benefit of any other person than myself. It is absolutely and exclusively my own.

As to mortgages, ____.¹⁰ As to taxes and assessments, ____.¹¹ As to judgments, ____.¹² I am in partnership with ____.¹³ My debts and liabilities are as follows: ____.¹⁴

Except as above stated, I am not liable as bail, bondsman, surety, indorser, guarantor, indemnitor, or otherwise, in any manner whatever; and, except as so stated, I do not owe any money and am not indebted to any person, firm, or company in any sum or upon any account whatever. No person holds a power of attorney from me for the sale of or the disposal of the property I have mentioned. I have not received any consideration, nor do I expect any, for going on the undertaking in the above-mentioned case. I have not been indemnified.

Subscribed and sworn to before me this ____ day of ____, 19__.

____, County Clerk.

By ____, Deputy County Clerk.

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Married, or as the fact may be. 4, 5. Name the town or city. 6. Give general statement. 7. Or, city and county. 8. State time as closely as possible. 9. Absolute, or according to the fact. 10-12. Give all necessary information. 13. State with whom. 14. Give statements, with names and amounts.

§ 290. Form. Affidavit that bond is insufficient.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

State of ____,
County² of ____, } ss.

____, being duly sworn, says that he is a creditor of the above-entitled estate; that his claim has been presented to the administrator³ of said estate, and has been approved by such administrator,⁴ and also by the judge of said court; that such claim is now on file as an approved claim; that no part of it has been paid; and that affiant has been informed

and believes, and therefore alleges the fact to be, that the sureties⁵ on the bond of such administrator⁶ are not worth as much as they justified to.⁷

Subscribed and sworn to before me this ____ day of _____, 19____, _____, Notary Public, etc.⁸

Explanatory notes. 1. Give file number. 2. Or, City and County. 3, 4. Or, administratrix; or, executor or executrix, etc., according to the fact. 5. Or some one or more of them, giving names. 6. Or, administratrix; or, executor or executrix, etc., as the case may be. 7. Or, are insolvent, or becoming so, according to the fact. 8. Or other officer taking the oath.

§ 291. Citation and requirements of judge on deficient bonds. Additional security. Before the judge approves any bond required under this title, and after its approval, he may, of his own motion, or upon the motion of any person interested in the estate, supported by affidavit that the sureties, or some one or more of them, are not worth as much as they have justified to, order a citation to issue requiring such sureties to appear before him at a designated time and place, to be examined touching their property and its value; and the judge must, at the same time, cause a notice to be issued to the executor or administrator requiring his appearance on the return of the citation; and on its return he may examine the sureties and such witnesses as may be produced, touching the property of the sureties and its value; and if, upon such examination, he is satisfied that the bond is insufficient, he must require sufficient additional security. **Kerr's Cyc. Code Civ. Proc., § 1394.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1673.

Idaho. Code Civ. Proc. 1901, sec. 4068.

Montana.* Code Civ. Proc., sec. 2477.

Nevada. Comp. Laws, sec. 2343.

Oklahoma. Rev. Stats. 1903, sec. 1558.

South Dakota. Probate Code 1904, § 106.

Utah. Rev. Stats. 1898, sec. 3832.

Washington.* Pierce's Code, § 2446.

Wyoming. Rev. Stats. 1899, sec. 4667.

§ 292. Right ceases, when sufficient security not given. If sufficient security is not given within the time fixed by the judge's order, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate, who will execute a sufficient bond, must be appointed to the administration. **Kerr's Cyc. Code Civ. Proc., § 1395.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1674.
- Idaho.*** Code Civ. Proc. 1901, sec. 4069.
- Montana.*** Code Civ. Proc., sec. 2478.
- Nevada.*** Comp. Laws, sec. 2844.
- Oklahoma.*** Rev. Stats. 1903, sec. 1559.
- South Dakota.*** Probate Code 1904, § 107.
- Utah.** Rev. Stats. 1898, sec. 3832.
- Washington.*** Pierce's Code, § 2448.
- Wyoming.*** Rev. Stats. 1899, sec. 4668.

§ 293. When bond may be dispensed with. Order that executor file a bond, though will requires none. When it is expressly provided in the will that no bond shall be required of the executor, letters testamentary may issue, and sales of real estate be made and confirmed without any bond, unless the court, for good cause, require one to be executed; but the executor may at any time afterward (if it appear from any cause necessary or proper) be required to file a bond, as in other cases. **Kerr's Cyc. Code Civ. Proc., § 1396.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 777, p. 306.
- Arizona.*** Rev. Stats. 1901, par. 1675.
- Colorado.** 3 Mills's Ann. Stats., sec. 4713.
- Idaho.** Code Civ. Proc. 1901, sec. 4070.
- Kansas.** Gen. Stats. 1905, § 2878.
- Montana.*** Code Civ. Proc., sec. 2479.
- Nevada.** Comp. Laws, sec. 2845.
- New Mexico.** Comp. Laws 1897, sec. 2016.
- North Dakota.*** Rev. Codes 1905, § 8051.
- Oklahoma.*** Rev. Stats. 1903, sec. 1560.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1115.
- South Dakota.*** Probate Code 1904, § 108.

Utah. Rev. Stats. 1898, sec. 3833.

Washington.* Pierce's Code, § 2449.

Wyoming.* Rev. Stats. 1899, sec. 4669.

§ 294. Petition showing failing sureties. Further bonds. Any person interested in an estate may, by verified petition, represent to the superior court, or a judge thereof, that the sureties of the executor or administrator thereof have become, or are becoming, insolvent, or that they have removed, or are about to remove, from the state, or that from any other cause the bond is insufficient, and ask that further security be required. **Kerr's Cyc. Code Civ. Proc., § 1397.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 785, p. 307.

Arizona.* Rev. Stats. 1901, par. 1676.

Colorado. 3 Mills's Ann. Stats., sec. 4714.

Idaho.* Code Civ. Proc. 1901, sec. 4071.

Kansas. Gen. Stats. 1905, § 3060.

Montana.* Code Civ. Proc., sec. 2480.

Nevada. Comp. Laws, sec. 2846.

New Mexico. Comp. Laws 1897, secs. 2007, 2008.

North Dakota. Rev. Codes 1905, § 8057.

Oklahoma.* Rev. Stats. 1903, sec. 1561.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1123.

South Dakota.* Probate Code 1904, § 109.

Washington.* Pierce's Code, § 2450.

Wyoming. Rev. Stats. 1899, sec. 4670.

§ 295. Form. Petition for further security in case of failing sureties.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.] }

Now comes —, and by this, his verified petition, respectfully represents to this court ² that he is a creditor ³ of the above-entitled estate, and is personally interested therein, and that the sureties ⁴ of the administrator ⁵ of such estate have become ⁶ insolvent.⁷

Wherefore your petitioner prays that a citation issue, directed to said administrator,⁸ requiring him to show cause,

if any he can, at the time and place specified by this court, why he should not give further security.⁹

_____, Attorney for Petitioner. _____, Petitioner.

[Add ordinary verification.]

Explanatory notes. 1. Give file number. 2. Or a judge thereof. 3. Or, heir at law, or legatee, or devisee of said deceased, according to the fact. 4. Or, one or more of them, giving names. 5. Or, executor. 6. Or, are becoming. 7. Or, that they have removed, or are about to remove, from the state; or, that, from any other cause, the bond is insufficient. 8. Or, administratrix; or, executor or executrix, etc., according to the fact. 9. If the petition contains a clause that the administrator or executor is wasting the property of said estate, by engaging in useless and expensive litigation with the creditors of said deceased, etc., or in any other way, the petitioner may ask that, in the mean time, the powers of such administrator or executor be suspended. See § 304, post.

§ 296. Form. Order for citation to administrator or executor when sureties are insufficient.

[Title of court.]

[Title of estate.]

{ No. ____.¹ Dept. No. ____
[Title of form.] }

The court being informed ² that the sureties upon the bond of _____, administrator ³ of the estate of _____, deceased, have become ⁴ insolvent, and that said administrator ⁵ is wasting said estate; and the court being satisfied that the matter requires investigation, —

It is ordered, That a citation issue to said administrator,⁶ requiring him to appear before the above-entitled court on _____,⁷ the _____ day of _____, 19____, at the court-room thereof,⁸ at _____ o'clock in the forenoon ⁹ of that day, then and there to show cause why he should not give further security; and it is further ordered that his powers as administrator ¹⁰ be suspended until the further order of this court.

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. Where the order is not made on the court's own motion, say here, "by the affidavit of _____"; or, "by the allegations of the petition of _____." 3. Or, administratrix; or, executor or executrix, etc., according to the fact. 4. Or, are becoming. 5, 6. Or as the case may be. 7. Day of week. 8. Giving number of department, if any, and location of court-room. 9. Or, afternoon. 10. Or according to the fact.

§ 297. **Citation to executor, etc., to show cause against such application.** If the court, or a judge thereof, is satisfied that the matter requires investigation, a citation must be issued to the executor or administrator requiring him to appear, at a time and place to be therein specified, to show cause why he should not give further security. The citation must be served personally on the executor or administrator, at least five days before the return day. If he has absconded, or cannot be found, it may be served by leaving a copy of it at his place of residence, or by such publication as the court, or a judge thereof, may order. **Kerr's Cyc. Code Civ. Proc., § 1398.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 785, p. 307.

Arizona.* Rev. Stats. 1901, par. 1677.

Colorado. 3 Mills's Ann. Stats., sec. 4714.

Idaho. Code Civ. Proc. 1901, sec. 4072.

Montana.* Code Civ. Proc., sec. 2481.

Nevada. Comp. Laws, sec. 2847.

New Mexico. Comp. Laws 1897, sec. 2007.

North Dakota. Rev. Codes 1905, § 8057.

Oklahoma.* Rev. Stats. 1903, sec. 1562.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1123.

South Dakota.* Probate Code 1904, § 110.

Washington.* Pierce's Code, § 2451.

Wyoming. Rev. Stats. 1899, sec. 4671.

§ 298. **Form. Citation to representative when sureties are insufficient.**

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.] }

To ____, Administrator ² of the Estate of ____, Deceased.

It having come to the knowledge of the court ³ that the sureties on your bond as administrator ⁴ of the said estate are insolvent,⁵ you are hereby cited to appear before the above-entitled court, at the court-room thereof,⁶ in said county,⁷ on ____,⁸ the ____ day of ____, 19__, at ten o'clock in the forenoon ⁹ of that day, and show cause, if any

you can, why you should not be required to give further security.

[Seal]

_____, Clerk of the _____ Court.

Explanatory notes. 1. Give file number. 2. Or, administratrix; or, executor or executrix, etc., according to the fact. 3. If a petition or affidavit has been filed, say here, "by the allegations of the petition of _____"; or, "by the affidavit of _____" 4. Or as the fact may be. 5. Or, are becoming insolvent. 6. Give number of department, if any, and location of court-room. 7. Or, city and county. 8. Day of week. 9. Or, afternoon.

§ 299. Form. Order that further security be given.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.]

It appearing that the citation heretofore issued, requiring the administrator ² of the above-entitled estate to show cause why he should not be required to give further security, has been served and returned, and the said administrator ³ having this day appeared before me at the time and place named in said citation, the court proceeds to hear the allegations and proofs; and the court, after such hearing, being satisfied that the security afforded by the bond of such administrator ⁴ is inadequate,⁵ —

It is ordered, That the said administrator,⁶ within _____ days from the making of this order, file a new bond,⁷ as administrator ⁸ of said estate, in the sum of _____ dollars (\$_____), in the form prescribed by law, and with sureties to be approved by the judge of this court.

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2-4. Or, administratrix; or, executor or executrix, etc., according to the fact. 5. "By reason of the insolvency of one or more of the sureties," or as the case may be. 6. Or, according to the fact. 7. Or, give further security, as the court may order. 8. Or, executor.

§ 300. Hearing. Further security may be ordered when. On the return of the citation, or at such other time as the judge may appoint, he must proceed to hear the proofs and

allegations of the parties. If it satisfactorily appears that the security is, from any cause, insufficient, he may make an order requiring the executor or administrator to give further security, or to file a new bond in the usual form within a reasonable time, not less than five days. **Kerr's Cyc. Code Civ. Proc.**, § 1399.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 785, p. 307.
- Arizona.*** Rev. Stats. 1901, par. 1678.
- Colorado.** 3 Mills's Ann. Stats., sec. 4714.
- Idaho.*** Code Civ. Proc. 1901, sec. 4073.
- Kansas.** Gen. Stats. 1905, § 3060.
- Montana.*** Code Civ. Proc., sec. 2482.
- Nevada.** Comp. Laws, sec. 2848.
- New Mexico.** Comp. Laws 1897, sec. 2007.
- North Dakota.** Rev. Codes 1905, § 8059.
- Oklahoma.*** Rev. Stats. 1903, sec. 1563.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1123.
- South Dakota.*** Probate Code 1904, § 111.
- Washington.*** Pierce's Code, § 2452.
- Wyoming.** Rev. Stats. 1899, sec. 4672.

§ 301. **Neglecting to obey order.** If the executor or administrator neglects to comply with the order within the time prescribed, the judge must, by order, revoke his letters, and his authority must thereupon cease. **Kerr's Cyc. Code Civ. Proc.**, § 1400.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 786, p. 307.
- Arizona.*** Rev. Stats. 1901, par. 1679.
- Colorado.** 3 Mills's Ann. Stats., sec. 4714.
- Idaho.*** Code Civ. Proc. 1901, sec. 4074.
- Montana.*** Code Civ. Proc., sec. 2483.
- Nevada.*** Comp. Laws, sec. 2849.
- North Dakota.** Rev. Codes 1905, § 8059.
- Oklahoma.*** Rev. Stats. 1903, sec. 1564.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1124.
- South Dakota.*** Probate Code 1904, § 112.
- Washington.*** Pierce's Code, § 2453.
- Wyoming.** Rev. Stats. 1899, sec. 4673.

§ 302. Form. Order revoking letters on failure to give further security.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

An order having been made by the judge of this court on the ____ day of ____, 19____, requiring ____, the administrator² of said estate, to give further security³ on his bond as such administrator⁴ within ____ days from the time of making said order, and said time having expired, and said administrator⁵ having neglected to file such further security⁶ within the time as aforesaid, —

It is ordered, That the letters of administration⁷ heretofore granted to the said ____ be, and the same are hereby, revoked.

Dated ____, 19____. ____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2. Or, executor, etc., according to the fact. 3. Or, a new bond. 4, 5. Or, executor, etc., according to the fact. 6. Or, new bond. 7. Or, letters testamentary. See § 311, post.

§ 303. Suspending powers of executor, etc. When a petition is presented praying that an executor or administrator be required to give further security, or to give bond, where, by the terms of the will, no bond was originally required, and it is alleged, on oath, that the executor or administrator is wasting the property of the estate, the judge may, by order, suspend his powers until the matter can be heard and determined. **Kerr's Cyc. Code Civ. Proc.**, § 1401.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1680.

Idaho.* Code Civ. Proc. 1901, sec. 4075.

Montana. Code Civ. Proc., sec. 2484.

Nevada. Comp. Laws, sec. 2850.

Oklahoma. Rev. Stats. 1903, sec. 1565.

South Dakota.* Probate Code 1904, § 113.

Wyoming. Rev. Stats. 1899, sec. 4674.

§ 304. Further security on court's own motion. When it comes to his knowledge that the bond of any executor or ad-

ministrator is from any cause insufficient, the judge, without any application, must cause him to be cited to appear and show cause why he should not give further security, and must proceed thereon as upon the application of any person interested. **Kerr's Cyc. Code Civ. Proc.**, § 1402.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 789, p. 308.
- Arizona.*** Rev. Stats. 1901, par. 1681.
- Colorado.** 3 Mills's Ann. Stats., sec. 4714.
- Idaho.*** Code Civ. Proc. 1901, sec. 4076.
- Kansas.** Gen. Stats. 1905, § 3060.
- Montana.*** Code Civ. Proc., sec. 2485.
- Nevada.*** Comp. Laws, sec. 2851.
- New Mexico.** Comp. Laws 1897, sec. 2007.
- North Dakota.** Rev. Codes 1905, § 8058.
- Oklahoma.*** Rev. Stats. 1903, sec. 1566.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1127.
- South Dakota.*** Probate Code 1904, § 114.
- Washington.*** Pierce's Code, § 2454.
- Wyoming.** Rev. Stats. 1899, sec. 4675.

§ 305. **Release of surety.** When a surety of any executor or administrator desires to be released from responsibility on account of future acts, he may make application to the superior court, or a judge thereof, for relief. The court or judge must cause a citation to the executor or administrator to be issued, and served personally, requiring him to appear at a time and place, to be therein specified, and to give other security. If he has absconded, left, or removed from the state, or if he cannot be found, after due diligence and inquiry, service may be made as provided in section one thousand three hundred and ninety-eight. **Kerr's Cyc. Code Civ. Proc.**, § 1403.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1682.
- Colorado.** 3 Mills's Ann. Stats., sec. 4716.
- Idaho.** Code Civ. Proc. 1901, sec. 4077.
- Kansas.** Gen. Stats. 1905, § 3061.
- Montana.*** Code Civ. Proc., sec. 2486.
- Nevada.** Comp. Laws, sec. 2852.

North Dakota. Rev. Codes 1905, § 8060.

Oklahoma. Rev. Stats. 1903, sec. 1567.

South Dakota.* Probate Code 1904, § 115.

Utah. Rev. Stats. 1898, sec. 3834.

Wyoming. Rev. Stats. 1899, sec. 4676.

§ 306. Form. Petition of surety to be released.

[Title of court.]

[Title of estate.] { No. ____.¹ Dept. No. ____
[Title of form.] }

To the Honorable the ____² Court of the County³ of ____,
State of ____.

The petition of ____ respectfully states: That ____ is the administrator⁴ of the estate of ____, deceased; and that, on qualifying as such administrator,⁵ he, the said ____, gave a bond as such administrator,⁶ which was duly filed and recorded in this court, and is now in force;

That your petitioner is a surety on said bond, but that he now desires to be released from all responsibility thereon as such surety, by reason of any future act or acts of said administrator.⁷

Wherefore petitioner prays that this court cause a citation to issue to the said administrator,⁸ requiring him to appear at a time and place therein specified, to give other security, and that petitioner be released from further liability by reason of said bond. _____, Petitioner.

_____, Attorney for Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, city and county. 4-8. Or, executor, etc.

§ 307. Form. Order for citation, on petition of surety to be released.

[Title of court.]

[Title of estate.] { No. ____.¹ Dept. No. ____
[Title of form.] }

It appearing that ____, a surety on the bond of ____, administrator² of the estate of ____, deceased, has filed herein his petition to be released from responsibility on account of any future act or acts of said ____, as such administrator,³ —

It is ordered, That a citation issue to said administrator,⁴ requiring him to appear before this court,⁵ at the court-room thereof, at _____,⁶ in the said county ⁷ of _____, state of _____, on the _____ day of _____, 19____, at the hour of _____ o'clock in the forenoon ⁸ of said day, and give further security.

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2-4. Or, executor. 5. Or, me, at chambers. 6. State location of court-room. 7. Or, city and county. 8. Or according to the fact.

§ 308. Form. Citation to administrator to give further security, where surety seeks to be released.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To _____, Administrator ² of the Estate of _____, Deceased.

You are hereby cited to appear before the above-entitled court,³ at the court-room thereof, at _____,⁴ in the said county ⁵ of _____, state of _____, on the _____ day of _____, 19____, at the hour of _____ o'clock in the forenoon ⁶ of said day, and give further security, one of your bondsmen, to wit, _____, having petitioned to be released from further responsibility on account of any future act or acts of yours, and the court having made an order that this citation issue.

[Seal] _____, Clerk of the _____ Court.

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Or, before the judge thereof, at chambers. 4. State location of court-room. 5. Or, city and county. 6. Or, afternoon, as the case may be.

§ 309. Non-liability of new sureties. If new sureties be given to the satisfaction of the judge, he may thereupon make an order that the sureties who applied for relief shall not be liable on their bond for any subsequent act, default, or misconduct of the executor or administrator. **Kerr's Cyc. Code Civ. Proc.**, § 1404.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 786, p. 307.

Arizona.* Rev. Stats. 1901, par. 1683.

Colorado. 3 Mills's Ann. Stats., sec. 4717.

Idaho.* Code Civ. Proc. 1901, sec. 4078.

Kansas. Gen. Stats. 1905, § 3061.

Montana.* Code Civ. Proc., sec. 2487.

Nevada. Comp. Laws, sec. 2853.

New Mexico. Comp. Laws 1897, sec. 2009.

North Dakota. Rev. Codes 1905, § 8060.

Oklahoma.* Rev. Stats. 1903, sec. 1568.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1124.

South Dakota.* Probate Code 1904, § 116.

Utah.* Rev. Stats. 1898, sec. 3835.

Wyoming. Rev. Stats. 1899, sec. 4677.

§ 310. Form. Order that surety be released.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

The petition of _____, a surety on the bond of _____, administrator² of the estate of _____, deceased, having been filed herein, and such proceedings having afterwards been had that the said administrator³ has given new sureties to the satisfaction of the judge of this court, —

It is ordered, That the said _____ shall not be liable as surety on said bond for any act, default, or misconduct of said administrator⁴ subsequently to the making of this order: _____, Judge of the _____ Court.

Dated _____, 19____.

Explanatory notes. 1. Give file number. 2-4. Or, administrator.

§ 311. Neglect to give new sureties forfeits letters. If the executor or administrator neglects or refuses to give new sureties, to the satisfaction of the judge, on the return of the citation, or within such reasonable time as the judge shall allow, unless the surety making the application shall consent to a longer extension of time, the court or judge must, by order, revoke his letters. **Kerr's Cyc. Code Civ. Proc., § 1405.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1684.

Colorado. 3 Mills's Ann. Stats., sec. 4716.

Idaho.* Code Civ. Proc. 1901, sec. 4079.

Kansas. Gen. Stats. 1905, § 3061.

Montana.* Code Civ. Proc., sec. 2488.
Nevada. Comp. Laws, sec. 2854.
North Dakota. Rev. Codes 1905, § 8060.
Oklahoma.* Rev. Stats. 1903, sec. 1569.
South Dakota.* Probate Code 1904, § 117.
Utah.* Rev. Stats. 1898, sec. 3836.
Wyoming. Rev. Stats. 1899, sec. 4678.

§ 312. Form. Order revoking letters on failure to give new sureties.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
 { [Title of form.]

It being shown to the court that —, one of the sureties in the bond of —, administrator² of the estate of —, deceased, on the — day of —, 19—, filed a petition wherein to be released from liability for the future acts of said administrator;³ and it appearing that said administrator⁴ was duly cited to appear⁵ on the — day of —, —, to give new sureties, but that said administrator⁶ failed to give new sureties at the time and place required by such citation,⁷ and that said time has expired, without such new sureties having been given, —

It is ordered, That the letters of administration⁸ heretofore granted to the said — be, and the same are hereby, revoked. —, Judge of the — Court.

Dated —, 19—.

Explanatory notes. 1. Give file number. 2-4. Or, executor, etc., according to the fact. 5. Before the court, or a judge thereof, as the case may be. 6. Or, executor, etc., as the case may be. 7. Or, within — days' additional time granted in which to give such new sureties. 8. Or, letters testamentary. See § 301, ante.

§ 313. Applications to be determined at any time. The applications authorized by the nine preceding sections of this chapter may be heard and determined at any time. All orders made therein must be entered upon the minutes of the court. **Kerr's Cyc. Code Civ. Proc., § 1406.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1685.
Idaho.* Code Civ. Proc. 1901, sec. 4080.
 Probate — 28

Oklahoma. Rev. Stats. 1903, sec. 1570.

South Dakota. Probate Code 1904, § 118.

Washington. Pierce's Code, § 2459.

Wyoming.* Rev. Stats. 1899, sec. 4679.

§ 314. **Liability on bond.** The liability of principal and sureties upon the bond of any executor, administrator, or guardian, is in all cases to pay in the kind of money or currency in which the principal is legally liable. **Kerr's Cyc. Code Civ. Proc., § 1407.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1686.

BONDS OF EXECUTORS AND ADMINISTRATORS, AND LIABILITY THEREON.

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| <p>1. Administration bonds.</p> <p>(1) In general.</p> <p>(2) May be required when. Effect of failure to give.</p> <p>(3) Validity.</p> <p>(4) Joint and several bond. Effect of.</p> <p>(5) Additional bond. Further security.</p> <p>2. Liability on administration bonds.</p> <p>(1) In general.</p> <p>(2) Sureties' liability attaches when.</p> <p>(3) Conclusiveness upon sureties of accounting, distribution, and judgment.</p> <p>(4) Breach of bond.</p> <p>(5) Sureties are liable for what.</p> <p>(6) Liability of sureties for personal debts of executor or administrator.</p> <p>(7) Sureties are not liable for what.</p> <p>(8) Joint liability. Subrogation. Contribution. Reimbursement.</p> | <p>(9) Release. Termination of liability. Discharge. In general.</p> <p>(10) What does not release sureties.</p> <p>3. Action on bonds.</p> <p>(1) In general.</p> <p>(2) Successive administrations. Actions against sureties of defaulting administrators and deceased administrators or co-executors.</p> <p>(3) Leave to sue.</p> <p>(4) Restriction upon action against sureties.</p> <p>(5) Parties.</p> <p>(6) Pleadings.</p> <p>(7) Defense. What is and what is not.</p> <p>(8) Evidence.</p> <p>(9) Judgment.</p> <p>(10) Limitations of actions.</p> <p>(11) Appeal.</p> |
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1. Administration bonds.

(1) **In general.** While it is true that the administrator is not authorized to act until he has given a bond, the mere order of time

in which the act of receiving the letters and the act of giving the bond are performed will not affect the validity of his appointment, nor any act performed by him after giving the bond, where no official act was performed by him before his bond was made and approved. The fact that he does not present his bond for approval until several days after the issuance of letters to him and the taking of the oath of office, does not require the issuance of any letters after such bond is given: *Ions v. Harbison*, 112 Cal. 260, 267; 44 Pac. Rep. 572.

REFERENCES.

Execution of executor's or administrator's bond on condition that others shall sign: See note 45 L. R. A. 340, 341.

(2) **May be required when. Effect of failure to give.** In California, an administrator is not authorized to act until he has given a bond: *Ions v. Harbison*, 112 Cal. 260, 267; 44 Pac. Rep. 572. But, in Utah, the failure to give a bond does not necessarily avoid the letters of administration. It only makes them voidable: *Harris v. Chipman*, 9 Utah, 101; 33 Pac. Rep. 242. Section 1401 of the Code of Civil Procedure of California does not conflict with section 1396 of that code, which gives the probate court the general power to require a bond in proper cases: *Estate of White*, 53 Cal. 19, 20. The English rule permitting an executor to administer upon the estate of his intestate, without giving bonds in the first instance, prevails in many states, but in the majority of them, including Oregon, the privilege is given only when the will expressly so directs. The only effect of the statute in that state allowing the testator to exempt his executor from giving bond is to relieve him therefrom in the first instance, but it is plainly not only the right, but in many instances also the duty, of the county court, when it has reason to suspect that an estate will be fraudulently administered, or the property thereof lost to those interested in it, on a proper application by a legatee or creditor, to require the executor to give a bond, notwithstanding such exemption in the will: *Bellinger v. Thompson*, 26 Or. 320; 37 Pac. Rep. 714, 716, 717. Although the county court in that state has no authority to require an executor to give bonds in the first instance for the faithful execution of the trust reposed in him, where the will expressly provides that no bonds shall be required of him, yet a bond given voluntarily, which contains no conditions unauthorized by law, and none against public policy, and which is good as a common-law obligation, is valid: *Bellinger v. Thompson*, 26 Or. 320; 37 Pac. Rep. 714, 717.

(3) **Validity.** The plain meaning of section 1388 of the Code of Civil Procedure of California is, that the principal and sureties must sign the bond before letters can be issued, for, obviously, there can

be no execution without signing. The decisions are somewhat conflicting on the proposition as to whether the sureties can be held liable on a bond which purported to be joint and several, but which has not been signed by the principal. If, however, a bond is not, in form, the joint and several obligation of all the parties, as it should be, but is the joint obligation of the principal and sureties, and the several obligation only of the latter, the bond, not having been executed by the principal, is not valid for any purpose, and the sureties are not liable thereon, unless there is evidence showing that they intended to be bound without requiring the principal's signature: *Weir v. Mead*, 101 Cal. 125, 128, 130; 40 Am. St. Rep. 46; 35 Pac. Rep. 567. As a matter of law, it is immaterial where the signature of one signing a bond may be. It is as binding when found anywhere else on the paper as it is when appearing at the end, the question being always open whether the party, not having signed it regularly at the foot, meant to be bound by it as it stands, or whether he left it so unsigned because he refused to complete it. Hence, if the bond of an administrator is delivered without the principal's signature, this does not violate an agreement with the sureties that the bond was not to be filed with the probate court until the principal had signed it, if his name was signed in the body of the instrument before delivery: *Kenck v. Parchen*, 22 Mont. 519; 57 Pac. Rep. 94, 95. "The state of California" and "the people of the state of California" describe the same party, and a statute which requires a bond to be given in the one name is satisfied by a bond given in the other: *People v. Love*, 19 Cal. 676, 681; *Tevis v. Randall*, 6 Cal. 632, 635; 65 Am. Dec. 547.

(4) Joint and several bond. Effect of. Under section 1391 of the Code of Civil Procedure of California, when two or more persons are appointed executors or administrators, the superior court must require a separate bond from each; and when executors give a joint and several bond, the effect is to make them jointly and severally liable, on such bond, for the misconduct of each: *Estate of Sander-*son, 74 Cal. 199, 213; 15 Pac. Rep. 753.

(5) Additional bond. Further security. Those provisions of the statute authorizing the requirement of "further security" are intended to be cumulative. The very purpose of requiring "further security" is to strengthen, not to increase, the security previously existing; and it is obvious that the purpose would fail unless both bonds relate to the same subject-matter: *Lacoste v. Splivalo*, 64 Cal. 35, 40; 30 Pac. Rep. 571. The title to property sold by an executor passes, though no bond is given: *Evans v. Gerken*, 105 Cal. 311, 313; 38 Pac. Rep. 725. The statute provides that an additional bond must, under certain circumstances, be required by the probate judge when he orders

sale of real estate; and when a party objects to the confirmation of the sale, on the ground that the bond required by the probate court was not in fact given, the objecting party should be permitted to submit his proof in support of the objection: *Estate of Guerrero*, 50 Cal. 308, 310. The statute declares that the mere failure to give the security within the time fixed by the judge's order shall, of itself, and without any further action on the part of the court, cause the right of the administrator to cease. It does not require any order to be served upon him. Hence, upon the failure of the administrator to file additional security required by the order of the court, and the consequent cessation of his right to the administration of the estate, the court is required to appoint as administrator "the person next entitled to the administration on the estate, who will execute a sufficient bond," and is authorized to make an order suspending the powers of the administrator until such further appointment can be made, and in the mean time to appoint a special administrator of the estate: *Barrett v. Superior Court*, 111 Cal. 154, 158; 43 Pac. Rep. 519. The statute of Oregon does not require the executor to give an additional undertaking before entering upon the duties of his administration; but where the duty of administering the partnership property of the deceased devolves upon an administrator by the surviving partner's failure to qualify, he is exonerated from giving the additional undertaking required by the statute: *Palicio v. Bigne*, 15 Or. 142; 13 Pac. Rep. 765, 767. The courts at law are authorized to ask for further security, and it is the duty of the court, whenever it comes to its knowledge that the bond of an executor or administrator is insufficient, to require him to file additional security, or an additional bond; and when such bond has been given by the executor or administrator, either voluntarily or after an order requiring him to file it, it does not affect the rights and liabilities of another surety upon the original bond: *Salde v. Murphy*, 146 Cal. 168, 171; 79 Pac. Rep. 866.

2. Liability on administration bonds.

(1) **In general.** It has been repeatedly held that an action cannot be maintained against the sureties of an executor, administrator, or guardian for breach of the bond until the amount of indebtedness has been determined by order of the probate court: *Nickals v. Stan-*, 146 Cal. 724, 726; 81 Pac. Rep. 117; *Reither v. Murdock*, 135 Cal. 67; 67 Pac. Rep. 784; *Chaquette v. Ortet*, 60 Cal. 594, 599. But in the case of a debt due from the executor to the testator long before the latter's death, which has been properly included in the inventory of money in the hands of the executor, the sureties on the bond of the executor are answerable for the default of the executor in not making payment, and without demand or notice. In such a case the liability of the principal is fixed: *Treweek v. Howard*, 105 Cal. 434, 439; 39 Pac. Rep. 20. But an action may be brought in a court of

equity to have the account of a deceased guardian settled, and for a judgment against the sureties for the sum that may be found due to the plaintiff upon such settlement, without a separate suit in equity to settle and determine the liability of the deceased guardian, where all the parties in interest are before the court. One suit is all that is necessary. It matters not that part of the relief is equitable and part of it legal, nor under which head it may be placed. The result of the suit is the same as the result of two would have been: *Zurduh v. Smith*, 135 Cal. 644, 647; 67 Pac. Rep. 1089. Sureties are entitled to stand upon the precise terms of their contract, and if the bond is limited to the duties cast upon the principal, the liabilities cannot be extended: *Treweek v. Howard*, 105 Cal. 434, 444; 39 Pac. Rep. 20. But sureties on the bond of an executor or administrator are answerable for the faithful execution of the duties of his trust, without regard to the time of the execution of the bond: *Lacoste v. Splivalo*, 64 Cal. 35, 41; 30 Pac. Rep. 571. Sureties are all liable in the same action: *Slater v. McAvoy*, 123 Cal. 437, 440; 56 Pac. Rep. 49. Sureties on official bonds are liable only for defaults occurring after the commencement of the term of office for which they become answerable; but this rule has no application to an executor's or administrator's bond, because the law under which and the purpose for which they are given are different. There are no terms of office of an executor or administrator. It is a continuous employment from the date of appointment until the close of the administration, and the sureties on the bond of an executor or administrator, conditioned for the faithful performance of his duties, are answerable for assets which have been misapplied by him before the execution of the bond, but subsequent to his appointment. A surety on the administrator's or executor's bond is liable for whatever is properly chargeable to the executor in his official capacity; and it is not necessary to show that the fund, or property so chargeable, was actually on hand, intact, or in specie at the time the bond was executed. If it is shown to have come into the hands of the executor in his official capacity, and he has not properly disposed of or accounted for it, he is bound to do so on final settlement; and the sureties on his bond, whenever given, are held for the faithful performance of that duty: *Bellinger v. Thompson*, 26 Or. 320; 37 Pac. Rep. 714, 718, 719; *Greer v. McNeal*, 11 Okl. 526; 69 Pac. Rep. 893, 899. Where an executor, who is a residuary legatee, executes a bond to pay all the debts and legacies of the testator, he and his sureties become absolutely liable, to the extent of the penalty of the bond, for all debts and legacies, regardless of the amount or value of the assets of the estate; and where a specific legacy is not paid when due, the legatee may, without obtaining an order of allowance by the probate court, and upon demand and refusal of payment, maintain an action for the recovery of such legacy against the obligors of the bond: *Kreamer v. Kreamer*, 52 Kan. 597; 35 Pac. Rep. 214.

(2) **Sureties' liability attaches when.** The general rule is, that the liability of a surety on an administrator's or guardian's bond depends upon the liability of the principal, and does not attach until that has been ascertained and determined by the judgment of a court of competent jurisdiction: *Reither v. Murdock*, 135 Cal. 197, 198; 67 Pac. Rep. 784; *Nickals v. Stanley*, 146 Cal. 724, 726; 81 Pac. Rep. 117. The poverty or riches of their principal, the condition of the estate, and where and how invested, are proper subjects of inquiry for sureties on the bond of an executor or administrator, in determining whether or not to become responsible, but cannot be urged as reasons to excuse them from the liability which they assume. Nor can the representations of their principal as to his financial position avail the sureties: *Treweek v. Howard*, 105 Cal. 434, 446; 39 Pac. Rep. 20. A surety is a principal debtor, and no demand is necessary before action. If a demand is necessary, the bringing of a suit is sufficient: *Bolles v. Bird*, 12 Col. App. 78; 54 Pac. Rep. 403.

REFERENCES.

Liability of sureties in proceedings against them on the bond of an executor or administrator: See note 51 *Am. Dec.* 519-525.

(3) **Conclusiveness upon sureties of accounting, distribution, and judgment.** The sureties upon the bond of an executor or administrator are, in the absence of fraud, concluded by the decree of the probate court, duly rendered upon a final settlement and accounting by their principal as to the amount of the principal's liability, although the sureties on the bond are not parties to the accounting. Such a decree cannot be collaterally attacked: *Greer v. McNeal*, 11 Okl. 526; 69 Pac. Rep. 893, 898; 11 Okl. 519; 69 Pac. Rep. 891; *Kenek v. Parehen*, 22 Mont. 519; 57 Pac. Rep. 94; *Bellinger v. Thompson*, 26 Or. 320; 37 Pac. Rep. 714; *Irwin v. Backus*, 25 Cal. 214; 85 *Am. Dec.* 125; *Chaquette v. Ortet*, 60 Cal. 594; *Treweek v. Howard*, 105 Cal. 434, 445; 39 Pac. Rep. 20; *Reither v. Murdock*, 135 Cal. 197, 198; 67 Pac. Rep. 784. But the probate court being one of only a limited jurisdiction, and its proceedings being regulated and governed entirely by statute, it can only settle the accounts of administrators or guardians in the manner prescribed by the code. If an administrator or guardian dies or absconds, or is beyond the jurisdiction of the court, the proper method, in order to ascertain whether he is liable, and to what extent, so as to bind the sureties on his official bond, is by a proceeding in the nature of a civil action, wherein the sureties are made parties and have opportunity to be heard. If this is not done, neither the administrator nor his sureties are bound by the decree settling his account: *Reither v. Murdock*, 135 Cal. 197, 201; 67 Pac. Rep. 784. So a decree of distribution of the estate of a deceased person fixes the liability of the executor or administrator, and,

in the absence of fraud, is binding upon the representative and his sureties, although they were not made parties to the proceeding, and without regard to the fact as to whether an additional bond was given or not: *Evans v. Gerken*, 105 Cal. 311, 313; 38 Pac. Rep. 725; *Treweek v. Howard*, 105 Cal. 434, 445; 39 Pac. Rep. 20; and if a person continues to act as executor, after his account is settled, and after a decree of partial distribution has been entered, he is answerable on his bond for a failure to pay over money, actually in his possession and under his control, until it is actually paid over pursuant to agreement: *McCloud v. Hewlett*, 135 Cal. 361, 363, 369; 67 Pac. Rep. 333.

(4) **Breach of bond.** The refusal or neglect of an executor or administrator to obey or to comply with the final judgment of the probate court rendered against him constitutes a breach of his bond, which provides that he "shall faithfully execute the duties of the trust, as such administrator, according to law," and renders him liable, as well as the sureties thereon, for the full amount of said judgment: *Greer v. McNeal*, 11 Okl. 526; 69 Pac. Rep. 893, 898. His failure to account to the estate for certain moneys which came into his hands is a breach of his bond: *McAllister v. People*, 28 Col. 156; 63 Pac. Rep. 308. So his failure to make payment according to the directions of the court constitutes a breach of his bond, for which the sureties are answerable. But there is no breach until there is a failure to account, or to pay over the money as ordered: *Chaquette v. Ortet*, 60 Cal. 594, 599; *Bellinger v. Thompson*, 26 Or. 320; 37 Pac. Rep. 714, 718.

REFERENCES.

What constitutes a breach of the bond of an executor or administrator: See note 51 Am. Dec. 525-534.

(5) **Sureties are liable for what.** As the employment of an executor or administrator is a continuous one from the date of appointment until the close of the administration, and as he is answerable during such time for the faithful performance of his duties, he is liable for assets misapplied during such time, though the appropriation occurred before the execution of his bond: *Bellinger v. Thompson*, 26 Or. 320; 37 Pac. Rep. 714, 718. Under the statute of Wyoming, the executor or administrator of a decedent becomes liable, with his sureties, for the faithful discharge of "all just debts and obligations" of the deceased, although there was a misapplication of funds of the estate, occurring after decedent's death: *Snyder v. State*, 5 Wyo. 318; 40 Pac. Rep. 441. An executor or administrator and his sureties are answerable for damages, when the representative does what the law forbids, or fails to exercise reasonable care and diligence in doing what it enjoins. Thus they are answerable for money deposited in a

bank by the administrator, where he allows it to remain after a time when, if he had performed his duty, it would have been distributed to those entitled, and is lost by the bank's failure: *McNabb v. Wixom*, 7 Nev. 830. The sureties on the bond of an executor or administrator are answerable for the faithful execution, by the representative, of the duties of his trust, without regard to the time of the execution of the bond: *Lacoste v. Splivalo*, 64 Cal. 35, 41; 30 Pac. Rep. 571.

(6) **Liability of sureties for personal debts of executor or administrator.** Notwithstanding the fiction of law in California that money due from an administrator to the estate which he represents shall, as against him, be deemed money on hand, such legal fiction will not be allowed to work wrong and injustice. It may be that he will never have, at any time, in accounting as executor or administrator, the means to enable him to pay the debt, or any part thereof; and the rule now is, that the executor or administrator should not be charged for his personal debt to the estate beyond his actual ability to pay, nor only to that extent does he, by his appointment, receive money from himself belonging to the estate: *Estate of Walker*, 125 Cal. 242, 248; 73 Am. St. Rep. 40; 57 Pac. Rep. 991; *Sanchez v. Forster*, 133 Cal. 614; 65 Pac. Rep. 1077; *Estate of Thomas*, 140 Cal. 397; 73 Pac. Rep. 1059. The sureties upon an administrator's bond are in no sense guarantors of a debt owed by the administrator to the deceased in his lifetime. Section 1615 of the Code of Civil Procedure declares that "no executor or administrator is accountable for any debts due to the decedent, if it appears that they remain uncollected without his fault." This rule of law applies to the debt of an administrator, equally with that of any other person, and special restrictions upon executors, as declared in section 1447 of that code, are not made applicable to administrators: *Sanchez v. Forster*, 133 Cal. 614, 615; 65 Pac. Rep. 1077. But in Oregon, where the single question presented on appeal was, whether the sureties on an executor's bond, who executed the same without knowledge of his indebtedness or his insolvency, were liable, under the decree of final distribution, for the amount of his personal debt to the estate, the court was of the opinion that there could be but one answer to the question, and that was, that they were liable. "It is common learning [knowledge]," said the court, "that the liability of the executor is coextensive with that of the principal," and the decree of the county or probate court, which binds the principal, will, in the absence of fraud or collusion, bind the surety. It follows, that when an executor has been charged, upon the settlement of his accounts, with a personal debt which he owed the deceased, whether by virtue of the statute, as in this state, or without a statute, as in other jurisdictions, the sureties on his bond are bound for the payment thereof, and the executor's insolvency or inability to pay is

no defense: *United Brethren First Church etc. v. Akin*, 45 Or. 247; 77 Pac. Rep. 748.

REFERENCES.

Liability of sureties on bond of executor or administrator for a debt of the representative owing to the estate: See note 112 Am. St. Rep. 409-413.

(7) **Sureties are not liable for what.** The sureties on an administrator's bond are not answerable for his failure to account until the power of the court to secure the appearance of the administrator at a settlement has been exhausted, by the issuance of a citation demanding him to appear. It cannot be assumed that the administrator would have failed to appear and to render an account had a citation been served upon him: *Ashurst v. Fountain*, 67 Cal. 18; 6 Pac. Rep. 849. So where an administrator uses money in pursuance of an order of the probate court, having jurisdiction of the subject-matter and over the parties, in the payment of the costs of administration, and in payment of the indebtedness against the estate, it is not only the right of the administrator to comply with the orders of the court, but it is also his duty, and he is not, nor are his bondsmen, answerable for such disbursement: *Miller v. Baker*, 9 Kan. App. 883; 58 Pac. Rep. 1002, 1003. Neither is the administrator in his official capacity, nor are the sureties on his bond, answerable for the appropriation of the proceeds of a policy of life insurance payable to the executors or administrators of the decedent for the benefit of his wife, which were collected by the administrator and applied to the payment of debts of the estate. The sureties, under the terms of the contract, were answerable only for the faithful performance of such duties as were imposed by law on the administrator, as administrator of the estate of the deceased. If the proceeds of the insurance policy were received by the administrator as a trustee for the widow, and solely for her use, because of the terms of the agreement between the deceased and the insurance company, such proceeds were in no sense property of the estate, and were not received by him in the discharge of any official duties as administrator. The property was, in such event, the property of the widow, and the administrator was simply her agent or trustee in regard thereto. The sureties on his bond as administrator thereon had not undertaken to be answerable for the faithful performance of his duties as such agent or trustee, or for the faithful performance of any duties, except those relating to the administration of the decedent's estate. And the fact that persons interested in the estate may have profited by reason of the wrongful act of the administrator cannot affect the question as to the liability of the estate: *Nickals v. Stanley*, 146 Cal. 724, 725; 81 Pac. Rep. 117. In the case of a fraudulent sale of the estate of a decedent, made by the executor or administrator of the estate, the sureties are not an-

werable. The representative alone is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein: *Weihe v. Statham*, 17 Cal. 245; 7 Pac. Rep. 673, 676.

(8) Joint liability. Subrogation. Contribution. Reimbursement.

There is no joint liability between the sureties on separate bonds of co-executors, and as there is no joint liability, there can be no right of contribution by one set of sureties against the others: *Hewlett v. Beede*, 2 Cal. App. 561; 83 Pac. Rep. 1086, 1087. If one of several sureties dies, it is not improper to join his executor with some of the other sureties, in an action against another surety for contribution: *Dussol v. Bruguieres*, 50 Cal. 456, 459. But if the principal dies, a judgment against the sureties is not enforceable by them as a claim against their principal's estate until they have paid it. Reimbursement can be claimed only for what has been expended: *Estate of Hill*, 17 Cal. 238, 243; 7 Pac. Rep. 664. Sureties on an administrator's bond are usually entitled to be subrogated to the security held by the creditor; and in a case where the executor or administrator is indebted to the estate which he represents, the sureties would succeed to the debt against the administrator: *Estate of Walker*, 125 Cal. 242, 247; 73 Am. St. Rep. 40; 57 Pac. Rep. 991. The reimbursement to which an administrator is entitled on account of payments made for attorneys' fees, expenses, and for extraordinary services, is a right personal to himself, and one which he may waive; but if it could be said that this right of the principal on the bond to assert the claim is one to which the sureties might be subrogated, yet it must follow that such sureties would be restricted in the enforcement of such subrogated rights to the mode prescribed for their enforcement by the principal: *Elizalde v. Murphy*, 4 Cal. App. 114, 116; 87 Pac. Rep. 245.

(9) Release. Termination of liability. Discharge. In general.

The power of the county court to relieve a surety on an administrator's or executor's bond from liability is purely statutory. After a bond has been given, the heir, legatee, or creditor of the estate acquires and has a vested interest in it, and the power of the court over it ceases, except in a proceeding authorized by law. When, therefore, an executor or administrator has given a bond for the performance of his duties as such, he cannot, after it has been accepted and filed, upon his own motion, and to suit his own convenience or his own interest, apply for and obtain an order of the court setting it aside, discharging the sureties thereof, and substituting a new one in its stead. In many states the statutes provide that a surety may, on his own petition, and with notice to interested parties, obtain an order and be discharged from further liability upon an executor's or administrator's bond, but no such statute exists in Oregon. In that state

there is a method provided by which a surety can be discharged or relieved, but it does not follow that because a county court in that state has power to compel an executor or administrator to give a bond, it also has power to cancel it and substitute another in its place. After the bond has been given, the power of the county court over it ceases, and the heirs, legatees, or creditors for whose security it was given have a vested interest therein, of which they can be deprived only by some proceeding known to the law. It is only when the amount of the executor's or administrator's undertaking is insufficient, or the sureties therein, or either of them, have become non-residents of the state, or are likely to or have become insolvent, that the county court may require a new bond, which will operate to discharge the sureties on the former undertaking from liability on account of their principal, arising from his acts or omissions subsequent thereto; and this proceeding is, by statute, wisely limited to cases where complaint is made by an heir, legatee, devisee, or creditor, or other person interested in the estate, and who have a vested interest in such undertaking or bond: *Bellinger v. Thompson*, 26 Or. 320; 37 Pac. Rep. 714, 720. The entry of a conventional judgment and order in an action, whereby the remedies of the sureties are delayed and made to wait upon contingencies to which they have never assented, and about which they have never been consulted, will release the sureties on an executor's bond from their liability: *Fordyce v. Ellis*, 29 Cal. 96, 101.

(10) **What does not release sureties.** Mere passive delay and forbearance on the part of the sureties of an executor or administrator in compelling him to account to the probate court does not discharge them from liability nor affect their obligation. The condition of their obligation is, that their principal will perform all the duties of executor or administrator, including that of rendering to the probate court, from time to time, such accounts of his administration as are required by law; and his failure to render such accounts is a dereliction of duty, for which his sureties are answerable, especially where they might have taken proceedings, under the statute, to procure their release from future responsibility, but failed to do so: *Biggins v. Raisch*, 107 Cal. 210, 213; 40 Pac. Rep. 333. Where the statute permits the obligee on the bond of an executor or administrator to sue any or all of the obligors, the dismissal of an action as to the principal, sued with a surety, does not release the surety. The situation is the same as though the action in the first instance had been brought by the obligee against the surety only: *McAllister v. People*, 28 Col. 156; 63 Pac. Rep. 308. Under the statute, the heirs at law are authorized to ask for "further security," and it is the duty of the court, whenever it comes to its knowledge that the bond of an executor or administrator is insufficient, to require him to file an "additional security";

and the giving of such bond does not affect the rights and liabilities of a surety upon the original bond, whether such additional bond was given by the representative voluntarily or after an order requiring him to file it: *Elizalde v. Murphy*, 146 Cal. 168, 171; 79 Pac. Rep. 866. Section 1543 of the Civil Code of California declares that "a release of one of two or more joint debtors does not extinguish the obligation of any of the others." The provisions of this section are universal, and include all releases, whether resulting from operation of law or by virtue of a statutory provision, or by the direct act of the party with whom or for whose benefit the obligation was entered into: *Elizalde v. Murphy*, 146 Cal. 168, 171; 79 Pac. Rep. 866. An order of the court, made on application of the heirs, releasing an insolvent surety on the bond of an administrator, and requiring the administrator to give additional security, does not release the co-surety's obligation on the original bond: *Elizalde v. Murphy*, 146 Cal. 168, 171; 79 Pac. Rep. 866. Nor are the sureties on an administrator's bond released from liability by the neglect of a subsequent administrator of the estate of the decedent to collect from the former administrator a balance found to be due from him to the estate upon the settlement of his accounts: *Estate of Connolly*, 73 Cal. 423, 424; 15 Pac. Rep. 56. If a decree in a probate proceeding has been entered, directing an executor to deposit certain money in a bank for the use and benefit of an heir, the executor cannot be released and his bondsmen discharged until he has fully complied with the decree of the probate court: *Ehrngren v. Gronlund*, 19 Utah, 1; 57 Pac. Rep. 268.

3. Action on bonds.

(1) **In general.** In an action on the bond of an executor or administrator, the only matter triable is the validity of the bond sued on, and the liability of the sureties to the plaintiff. It is very doubtful whether the rights and liabilities of the defendants, as among themselves, can be determined, even upon issues framed for that purpose: *Bellinger v. Thompson*, 26 Or. 320; 40 Pac. Rep. 229. In such an action the heirs are concluded as to all matters embraced in the final account of the representative, but not as to matters not embraced therein: *Partsel v. People*, 21 Col. 296; 40 Pac. Rep. 567, 568. If a person has two characters,—that of executor and that of trustee,—the duties of one are separate and distinct from and independent of the other; and until he is discharged from the former, and has assumed the duties of the latter, his liability as executor still continues. A mere order of final settlement or distribution cannot discharge him as executor, or relieve his bondsmen, until distribution is actually made; and if he has never qualified as trustee, he cannot be regarded as having acted in any other capacity than that of executor. At all events, the sureties upon his bond as executor are, in an action thereon, estopped from asserting that he had ceased to be

an executor, and was only a trustee, where he had never assumed the duties of trustee for the purpose of converting assets into cash and paying the proceeds over to a guardian: *Bellinger v. Thompson*, 26 Or. 320; 37 Pac. Rep. 714, 718. So the sureties upon the bond of an executor or administrator are estopped from denying that the order appointing him was duly made and entered, where the bond recites that, by an order of the probate court "duly made and entered," the executor was appointed as such: *Moore v. Earl*, 91 Cal. 632, 636; 27 Pac. Rep. 1087. Under the Colorado statute, actions may be maintained by the people of the state for the use of any person who may be injured by the conduct of the administrator or executor. But the statute gives strangers a right to sue on the bond only when they have sustained some damage which they show. When the plaintiff fails to prove that he had a claim against the estate, or that the administrator had received any assets, he is not injured by the misconduct of the administrator (in this case failure to file an inventory), and consequently he fails to establish the essential elements of a cause of action: *Metz v. People*, 6 Col. App. 57; 40 Pac. Rep. 51.

(2) **Successive administrations.** Actions against sureties of defaulting administrators and deceased administrators or co-executors. A public administrator must procure letters of administration, like any other applicant. He is not an *ex officio* administrator of any estate. If a person's authority to administer upon an estate is derived solely by the grant of letters issued to him during his first term of office as public administrator, the fact that he afterwards succeeds himself as public administrator has nothing to do with the liability of the bondsmen for his first term, and may be treated as though it did not exist. He continues to be administrator of the estate after the expiration of his first term as public administrator, and it naturally follows that the sureties on his second official bond are not liable for the acts and omissions as administrator of any estate of which he became the representative before they executed their undertaking: *O'Rourke v. Harper* (Mont.), 89 Pac. Rep. 65, 66. An administrator *de bonis non* may maintain an action against a former administrator, who has been removed, as well as against the sureties on his administration bond, to recover the personal effects and assets of the estate unadministered, including the proceeds derived from a sale of the assets of the estate and converted by the former administrator, and also for his other maladministrations or omissions. The fact that no final accounting has been had with such administrator in the probate court does not deprive the district court of power to hear and determine such action, where the administrator has absconded from the state, and has been removed from office, and has failed to turn over the assets of the estate upon the order of the probate court. The assets of the estate are not to be regarded as administered until they have

been collected and applied as required by law and the will of the testator; and when moneys of an estate have been misapplied or wrongfully paid out, the administrator *de bonis non* may recover from the defaulting administrator and his sureties the amount so misapplied, and also for the additional expense of administration made necessary by the default: *Surety Co. v. Piatt*, 67 Kan. 294, sub nom. *American Surety Co. v. Piatt*, 72 Pac. Rep. 775. If an administrator dies, leaving an unstated account, and there is no administration of his estate, a subsequent administrator may bring an action against the sureties on the bond of the deceased administrator to compel an accounting, and in such a case the sureties are the proper parties to make the settlement: *Slater v. McAvoy*, 123 Cal. 437, 440; 56 Pac. Rep. 49. In such a case, jurisdiction to compel an accounting from the proper parties vests in the superior court as a court of equity, and it is not necessary, before bringing such suit, that the plaintiff pursue the personal representative of the deceased administrator and compel from him a statement and settlement of the deceased administrator's account. It is not necessary that the account be settled in some other forum or in some other action before proceeding against the sureties: *Slater v. McAvoy*, 123 Cal. 437, 439; 56 Pac. Rep. 49. See also *Chaquette v. Ortet*, 60 Cal. 594; *Zurfluh v. Smith*, 135 Cal. 644; 67 Pac. Rep. 1089. If a co-executor dies, leaving funds of the estate received by him unaccounted for, it is the duty of a surviving executor, as such, to sue his sureties for the recovery of such funds: *Hewlett v. Beede*, 2 Cal. App. 561; 83 Pac. Rep. 1086, 1088.

(3) **Leave to sue.** Except in cases where the statute prescribes that application must first be made to the court and leave obtained to sue on the bond of an executor or administrator, no application for leave to bring such suit is necessary. The statute of Washington which provides that before any action shall be commenced by plaintiff, other than the state or municipality, against any public officer for official misconduct, does not apply to an action against an executor or administrator, as such representative is not a "public officer": *Bartels v. Gove*, 4 Wash. 632; 30 Pac. Rep. 675.

(4) **Restriction upon action against sureties.** No action can be maintained against the sureties of an executor, administrator, or guardian for breach of their bond until the amount of their indebtedness has been determined by order of the probate court: *Nickals v. Stanley*, 146 Cal. 724, 726; 81 Pac. Rep. 117; *Cook v. Ceas*, 143 Cal. 221, 225; 77 Pac. Rep. 65; *Reither v. Murdock*, 135 Cal. 197, 198; 67 Pac. Rep. 784; *Chaquette v. Ortet*, 60 Cal. 594, 599; *Elizalde v. Murphy*, 4 Cal. App. 114, 118; 87 Pac. Rep. 245. An executor or administrator cannot be sued on his bond until final settlement of his account, notwithstanding his removal for misconduct: *Adams v.*

Petrain, 11 Or. 304; 3 Pac. Rep. 163, 167. Nor can his sureties be held until their principal's liability is determined: *Hamlin v. Kinney*, 2 Or. 92, 93. No action on the bond for a misappropriation of funds of the estate can be had until after an accounting made in the probate court, and the refusal of the representative to pay the amount adjudged against him: *Weihe v. Statham*, 67 Cal. 84; 7 Pac. Rep. 143. Nor is an action maintainable on the bond of an executor or administrator, to recover for his neglect or misconduct in the sale of decedent's real estate unless the plaintiff has "suffered damage": *Weihe v. Statham*, 67 Cal. 245; 7 Pac. Rep. 673, 676. Where the estate of a deceased person is in process of settlement in the probate court, and an accounting has not been had with a former executor therein, and there has been no refusal by such executor to make a full and final accounting, and where a full settlement may be required and an adequate remedy had in that court, no occasion exists to invoke the equitable jurisdiction of the district court, or for interference by that court with the settlement in the probate court; and, in such a case, an action cannot be maintained on the executor's bond until an accounting has been had in the proper tribunal, a liability ascertained, and an opportunity afforded the former executor to discharge it: *Hudson v. Barratt*, 62 Kan. 137; 61 Pac. Rep. 737.

(5) **Parties.** Where a deceased administrator had, in his lifetime, and as such administrator, collected a life-insurance policy made payable by assignment to the executor, administrator, or assigns of the deceased policy-holder, the beneficiary of the policy is the real party in interest; and a suit may be brought in his name, under the code, against the sureties upon the administrator's bond, to recover the proceeds collected upon the policy: *Conway v. Carter*, 11 N. M. 419; 68 Pac. Rep. 941. In an action against a representative purely as administrator, his sureties are not proper parties defendant: *Nickals v. Stanley*, 146 Cal. 724, 726; 81 Pac. Rep. 117; but in an action to compel the sureties of a deceased administrator to account, where there is no administration of his estate, the sureties are proper parties defendant: *Slater v. McAvoy*, 123 Cal. 437, 440; 56 Pac. Rep. 49. A deceased principal's personal representative may be joined with the surviving co-obligors in an action on the bond: *Lawrence v. Doolan*, 68 Cal. 309; 5 Pac. Rep. 484.

(6) **Pleadings.** Where the complaint in an action on an executor's bond alleges that the executor was appointed; that letters testamentary were directed to be issued to him upon his "executing a bond according to law," etc.; and that the executor and the appellants "duly made and executed the bond required by said order,"—it is not open to the objection that it does not allege that the bond

ued on was approved by the judge, or was ever filed or recorded, or that any certificate of justification was attached thereto. The allegations are sufficient to meet the requirements of the statute, certainly as against a general demurrer: *Evans v. Gerken*, 105 Cal. 311, 15; 38 Pac. Rep. 725. In an action to recover assets of the estate from an administrator, who has been removed, and who refuses to turn over to his successor the property and moneys of said estate, the complaint sufficiently alleges a breach of the condition of the bond, and states facts sufficient to constitute a cause of action, where it alleges that the order removing the administrator required him, upon demand, to turn over to the successor all property and moneys belonging to said estate; that a designated person was appointed as such successor, and, having duly qualified as such administrator, he demanded of the removed administrator all of the money in his possession belonging to said estate; but that he refused and still neglects to pay over any part thereof: *Rutinic v. Hamakar*, 40 Or. 444; 7 Pac. Rep. 196, 200. Where a complaint in an action against an administrator and sureties on his bond contains several accounts, it is not necessary to repeat at length, in each of the succeeding counts of the complaint, the facts stated in the first count and leading up to the decree of distribution, where the reference made to the preceding count is definite and certain: *Treweek v. Howard*, 105 Cal. 34, 441; 39 Pac. Rep. 20. In a suit against an administrator and the sureties on his bond for moneys alleged to have been lost by failure and refusal of the administrator, for nineteen months after his appointment, to file his final account, and to distribute the estate, the mere failure on the part of defendants to deny the demand and refusal does not admit the conversion alleged: *McNabb v. Wixom*, 7 Nev. 163, 174.

(7) **Defense. What is and what is not.** In an action on the bond of an executor or administrator for misappropriation of moneys of the estate, which he failed to pay over to the distributees, it is not a good defense that such money was not a part of the personal property or income of the estate, but was derived from the sale of realty belonging to the estate, which the executor had been permitted, by the neglect and failure of the superior court and plaintiff, to sell without giving the additional bond required by law, and without the consent of the sureties of defendant that said realty should be sold without such additional bond being given. Such a defense may properly be stricken out as irrelevant and redundant: *Evans v. Gerken*, 105 Cal. 311, 313; 38 Pac. Rep. 725. It is no defense for the sureties, in such an action, that the executor had, during the lifetime of the testator, and while acting as an agent, embezzled money of the testator, and that the sureties on his bond were ignorant of that fact, as well as of his insolvency: *Treweek v. Howard*, 105 Cal.

434, 446; 39 Pac. Rep. 20. Nor does the neglect of a succeeding administrator to recover a balance found to be due, from a former administrator, to the estate upon the settlement of his accounts, constitute a defense for the sureties on the bond of the former administrator: *Estate of Connolly*, 73 Cal. 423; 15 Pac. Rep. 56. It is no defense, in an action on the bond of an executor or administrator to recover money which he has been ordered to turn over to his successor in office, that he has applied money in satisfaction of the debt of the estate to him, where the estate is insolvent. To permit such a defense would have the effect of disturbing the ratable distribution of the fund arising from the sale of the decedent's property to which each of the creditors is entitled. In any event, the representative, under such circumstances, is not entitled to the payment of his claim in full: *Rutenic v. Hamakar*, 40 Or. 444; 67 Pac. Rep. 196, 201. But the sureties, in such an action, may show, in defense, that the bond was not made, or that the decree was not made, or if made, that the same has been obeyed, or that it was obtained by collusion or fraud; but they cannot show that the court has erred in making the decree, or that no assets ever came into the possession of the representative: *Irwin v. Backus*, 25 Cal. 214, 224; 85 Am. Dec. 125.

(8) **Evidence.** Proceedings fixing the liabilities of sureties on the bond of an executor or administrator are admissible in evidence in an action on such bond: *Irwin v. Backus*, 25 Cal. 214, 224; 85 Am. Dec. 125. The fact that an administrator *de bonis non* was permitted to testify that the administrator, at the time of the former's appointment, handed to him, as his successor, a book in which were kept the administrator's accounts, and that the administrator *de bonis non* was permitted to testify therefrom, without introducing the book in evidence, is not prejudicial, even if it be considered erroneous: *McAllister v. People*, 28 Col. 156; 63 Pac. Rep. 308, 309.

(9) **Judgment.** If the allegations of the complaint in an action on the bond of a deceased executor or administrator are sufficient to warrant a recovery, and the answer and cross-complaint of the defendant surety admit all the allegations of the complaint, except the allegation that the deceased administrator was insolvent at the time of his death, which was denied, it is not error for the court to render judgment for the plaintiff upon the pleadings on plaintiff's motion; issues sought to be raised by the answer and cross-complaint being immaterial. In such a case, a cross-complaint by the defendant surety, alleging that the deceased administrator died seized of real estate, and praying that the court order the sale of the same, apply the proceeds to the payment of the debts of the other creditors, and that suit on the bond be stayed pending such proceedings,

no bar to the plaintiff's recovery upon the pleadings, notwithstanding the cross-complaint: *Conway v. Carter*, 11 N. M. 419; 68 Pac. Rep. 941. The question whether a judgment of a creditor of the estate against the administrator de bonis non is conclusive against the sureties becomes immaterial, where such judgment was not treated as conclusive, and testimony was received as to the merits of the claim on which the judgment was rendered: *Surety Co. v. Piatt*, 67 Kan. 294, sub nom. *American Surety Co. v. Piatt*, 72 Pac. Rep. 775. Where an executor or administrator has received money, which came into his hands by virtue of his trust, the estate, in an action against him and his sureties, is entitled to interest on such money, and the court is authorized to give judgment for such interest: *Rutenic v. Lamakar*, 40 Or. 444; 67 Pac. Rep. 196, 201. The sureties on an administrator's bond cannot collaterally attack a judgment of the probate court against the administrator upon a final settlement and accounting by their principal, for whose fidelity to his trust they have obligated themselves: *Greer v. McNeal*, 11 Okl. 526; 69 Pac. Rep. 893. A judgment entered by a county court of this state upon the final accounting of an executor is conclusive as against the bondsmen as well as the executor, and, as against the bondsmen, imports verity, and is not merely prima facie evidence of its contents. Such judgment is not a judgment against mere indemnitors; hence the fact that the bondsmen were not present, and were not made parties to the accounting, does not invalidate the judgment as against the bondsmen: *Joy v. Elton*, 9 N. D. 428; 83 N. W. Rep. 875.

REFERENCES.

A judgment against an executor or administrator, how far conclusive on the sureties: See note 32 Am. Dec. 202-204.

(10) **Limitations of actions.** The statute of Washington which provides that an action by an heir, legatee, creditor, or other party interested, against an executor or administrator, for alleged misfeasance, malfeasance, or mismanagement of the estate, must be commenced within one year from the time of final settlement, or from the time such alleged misconduct was discovered, has reference to the time of the final settlement of the estate, and not to that of the settlement of the accounts of every intermediate administrator that there might happen to be in the progress of the settlement of the estate. Hence the limitation does not apply in an action by an administrator de bonis non against a former administrator, to recover an amount alleged to be due from such former administrator to the plaintiff, claiming the property as such new administrator: *Bartels v. Love*, 4 Wash. 632; 30 Pac. Rep. 675. If the assets of an estate are lost, in part, through an executor's negligence, he becomes jointly liable with his co-executor, and also severally, and if the heir ig-

nore the joint liability, as he has a right to, and sues the defaulting executor, without joining the sureties of his co-executor, and recovers judgment, which the defaulting co-executor pays, and the defaulting co-executor, in his individual capacity, seeks to recover from the sureties of the other co-executor what he was compelled to pay the heir, the heirs no longer have any concern in the question whether the defendant may default or not, for they have received the estate, and the matter becomes a purely personal one between the two co-executors as individuals, and the plaintiff's cause of action is barred, if not brought within four years from the time that the estate was rightfully demanded by the heir: *Hewlett v. Beede*, 2 Cal. App. 561, 568, 569; 83 Pac. Rep. 1086.

(11) **Appeal.** In an action on the official bond of an executor or administrator, sureties who are benefited by the judgment, not being aggrieved, have no right to complain thereof: *McCloud v. Hewlett*, 135 Cal. 361, 365; 67 Pac. Rep. 333. On appeal, the action of the probate court in ascertaining the value of the estate, and fixing the amount of the administrator's bond, will not be reviewed: *Lucas v. Todd*, 28 Cal. 182, 187. In such actions, objections not raised in the court below will not be considered for the first time on appeal: *Bellinger v. Thompson*, 26 Or. 320; 37 Pac. Rep. 714, 720.

REFERENCES.

For instructive cases in general as to actions upon the bonds of executors or administrators, see *Bellinger v. Thompson*, 26 Or. 320; 37 Pac. Rep. 714; *Rutenie v. Hamakar*, 40 Or. 444; 67 Pac. Rep. 196; *Greer v. McNeal*, 11 Okl. 526; 69 Pac. Rep. 893.

CHAPTER VII.

SPECIAL ADMINISTRATORS, AND THEIR POWERS AND DUTIES.

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SPECIAL ADMINISTRATORS.

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- (4) Considerations for appellate court.
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315. Special administrator, when appointed. When there is delay in granting letters testamentary or of administration from any cause, or when such letters are granted regularly, or no sufficient bond is filed as required, or when application is made for such letters, or when an executor or administrator dies, or is suspended, or removed, the superior court, or a judge thereof, must appoint a special administrator to collect and take charge of the estate of the decedent in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for

the preservation of the estate; or he may direct the public administrator of his county to take charge of the estate. **Kerr's Cyc. Code Civ. Proc., § 1411.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 780, p. 306.
- Arizona.*** Rev. Stats. 1901, par. 1687.
- Colorado.** 3 Mills's Ann. Stats., sec. 4697.
- Idaho.*** Code Civ. Proc. 1901, sec. 4081.
- Kansas.** Gen. Stats. 1905, § 2889.
- Montana.** Code Civ. Proc., sec. 2500.
- Nevada.** Comp. Laws, secs. 2855, 2861, 3027.
- New Mexico.** Comp. Laws 1897, sec. 1941; Laws 1901, p. 151, sec. 1.
- North Dakota.** Rev. Codes 1905, § 8032.
- Oklahoma.** Rev. Stats. 1903, sec. 1571.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1118.
- South Dakota.** Probate Code 1904, § 119.
- Utah.** Rev. Stats. 1898, secs. 3821, 3975.
- Washington.** Pierce's Code, § 2465.
- Wyoming.** Rev. Stats. 1899, sec. 4639.

§ 316. Form. Petition for appointment of special administrator.

[Title of court.]

[Title of estate.]

{ Department No. ____
[Title of form.]

To the Honorable the ____¹ Court of the County² of ____,
State of ____.

[State the jurisdictional facts, names, ages, and residences of heirs, value and character of property, and search for and failure to find a will, as in § 221, and then allege:]

That there has been delay in the granting of letters of administration upon said estate; that there will probably be a longer delay before letters are granted; and that it is necessary that some one be authorized to collect, take charge of, and preserve said estate, —

Wherefore your petitioner prays that he be appointed special administrator of said estate. _____, Petitioner.
_____, Attorney for Petitioner.

Explanatory notes. 1. Title of court. 2. Or, city and county.

317. Form. Order appointing special administrator.

[Title of court.]

[Estate of.]

{	No. ____ ¹	Dept. No. ____
	[Title of form.]	

Good cause being shown therefor, and on motion of —, ordered by the court, That — be, and he is hereby, appointed special administrator² of the estate of —, deceased, late of the county³ of —, state of —, and that such special administrator⁴ he shall have power to collect and preserve all the personal property of said estate, in whatever county or counties the same may be found, and all income, issues, rents, and profits of the real and personal property of said estate, and all claims and demands of the estate, and take charge of and manage the real estate, and preserve the same from damage, waste, and injury, and commence, maintain, and defend all suits and other legal proceedings necessary to carry out these powers; that he give bond, as such special administrator,⁵ in the sum of — dollars (\$—), and that thereupon letters of administration be issued to him in conformity with this order.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, administratrix. 3. County, city and county. 4, 5. Or, administratrix.

318. Special letters may issue at any time. The appointment may be made at any time, and without notice, but must be made by entry upon the minutes of the court, specifying the powers to be exercised by the administrator. Upon such order being entered, and after the person appointed has given bond, the clerk must issue letters of administration to such person in conformity with the order.

Rev. Code Civ. Proc., § 1412.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1688.

Colorado. 3 Mills's Ann. Stats., sec. 4697.

Idaho.* Code Civ. Proc. 1901, sec. 4082.

Montana.* Code Civ. Proc., sec. 2501.

Nevada. Comp. Laws, sec. 2856.

Oklahoma. Rev. Stats. 1903, sec. 1572.

South Dakota.* Probate Code 1904, § 120.

Utah. Rev. Stats. 1898, sec. 3822.

Wyoming.* Rev. Stats. 1899, sec. 4640.

§ 319. Form. Special letters of administration.

[Title of court.]

[Title of estate.]

{ Department No. ____
[Title of form.]

State of _____,
County¹ of _____, } ss.

_____ is hereby appointed special administrator² of the estate of _____, deceased, to collect and take charge of the estate of said deceased, in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of said estate.

Witness, _____, clerk of the _____ court in and for the county³ of _____, with the seal of said court affixed, this _____ day of _____, 19____.

By order of the court.

[Seal]

_____, Clerk.
By _____, Deputy Clerk.

Explanatory notes. 1. Or, City and County. 2. Or, administratrix. 3. Or, city and county. The oath, which is substantially the same as that required of an ordinary executor or administrator, as shown in §§ 234, 237, ante, must be attached to the letters, and the letters must be recorded: See § 275, ante.

§ 320. Form. Clerk's certificate that special letters of administration have been recorded.

[Title of court.]

[Title of estate.]

{ Department No. ____
[Title of form.]

State of _____,
County¹ of _____, } ss.

I, _____, county clerk of the county² of _____, and ex officio clerk of the _____³ court thereof, do hereby certify the foregoing to be a full and correct copy of the special letters of administration in the matter of the estate of _____, deceased, now on file and of record in my office; and I further

certify that the same have not been revoked or vacated, but are still of full force and effect.

Witness my hand and the seal of said court this ____ day of ____, 19__.

[Seal]

By ____, Deputy Clerk.

Explanatory notes. 1. 2. Or, City and County. 3. Title of court.

§ 321. Preference given to persons entitled to letters. In making the appointment of a special administrator, the court or judge must give preference to the person entitled to letters testamentary or of administration, but no appeal must be allowed from the appointment. **Kerr's Cyc. Code Civ. Proc., § 1413.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1689.
- Colorado.** 3 Mills's Ann. Stats., sec. 4697.
- Idaho.*** Code Civ. Proc. 1901, sec. 4083.
- Montana.*** Code Civ. Proc., sec. 2502.
- Nevada.*** Comp. Laws, sec. 2857.
- North Dakota.** Rev. Codes 1905, § 8034.
- Oklahoma.*** Rev. Stats. 1903, sec. 1573.
- South Dakota.*** Probate Code 1904, § 121.
- Utah.** Rev. Stats. 1898, sec. 3823.
- Wyoming.*** Rev. Stats. 1899, sec. 4641.

§ 322. Special administrator to give bond and take oath. Before any letters issue to any special administrator, he must give bond in such sum as the court or judge may direct, with sureties to the satisfaction of the court or judge conditioned on the faithful performance of his duties; and he must take the usual oath, and have the same indorsed on his letters. **Kerr's Cyc. Code Civ. Proc., § 1414.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1690.
- Idaho.*** Code Civ. Proc. 1901, sec. 4084.
- Kansas.** Gen. Stats. 1905, § 2890.
- Montana.*** Code Civ. Proc., sec. 2503.
- New Mexico.** Comp. Laws 1897, sec. 1943.

Oklahoma.* Rev. Stats. 1903, sec. 1574.

South Dakota.* Probate Code 1904, § 122.

Utah.* Rev. Stats. 1898, sec. 3824.

Washington. Pierce's Code, § 2466.

Wyoming.* Rev. Stats. 1899, sec. 4642.

§ 323. Form. Bond of special administrator.

[Title of court.]

[Title of estate.]	{ No. ____ ¹ Dept. No. ____
	{ [Title of form.] }

Know all men by these presents, That we, _____ as principal, and _____ and _____ as sureties, are held and firmly bound to the state of _____, in the sum of _____ dollars (\$_____), lawful money of the United States of America, to be paid to the said state of _____, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that, whereas _____ has been appointed special administrator of the estate of _____, deceased, —

Now, therefore, if the said _____ shall faithfully execute the duties of his trust according to law, then this obligation is to be void; otherwise to remain in full force and effect.

Dated, signed, and sealed with our seals this _____ day of _____, 19____.

_____ [Seal]

_____ [Seal]

_____ [Seal]

Explanatory notes. 1. Give file number, if possible. This bond must be recorded: See § 275, ante.

§ 324. Duties of special administrator. The special administrator must collect and preserve for the executor or administrator, all the goods, chattels, debts, and effects of the decedent, all incomes, rents, issues, and profits, claims, and demands of the estate; must take the charge and management of, enter upon, and preserve from damage, waste, and injury, the real estate, and for any such and all necessary purposes may commence and maintain or defend suits

and other legal proceedings as an administrator; he may sell perishable property as the court may order to be sold, and exercise such other powers as are conferred upon him by his appointment, but in no case is he liable to an action by any creditor on a claim against the decedent. **Kerr's Cyc. Code Civ. Proc.**, § 1415.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1691.
Colorado. 3 Mills's Ann. Stats., sec. 4697.
Idaho.* Code Civ. Proc. 1901, sec. 4085.
Kansas. Gen. Stats. 1905, §§ 2891, 2894.
Montana.* Code Civ. Proc., sec. 2504.
Nevada. Comp. Laws, sec. 2858.
New Mexico. Comp. Laws 1897, sec. 1941; Laws 1901, p. 151, sec. 1.
North Dakota. Rev. Codes 1905, § 8035.
Oklahoma.* Rev. Stats. 1903, sec. 1575.
South Dakota.* Probate Code 1904, § 123.
Utah. Rev. Stats. 1898, sec. 3825.
Washington. Pierce's Code, §§ 2467, 2469.
Wyoming. Rev. Stats. 1899, sec. 4643.

325. Special administrator's powers cease when. When the executor testamentsary or of administration on the estate of the decedent have been granted, the powers of the special administrator cease, and he must forthwith deliver to the executor or administrator all the property and effects of the decedent in his hands; and the executor or administrator may prosecute to final judgment any suit commenced by the special administrator. **Kerr's Cyc. Code Civ. Proc.**, § 1416.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 780, p. 306.
Arizona.* Rev. Stats. 1901, par. 1692.
Idaho.* Code Civ. Proc. 1901, sec. 4086.
Kansas. Gen. Stats. 1905, § 2892.
Montana.* Code Civ. Proc., sec. 2505.
Nevada.* Comp. Laws, sec. 2859.
New Mexico. Comp. Laws 1897, sec. 1941; Laws 1901, p. 151, sec. 1.
North Dakota. Rev. Codes 1905, §§ 8036, 8163.
Oklahoma.* Rev. Stats. 1903, sec. 1576.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1118.

South Dakota.* Probate Code 1904, § 124.

Washington. Pierce's Code, § 2468.

Wyoming.* Rev. Stats. 1899, sec. 4644.

§ 326. **Special administrator to render account.** The special administrator must render an account, on oath, of his proceedings in a like manner as other administrators are required to do. He is entitled to a reasonable compensation for his services, to be fixed by the court at the time of the settlement of his final account. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 494), § 1417.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1693.

Idaho. Code Civ. Proc. 1901, sec. 4087.

Montana. Code Civ. Proc., sec. 2506.

Nevada. Comp. Laws, sec. 2860.

Oklahoma. Rev. Stats. 1903, sec. 1577.

South Dakota. Probate Code 1904, § 125.

Washington. Pierce's Code, § 2470.

Wyoming. Rev. Stats. 1899, sec. 4645.

SPECIAL ADMINISTRATORS.

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| 1. Nature of duties. | 4. Accounting. |
| 2. Appointment. | 5. Reimbursement. Compensation. |
| (1) In general. | 6. Actions by and against. |
| (2) Power to appoint. | 7. Appeal. |
| (3) Appointment is unauthorised when. | (1) Whether appeal lies. |
| (4) Presumption in favor of appointment. | (2) Presumption. |
| (5) Right to object to appointment. | (3) Stay of proceedings. |
| 3. Powers of. | (4) Considerations for appellate court. |
| | (5) Affirming disallowance of claim paid. |

1. **Nature of duties.** The office and duties of a special administrator are very similar to those of a receiver in equity. Each is appointed by the court to take charge, under its directions, of property in litigation, or which is involved in the proceedings before it, with a view to its care and preservation for the parties to whom the court may ultimately decide that it belongs. The powers and duties of each are special, and limited to such as are defined by statute, or expressed in the order of his appointment, or which he may from time to time receive for the purpose of more effectually

reserving the estate intrusted to his charge: *Estate of Moore*, 88 Cal. 1, 3; 25 Pac. Rep. 915.

2. Appointment.

(1) **In general.** Under a statute which authorizes the appointment of a special administrator, at any time and without notice, such an appointment is valid, whether made by the court or by a judge in chambers: *Raine v. Lawlor*, 1 Cal. App. 483, 485; 82 Pac. Rep. 88. The appointment must be made by entry upon the minutes of the court, specifying the powers to be exercised by the administrator. But the court has no power to appoint a special administratrix where letters testamentary have been issued to an executrix who has never been suspended or removed: *Schroeder v. Superior Court*, 70 Cal. 343, 44; 11 Pac. Rep. 651. The fact that a co-administrator has been misnamed "special administrator" does not vitiate the appointment of a special administrator: *Lethbridge v. Lauder*, 13 Wyo. 9; 76 Pac. Rep. 682.

(2) **Power to appoint.** The probate court has ample power to protect the estate, during a vacancy in the administration, by the appointment of a special administrator, whose proceedings are subject to its control and supervision: *Chapman v. Hollister*, 42 Cal. 462, 464. The court has power to appoint a special administrator to act during the period of suspension of the regular administrator, but not to appoint a general administrator until such order of suspension or of removal becomes final: *Estate of Moore*, 86 Cal. 72; 24 Pac. Rep. 846. In making the appointment of a special administrator of an estate, the court has only a limited jurisdiction over the estate. It has jurisdiction alone for the special purposes of that character of administration, and gains no power, by a proceeding which results in the appointment of a special administrator, to appoint a general administrator: *Estate of Damke*, 133 Cal. 433; 65 Pac. Rep. 888, 889. The jurisdiction of the court to appoint a special administrator is not affected by an insufficient showing made for such appointment, as this is a mere irregularity: *State v. Ayer*, 17 Wash. 127; 49 Pac. Rep. 226, 27. As the court should postpone an application for letters of administration on the estate of a decedent, who left a will, until the validity of the will has been determined, it may appoint a special administrator to care for the estate until that question has been determined. It is the simple case of the delay in granting letters testamentary or of administration: *Estate of Edwards* (Cal.), 97 Pac. Rep. 23, 24. If an order is made revoking the probate of a will, an appeal from such order does not revive the powers and functions of the former executor; and the court, therefore, has jurisdiction to appoint a special administrator: *Estate of Crozier*, 65 Cal. 332, 334; 4 Pac. Rep. 109.

(3) **Appointment is unauthorized when.** In the absence of any legal cause for the appointment of a special administrator, the court has no jurisdiction to appoint one; and where there is no such cause, the court violates the statute in appointing the public administrator as special administrator in preference to others who are first entitled to such appointment: *State v. District Court*, 34 Mont. 226; 85 Pac. Rep. 1022, 1023. Under a statute which provides that the probate court must give preference to the person entitled to letters testamentary or of administration, where a special administrator is appointed, the court has no power to appoint the public administrator as special administrator upon the removal of the original administrator, as against the application of one who is entitled to priority of appointment under the statute: *In re Ming*, 15 Mont. 79; 38 Pac. Rep. 228, 232. Pending an appeal from a judgment setting aside the probate of a will, it is error to appoint the executor therein named as special administrator of the estate: *Hartley v. Lord*, 38 Wash. 432; 80 Pac. Rep. 554. A statute which provides for the appointment of a special administrator in cases where "the death of the person whose estate is in question is not satisfactorily proved, but he is shown to have disappeared under circumstances which afford reasonable grounds to believe either that he is dead or has been secreted, confined, or otherwise unlawfully done away with," is invalid, as depriving the person of his property and its possession without notice or due process of law, when applied to the property of a person living, although such special administrator has no power to administer such estate generally. The taking of possession of the property of such person under letters of administration issued without notice is not such notice to the owner as will validate the proceedings. Nor can the taking of possession of a person's property, under such circumstances, be upheld as a proper exercise of the police power of the state. And it follows that costs and disbursements incurred by such special administrator, though acting in good faith, are not a legal charge against such person or his property, as the proceedings are wholly void: *Clapp v. Houg*, 12 N. D. 600; 98 N. W. Rep. 710.

(4) **Presumption in favor of appointment.** In administration proceedings to appoint a special administrator, the presumption is that the facts authorized the court to make the appointment, although the order granting such letters does not show the removal, suspension, or resignation of another administrator: *Lethbridge v. Launder*, 13 Wyo. 9; 76 Pac. Rep. 683, 685. An order granting letters of special administration cannot be held void in a collateral proceeding because it does not show the removal, suspension, or resignation of the prior administrator. In addition to the general presumption of regularity attaching to the orders of the court, the

statute expressly dispenses with the necessity of a showing of facts essential to jurisdiction by recital in the order or decree: *Lethbridge v. Lauder*, 13 Wyo. 9; 76 Pac. Rep. 682, 685.

(5) **Right to object to appointment.** The fact that a testator's widow asked that she be appointed special administratrix of the testator's estate does not estop her from objecting to the appointment of another person as special administrator in a case where the court has no jurisdiction to appoint any one to that office: *State v. District Court*, 34 Mont. 226; 85 Pac. Rep. 1022, 1023. Where the appointment of a special administrator was made with the consent and in the presence of the original administratrix, who was the only party interested, representing in herself and as guardian all the affairs of the estate, and the rights of creditors not being involved, she is not in a position to complain of such appointment on the ground that the order appointing the special administrator did not show the removal, suspension, or resignation of the prior administrator: *Lethbridge v. Lauder*, 13 Wyo. 9; 76 Pac. Rep. 682, 685.

3. **Powers of.** The paramount duty of a special administrator is to collect all the personal estate of the deceased, and to preserve the same for the general executor or administrator when appointed. The statutes limit the function of a special administrator to the exercise of powers necessary to collect and to preserve the estate for the executor or administrator to be regularly appointed. The enumeration of particular facts, such as to sell such perishable property as may be ordered sold, and to collect rents, etc., is but to enable a special administrator to collect and to preserve what otherwise might not be collected and preserved for the estate by any one in authority. The authority "to exercise such other powers as are conferred upon him by his appointment" is but a further power to what may be necessary to collect and to preserve. It is not a power to exercise the power and duties conferred upon a regular executor or administrator, such as the allowance of payment of claims: *State v. Second Jud. Dist. Ct.*, 18 Mont. 481; 46 Pac. Rep. 259, 261. A court of probate therefore has no power to order a special administrator to pay any claims in advance of general administration: *State v. Second Jud. Dist. Ct.*, 18 Mont. 481; 46 Pac. Rep. 259, 261. A special administrator cannot pay the debts of the estate, nor limit the time for the presentation of claims by any notice which he may give: *In re Ford's Estate*, 29 Mont. 283; 74 Pac. Rep. 735, 737; *Estate of Sackett*, 78 Cal. 300; 20 Pac. Rep. 863. He has no power to have appraisers appointed: *In re Ford's Estate*, 29 Mont. 283; 74 Pac. Rep. 735, 737. If a special administrator, without authority, and as such administrator, sells stock of a corporation which had been pledged to his decedent during the latter's

lifetime, as security for a loan, the sale is not such a conversion by the estate as will enable the pledgor to recover the enhanced value of the stock in an action of trover against the executors subsequently appointed, although the proceeds of such sale were paid over to the executors: *Von Schmidt v. Bourn*, 50 Cal. 616, 618.

4. Accounting. It is the duty of the court to hear and determine the issue raised by the exhibits and accounts of a special administrator, and the objections thereto filed, at least so far as may be necessary for the preservation of the estate before a regular administrator is appointed: *French v. Superior Court*, 3 Cal. App. 304; 85 Pac. Rep. 133, 134. If the administrator is himself indebted to the decedent, he is properly charged by the probate court in his account, with the amount of such indebtedness: *Estate of Armstrong*, 69 Cal. 239; 10 Pac. Rep. 335. The rule that a trustee is entitled to repayment, out of the trust property, of all expenses actually and properly incurred by him in the performance of his trust, and that he is entitled to the repayment of every unlawful expenditure, if they were productive of actual benefit to the estate, is not applicable to a special administrator. Hence, although a special administrator makes expenditures in good faith and for the benefit and preservation of the estate, this does not entitle him to be repaid expenditures not authorized by law. He is therefore not entitled to credit for expenses incurred in employing real estate agents to sell the property of another estate from the sale of which the estate he represented was benefited by the payment in full of a claim in favor of the deceased against such other estate. Nor is he entitled to repayment of expenses incurred in the employment of an expert to examine and report upon the condition of a mine which he sold; nor is he entitled to expenses paid to a detective agency to watch the office of former executors, who had been removed, on the ground that he believed them to be criminals, where no criminal act was shown; nor is he entitled to credit for costs and expenses incurred in the removal of an executor, in an action brought by him as heir of the deceased and as a creditor of his estate; neither is he entitled to credit for moneys paid to a clerk in his office for engrossing a bill of exceptions; and this, although such expenditures were beneficial to the estate: *Estate of Bell*, 145 Cal. 646, 648, 649, 650; 79 Pac. Rep. 358. In the absence of any statute requiring a special administrator to have appraisers appointed, all expenses incurred by him, or allowances made by him on account of such appraisers, are not justified, and should not be allowed. Neither should the special administrator receive credits for expenses incurred by him in publishing notice to creditors. Neither is the court justified in allowing him the expense of procuring a revenue stamp for his

bond: *In re Ford's Estate*, 29 Mont. 283; 74 Pac. Rep. 735. The court must determine whether, under the circumstances, repairs made by a special administrator were necessary, and the expenditures reasonable; and it is competent for the court to make allowances for such repairs as a special administrator may have made in excess of the amount allowed by the court, where it appears that the expenses were necessarily incurred in the proper management of the estate: *In re Moore*, 88 Cal. 1, 4; 25 Pac. Rep. 915. A special administrator, who is individually indebted to the deceased, must charge himself, in his account, with the amount of the debt: *Estate of Armstrong*, 69 Cal. 239, 241; 10 Pac. Rep. 335.

5. Reimbursement. Compensation. If it becomes necessary, during the management of an estate by a special administrator, to make any repairs, his expenditures must be sanctioned by the court appointing him, either by previous order or by subsequent approval, before he can reimburse himself from the funds of the estate. A prudent person would obtain from the court an order therefor before making such repairs, but it is not an indispensable prerequisite that he should do so. If he is willing to forego such protection, and rely upon his belief that the court will ratify his acts, there is no rule of law which deprives the court of the power to reimburse him, if his acts and expenditures are approved: *In re Moore*, 88 Cal. 1, 3; 25 Pac. Rep. 915. Although the statute makes no provision for the compensation of a special administrator for his services, the law does not contemplate that such services shall be rendered gratuitously, and the court has a discretionary power to allow him compensation in the settlement of his account: *In re Ford's Estate*, 29 Mont. 283; 74 Pac. Rep. 735, 736; and it is not improper for the court to make the rate of compensation fixed by the statute for an administrator the standard for determining a proper allowance to be made to him: *In re Moore*, 88 Cal. 1, 4; 25 Pac. Rep. 915. If an order appointing a special administrator was inadvertently granted, without notice as prescribed by the rules of court, the court, or a judge thereof, has power to set the order aside, and its decision is conclusive, in a collateral proceeding, although it was made in the erroneous exercise of jurisdiction. Prohibition will not lie to prevent an erroneous order setting aside and revoking the appointment: *Raine v. Lawlor*, 1 Cal. App. 483, 486; 82 Pac. Rep. 688. An heir or legatee, who seeks the removal of an executor, has no power to deal with, and has no control over, the assets of the estate, and cannot make contracts which in any way will bind the estate. Nor can the fact that such heir or legatee afterwards becomes special administrator justify the payment out of the assets of the estate of a sum paid to an attorney's clerk for engrossing his bill of exceptions. It was the

duty of the attorney to engross, or cause to be engrossed, the bill of exceptions, and it was a part of the strict legal duty of the attorney. A special remuneration to his clerk is no more a legal charge against the estate for such services than would be a claim for his salary during the time that he was actually employed upon the work: *Estate of Bell*, 145 Cal. 646; 79 Pac. Rep. 358, 359.

6. Actions by and against. If a special administrator brings an action to quiet title, and it does not appear from the face of the claim that he has legal capacity to sue, such omission can be taken advantage of only by answer. It is not a good ground for demurrer: *Miller v. Luco*, 80 Cal. 257, 259; 22 Pac. Rep. 195. An action may be maintained against a special administrator for the obstruction of a private way created or maintained by him, notwithstanding it was placed there by the decedent of whose estate he is special administrator. Such obstruction is a nuisance, and it is no defense that the defendant has no interest in the land over which the way is claimed: *Hardin v. Sin Claire*, 115 Cal. 460; 47 Pac. Rep. 363, 364.

7. Appeal.

(1) Whether appeal lies. No appeal lies from an order appointing a special administrator: *Estate of Carpenter*, 73 Cal. 202; 14 Pac. Rep. 677. If the contestant of the issuance of special letters of administration is defeated, his remedy is by appeal, and not by a writ of prohibition: *State v. Ayer*, 17 Wash. 127; 49 Pac. Rep. 226, 227. There is no statutory right in any person to be appointed special administrator, and, even if no appeal lies from an order revoking the appointment of a special administrator, he cannot be greatly injured, because he may again apply upon notice, and be heard the same as any one else, if the court shall deem it necessary to appoint a special administrator: *Raine v. Lawlor*, 1 Cal. App. 483, 487; 82 Pac. Rep. 688. A special administrator, who has been ordered by a court without jurisdiction to pay out money of the estate, is "a party beneficially interested," within the meaning of a statute which authorizes such a party to obtain a writ of review: *State v. Second Jud. Dist. Ct.*, 18 Mont. 481; 46 Pac. Rep. 259, 261.

(2) Presumption. Where the record on appeal from an order allowing the final account of a special administrator fails to disclose whether certain sales of personal property were made pursuant to the order of court, and the transcript does not purport to contain copies of all the papers in the case, it must be presumed, in the absence of a showing to the contrary, that such sales were made according to law, and that they were properly approved by the court: *In re Ford's Estate*, 29 Mont. 283; 74 Pac. Rep. 735, 736.

(3) **Stay of proceedings.** An appeal from an order granting general letters of administration does not stay a distinct proceeding as to special administration of the estate, or control the power of the court under such special administration to make any order it seems necessary or proper. Such orders have no relation or connection with the proceedings in which the order appealed from is made. They are made in a separate, distinct proceeding, and are independent orders. The evident purpose of the law is, that such appeal shall have no effect whatever upon the proceedings in the special administration: *Estate of Heaton*, 142 Cal. 116, 118; 75 Pac. Rep. 662; *Estate of Crozier*, 65 Cal. 332; 4 Pac. Rep. 109.

(4) **Considerations for appellate court.** If the order appointing special administrator and directing him to take charge of the estate depends for its validity entirely upon the validity of an order previously made annulling an order admitting a will to probate, and this latter order, annulling the order admitting the will to probate, is itself an order void upon its face, unless in turn the order originally admitting the will to probate was itself void on its face, it must follow that if the order annulling the order admitting the will to probate is itself void, then the order appointing the special administrator, which is based on such a void order, is itself necessarily void. Hence, if the order annulling the order admitting the will to probate is void, the subsequent order appointing a special administrator and directing him to take from the petitioner the property distributed to him by the decree, being an attempted interference with his right under such decree, the consideration of the validity or invalidity of the order annulling the order admitting the will to probate, on which the decree is based, is not only proper, but also essentially necessary; and it devolves on the appellate court to determine whether or not the order annulling the order admitting the will to probate was or was not void: *Dunsmuir v. Coffey*, 148 Cal. 137, 139, 140; 82 Pac. Rep. 82, 683. Where the record shows that the various items of expenses were incurred in behalf of the estate, and that the special administrator had vouchers for the same, the appellate court is precluded from considering any of the items, unless, upon the face of the account, they appear to be such as should not have been allowed at all: *In re Ford's Estate*, 29 Mont. 283; 74 Pac. Rep. 735, 736.

(5) **Affirming disallowance of claim paid.** If the entry of the appointment of a special administrator has not been made upon the minutes of the court, and is not before the appellate court, so that it may determine what powers are conferred upon the special administrator, the disallowance of a claim paid by the special administrator will be affirmed: *Estate of Sackett*, 78 Cal. 300; 20 Pac. Rep. 83.

CHAPTER VIII.

WILLS FOUND AFTER LETTERS OF ADMINISTRATION
GRANTED, AND MISCELLANEOUS PROVISIONS.

- § 327. Letters must be revoked when.
- § 328. Power of executor in such a case.
- § 329. Remaining administrator or executor to continue when his co-leagues are disqualified.
- § 330. Who to act when all acting are incompetent.
- § 331. Executor or administrator may resign when. Court to appoint successor. Liability of outgoer.
- § 332. Form. Notice of intention to resign.
- § 333. Form. Resignation of representative.
- § 334. All acts of executor, etc., valid until his power is revoked.
- § 335. Transcript of court minutes to be evidence.

INCAPACITY OF REPRESENTATIVE TO ACT.

- 1. In general.
- 2. Administrator with will annexed.

§ 327. **Letters must be revoked when.** Upon the admission to probate of a will after a grant of letters of administration on the ground of intestacy, or upon the admission to probate of a later will than the one before admitted to probate, the pre-existing grant of letters testamentary or of administration must be revoked, and the administrator or executor whose grant of authority is thus terminated must render an account of his administration within such time as the court may direct. **Kerr's Cyc. Code Civ. Proc. (Kerr Stats. and Amdts., p. 494), § 1423.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 782, p. 307.
- Arizona.** Rev. Stats. 1901, par. 1694.
- Colorado.** 3 Mills's Ann. Stats., sec. 4695.
- Idaho.** Code Civ. Proc. 1901, sec. 4088.
- Kansas.** Gen. Stats. 1905, § 2899.
- Montana.** Code Civ. Proc., sec. 2510.
- Nevada.** Comp. Laws, sec. 2864.
- New Mexico.** Laws 1901, sec. 5, p. 151.
- North Dakota.** Rev. Codes 1905, §§ 8020, 8061.

Oklahoma. Rev. Stats. 1903, sec. 1578.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1120.

South Dakota. Probate Code 1904, § 126.

Utah. Rev. Stats. 1898, sec. 3837.

Washington. Pierce's Code, § 2420.

Wyoming. Rev. Stats. 1899, sec. 4614.

§ 328. Power of executor in such a case. In such case, the executor or the administrator with the will annexed is entitled to demand, sue for, recover, and collect all the rights, goods, chattels, debts, and effects of the decedent remaining unadministered, and may prosecute to final judgment any suit commenced by the administrator before the revocation of his letters of administration. **Kerr's Cyc. Code Civ. Proc., § 1424.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1695.

Colorado. 3 Mills's Ann. Stats., sec. 4710.

Idaho.* Code Civ. Proc. 1901, sec. 4089.

Montana.* Code Civ. Proc., sec. 2511.

Nevada. Comp. Laws, sec. 2865.

North Dakota. Rev. Codes 1905, § 8163.

Oklahoma.* Rev. Stats. 1903, sec. 1579.

South Dakota.* Probate Code 1904, § 127.

Wyoming.* Rev. Stats. 1899, sec. 4615.

§ 329. Remaining administrator or executor to continue when his colleagues are disqualified. In case any one of several executors or administrators, to whom letters are granted, dies, becomes lunatic, is convicted of an infamous crime, or otherwise becomes incapable of executing the trust; or in a case the letters testamentary or of administration are revoked or annulled, with respect to any one executor or administrator, the remaining executor or administrator must proceed to complete the execution of the will or administration. **Kerr's Cyc. Code Civ. Proc., § 1425.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 787, p. 307.

Arizona.* Rev. Stats. 1901, par. 1696.

Colorado. 3 Mills's Ann. Stats., secs. 4708, 4768.

Idaho.* Code Civ. Proc. 1901, sec. 4090.

Montana.* Code Civ. Proc., sec. 2512.

Nevada.* Comp. Laws, sec. 2862.

New Mexico. Comp. Laws 1897, sec. 2063.

North Dakota. Rev. Codes 1905, §§ 8018, 8070.

Oklahoma.* Rev. Stats. 1903, sec. 1580.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1125.

South Dakota.* Probate Code 1904, § 128.

Utah. Rev. Stats. 1898, sec. 3839.

Washington. Pierce's Code, § 2473.

Wyoming.* Rev. Stats. 1899, sec. 4616.

§ 330. **Who to act when all acting are incompetent.** If all such executors or administrators die or become incapable, or the power and authority of all of them is revoked, the court must issue letters of administration, with the will annexed or otherwise, to the widow or next of kin, or others, in the same order and manner as is directed in relation to original letters of administration. The administrators so appointed must give bond in the like penalty, with like sureties and conditions, as hereinbefore required of administrators, and shall have the like power and authority. **Kerr's Cyc. Code Civ. Proc., § 1426.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 787, p. 307.

Arizona.* Rev. Stats. 1901, par. 1697.

Colorado. 3 Mills's Ann. Stats., secs. 4708, 4768.

Idaho.* Code Civ. Proc. 1901, sec. 4091.

Kansas. Gen. Stats. 1905, §§ 2898, 2983.

Montana.* Code Civ. Proc., sec. 2513.

Nevada.* Comp. Laws, sec. 2863.

New Mexico. Laws 1907, sec. 2, p. 157.

Oklahoma.* Rev. Stats. 1903, sec. 1581.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1125.

South Dakota.* Probate Code 1904, § 129.

Utah. Rev. Stats. 1898, sec. 3839.

Washington. Pierce's Code, § 2474.

Wyoming.* Rev. Stats. 1899, sec. 4617.

§ 331. **Executor or administrator may resign when. Court to appoint successor. Liability of outgoer.** Any executor

an administrator may, at any time, by writing, filed in the superior court, resign his appointment, having first settled his accounts and delivered up all the estate to the person whom the court shall appoint to receive the same. If, however, by reason of any delays in such settlement and delivery up of the estate, or for any other cause, the circumstances of the estate or the rights of those interested therein require it, the court may, at any time before settlement of accounts and delivering up of the estate is completed, revoke the letters of such executor or administrator, and appoint in his stead an administrator, either special or general, in the same manner as is directed in relation to original letters of administration. The liability of the outgoing executor or administrator, or of the sureties on his bond, shall not be in any manner discharged, released, or affected by such appointment or resignation. **Kerr's Cyc. Code Civ. Proc., § 1427.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 800, p. 310.
Arizona.* Rev. Stats. 1901, par. 1698.
Colorado. 3 Mills's Ann. Stats., sec. 4709.
Idaho.* Code Civ. Proc. 1901, sec. 4092.
Kansas. Gen. Stats. 1905, §§ 2895, 2896, 2983.
Montana.* Code Civ. Proc., sec. 2514.
Nevada. Comp. Laws, sec. 2866.
New Mexico. Laws 1901, sec. 17, p. 154.
Oklahoma.* Rev. Stats. 1903, sec. 1582.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1138.
South Dakota.* Probate Code 1904, § 130.
Utah. Rev. Stats. 1898, sec. 3838.
Washington. Pierce's Code, § 2471.
Wyoming. Rev. Stats. 1899, sec. 4618.

§ 332. Form. Notice of intention to resign.¹

[Title of court.]

Title of estate.] { No. ____² Dept. No. ____
 [Title of form.]

The undersigned, —, executor^s of the estate of —, deceased, hereby gives notice of his intention to resign his trust; that on the opening of the court on the — day of

_____, 19____, at the court-house of said county, at _____, or as soon thereafter as he can be heard, he will apply to the court to resign his letters; and that he has published, for the period of _____,⁴ in the _____,⁵ a newspaper of general circulation in the county wherein his letters were granted, a notice of his intention to apply to the _____⁶ court for leave so to resign.

_____, Executor ⁷ of the Estate of _____, Deceased.

Explanatory notes. 1. Form appropriate for Washington and Oregon. 2. Give file number. 3. Or, administrator. 4. Number of weeks, as prescribed by the statute. 5. Name of paper. 6. Designating it. 7. Or, administrator.

§ 333. Form. Resignation of representative.¹

[Title of court.]

[Title of estate.]

{ No. _____² Dept. No. _____
[Title of form.]

To the Honorable _____ Court of the County of _____, State of _____.

I hereby respectfully tender my resignation as executor ³ of the estate of _____, deceased.

Dated _____, 19____.

_____, Executor ⁴ of the Estate of _____, Deceased.

Explanatory notes. 1. Form appropriate for Washington or Oregon. 2. Give file number. 3, 4. Or, administrator.

§ 334. All acts of executor, etc., valid until his power is revoked. All acts of an executor or administrator, as such, before the revocation of his letters testamentary or of administration, are as valid, to all intents and purposes, as if such executor or administrator had continued lawfully to execute the duties of his trust. **Kerr's Cyc. Code Civ. Proc., § 1428.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1699.

Idaho.* Code Civ. Proc. 1901, sec. 4093.

Kansas. Gen. Stats. 1905, § 2901.

Montana.* Code Civ. Proc., sec. 2515.

Nevada.* Comp. Laws, sec. 2867.

North Dakota. Rev. Codes 1905, § 8069.

Oklahoma.* Rev. Stats. 1903, sec. 1583.

South Dakota.* Probate Code 1904, § 131.

Wyoming.* Rev. Stats. 1899, sec. 4619.

§ 335. Transcript of court minutes to be evidence. A transcript from the minutes of the court, showing the appointment of any person as executor or administrator, together with the certificate of the clerk, under his hand and the seal of his court, that such person has given bond and been qualified, and that letters testamentary or of administration have been issued to him and have not been revoked, shall have the same effect in evidence as the letters themselves. **Kerr's Cyc. Code Civ. Proc., § 1429.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1700.

Idaho.* Code Civ. Proc. 1901, sec. 4094.

Montana.* Code Civ. Proc., sec. 2516.

Nevada.* Comp. Laws, sec. 2868.

Oklahoma. Rev. Stats. 1903, sec. 1584.

South Dakota.* Probate Code 1904, § 132.

Wyoming. Rev. Stats. 1899, sec. 4620.

INCAPACITY OF REPRESENTATIVE TO ACT.

1. In general.

2. Administrator with will annexed.

1. In general. The power or jurisdiction of the probate court to appoint a new administrator may be exercised upon the happening of the death, insanity, or conviction of an infamous offense, of the former administrator, or upon the revocation of his power and authority by the court. In case of the death, insanity, or conviction of the former administrator, such death, insanity, or conviction must be judicially ascertained by the probate court before a new appointment can be made, but such fact may be properly ascertained by the court in a proceeding under a petition for the appointment of a new administrator. In case of the death of the former administrator, the fact is properly presented to the court in a petition for the appointment of a new administrator, and upon the hearing the fact may be established by witnesses. In case of the conviction of the former administrator of an infamous offense, the fact may be presented in the same manner, and proved upon the hearing by the production of

the record of his conviction. No citation to the convict is necessary, as it is the fact of the conviction, when shown to the court by proper allegation and evidence, which authorizes the court to make the new appointment. The convict is not a necessary party to the proceeding. He has had his day in court, and is conclusively bound by the record: *Estate of Blinn*, 99 Cal. 216, 220; 33 Pac. Rep. 841. The fact that the representative of the estate of a deceased person was sent to an insane asylum by an order of court does not create an absolute vacancy in the administration of the estate, although for the time being, he is incapable of executing the trust: *Estate of Moore*, 68 Cal. 281, 283; 9 Pac. Rep. 164. The legislature of California has classified death, insanity, and conviction of an infamous offense under the designation "incapable," and other matters affecting the integrity or qualification for the discharge of the duties of an administrator as "incompetency." The embezzler, the thief, the man who hesitates at no fraudulent scheme to despoil an estate, the man who is so careless and indifferent as to neglect, habitually and grossly, his duties, may have capacity to discharge properly all the duties of an administrator, but the man who is dead, or insane, or civiliter mortuus is "incapable." Whether the word "incompetent" was wisely chosen or not, the context of the statute leaves no room to doubt the sense in which it was used, and that it was used to designate a different class from those characterized as "incapable": *Estate of Blinn*, 99 Cal. 216, 221; 33 Pac. Rep. 841.

2. Administrator with will annexed. If an executor resigns before the trust without having closed the administration of the estate, it is the duty of the court to appoint an administrator with the will annexed to complete the administration: *Estate of Pina*, 112 Cal. 14, 16; 4 Pac. Rep. 332; *Estate of Strong*, 119 Cal. 663, 667; 51 Pac. Rep. 107. The appointment of such an administrator supersedes, per se, all former administrations of the estate: *McCauley v. Harvey*, 49 Cal. 497, 505. Such an administrator, under the statute of California, possesses all the power conferred upon the executor named in the will: *Kidwell v. Brummagim*, 32 Cal. 436, 441; *Crouse v. Peterson*, 130 Cal. 169; 80 Am. St. Rep. 89; 62 Pac. Rep. 475, 615; and see *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1356.

CHAPTER IX.

DISQUALIFICATION OF JUDGES, AND TRANSFERS OF
ADMINISTRATION.

- § 336. When judge not to act.
- § 337. Transfer of probate matters to adjoining county.
- § 338. Form. Order transferring proceedings.
- § 339. Transfer not to change right to administer. Retransfer, how made.
- § 340. Form. Petition for order retransferring proceeding.
- § 341. Form. Order retransferring proceeding.
- § 342. When proceedings must be returned to original court.

DISQUALIFICATION OF JUDGE. TRANSFER OF PROCEEDINGS.

Judge is disqualified when.

§ 336. When judge not to act. No will shall be admitted to probate, or letters testamentary or of administration granted, before any judge who is interested as next of kin to the decedent, or as a legatee or devisee under the will, or when he is named as executor or trustee in the will, or is a witness thereto, or is in any other manner interested or disqualified from acting. **Kerr's Cyc. Code Civ. Proc.**, § 1430.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1701.
- Colorado.** 3 Mills's Ann. Stats., secs. 4685, 4691.
- Idaho.*** Code Civ. Proc. 1901, sec. 4095.
- Montana.** Code Civ. Proc., sec. 2530.
- Nevada.** Comp. Laws, sec. 2869.
- North Dakota.*** Rev. Codes 1905, § 7900.
- South Dakota.** Probate Code 1904, § 28.
- Utah.** Rev. Stats. 1898, sec. 3776.
- Wyoming.** Rev. Stats. 1899, sec. 4621.

§ 337. Transfer of probate matters to adjoining county. When a petition is filed in the superior court, praying for admission to probate of a will, or for granting letters testamentary or of administration, or when proceedings are pending in the superior court for the settlement of an estate,

and there is no judge of said court qualified to act, an order must be made transferring the proceedings to the superior court of an adjoining county, and the clerk of the court ordering the transfer must transmit to the clerk of the court to which the proceedings are ordered to be transferred a certified copy of the order and all papers on file in his office in the proceedings;

[**Authority of court to which transferred.**] And thereafter after the court to which the proceeding is transferred shall exercise the same authority and jurisdiction over the estate and all matters relating to the administration thereof, as if it had original jurisdiction of the estate;

[**When case shall not be transferred.**] Provided, there shall not be any necessity for transferring such proceedings or any of them, when a judge of some other county qualified to act attends at the request of the judge of the county where such proceedings are pending, to hold court, to conduct and to try such proceedings; and such judge when so called upon to preside, shall exercise the same jurisdiction over any proceeding in the estate as is exercised in other cases under like circumstances. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 494), § 1431.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1702.

Colorado. 3 Mills's Ann. Stats., secs. 4685, 4691.

Idaho. Code Civ. Proc. 1901, sec. 4096.

Kansas. Gen. Stats. 1905, § 3077.

Montana. Code Civ. Proc., sec. 2531.

Nevada. Comp. Laws, sec. 2870.

North Dakota. Rev. Codes 1905, § 7901.

South Dakota. Probate Code 1904, § 28.

Utah. Rev. Stats. 1898, sec. 3776.

Wyoming. Rev. Stats. 1899, sec. 4621.

§ 338. Form. Order transferring proceedings.

[Title of court.]

[Title of proceeding.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

It appearing that ____;² and that there is no judge of this court qualified to act therein, —

It is ordered, That the above-entitled proceeding be, and the same is hereby, transferred to the ——— court of the county³ of ———, being an adjoining county; and the clerk of this court is hereby directed to transmit to the clerk of the ——— court of said county⁴ of ——— a certified copy of the order, and all papers on file in his office in said proceedings.

Dated ———, 19——. ———, Judge of the ——— Court.

Explanatory notes. 1. Give file number. 2. A petition has been filed herein for the admission to probate of the will of ———, deceased; or, for the granting of letters testamentary thereon; or, that a petition has been filed for letters of administration on the estate of ———, deceased; or, that proceedings are now pending in this court for the settlement of the estate of ———, deceased. 3, 4. Or, city and county.

§ 339. Transfer not to change right to administer. Re-transfer, how made. The transfer of a proceeding from one court to another as provided for in the preceding section, shall not affect the right of any person to letters testamentary or of administration on the estate transferred, but the same persons are entitled to letters testamentary or of administration on the estate, in the order hereinbefore provided. If, before the administration is closed of any estate transferred as herein provided, another person is elected and appointed, and qualified as judge of the court wherein the proceeding was originally commenced, who is not disqualified to act in the settlement of the estate, and the causes for which the proceeding was transferred no longer exist, any person interested in the estate may have the proceeding returned to the court from which it was originally transferred, by filing a petition setting forth these facts, and praying the court therefor. **Kerr's Cyc. Code Civ. Proc. and Stats. and Amdts.**, p. 495), § 1432.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1703.

Idaho. Code Civ. Proc. 1901, sec. 4097.

Montana. Code Civ. Proc., sec. 2532.

North Dakota. Rev. Codes 1905, § 7902.

South Dakota. Probate Code 1904, § 29.

§ 340. Form. Petition for order retransferring proceeding.

[Title of court.]

[Title of proceeding.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To the Honorable the ____ Court of the County² of ____

The petition of ____ respectfully shows:

That he is interested in the above estate, and is ____;³

That the proceedings in said estate were originally commenced in the ____ court of the county⁴ of ____, that being the court having original jurisdiction thereof;

That said proceedings were transferred to this court, order, about the ____ day of ____, 19____, on account of the disqualification of the then judge of said former court, and are still pending in this court;

That since said transfer, and on or about the ____ day of ____, 19____, the Honorable ____ was elected⁵ judge of the court from which said proceedings were transferred, and has duly qualified, is now judge of said court, and is no wise disqualified to act in said proceedings; and that the causes for which the said proceedings were transferred to this court no longer exist;

That the convenience of those interested in said estate and of most of those who will have occasion to consult the records of said proceedings, and of all witnesses who will probably be called to testify in regard to any matter in the course of said proceedings, or concerning the administration of said estate, will be much promoted by the retransfer of said proceeding to the ____ court of said county⁶ of ____ from which it was transferred to this court, as above shown;—

Wherefore your petitioner prays that an order be made retransferring said proceedings to the ____ court of the county⁷ of ____.

Dated ____, 19____. _____, Petitioner.
_____, Attorney for Petitioner.

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Give nature of interest; as, heir, devisee, executor, administrator, &c. 4. Or, city and county. 5. Or, appointed. 6, 7. Or, city and county.

§ 341. **Form. Order retransferring proceeding.**

[Title of court.]

Title of proceeding.]

{ No. ____¹ Dept. No. ____
[Title of form.] }

[It appearing from the petition of ____² herein filed, that the causes for which the above-entitled proceeding was transferred to this court no longer exist, and that good cause exists therefor, —

[It is ordered, That the above-entitled proceeding be, and the same is hereby, transferred back to the ____ court of the county³ of ____, from which it was transferred to this court; and the clerk of this court is directed to transmit to the clerk of said ____ court of the county⁴ of ____ a certified copy of this order, and all original papers on file in his office relating to said proceeding.

Dated ____, 19____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2. Give name of petitioner. 3, 4. Or, city and county.

§ 342. **When proceedings must be returned to original court.** On hearing the motion, if the facts required by the preceding section to be set out in the petition are satisfactorily shown, and it further appears to the court that the convenience of parties interested would be promoted by such change, the judge must make an order transferring the proceeding back to the court where it was originally commenced; and the clerk of the court ordering the transfer must transmit to the clerk of the court in which the proceeding was originally commenced, a certified copy of the order, and all the original papers on file in his office in the proceeding; and the court where the proceeding was originally commenced shall thereafter have jurisdiction and power to make all necessary orders and decrees to close up the administration of the estate. **Kerr's Cyc. Code Civ. Proc., § 1433.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1704.

Idaho.* Code Civ. Proc. 1901, sec. 4098.

Montana.* Code Civ. Proc., sec. 2533.

North Dakota.* Rev. Codes 1905, § 7903.

South Dakota. Probate Code 1904, § 29.

Utah. Rev. Stats. 1898, sec. 3776.

DISQUALIFICATION OF JUDGE. TRANSFER OF PROCEEDINGS.

Judge is disqualified when.

Where the sons of the judge are attorneys and hold a contract for a share of the estate, and are therefore the equitable owners of such share, such judge is disqualified from hearing and adjudging a contest upon a petition for the revocation of letters of administration and for the issuance of letters to another, who claims the entire estate as sole heir: *Howell v. Budd*, 91 Cal. 342, 350; 27 Pac. Rep. 747. In this case the application for a transfer of the cause was clearly insufficient, but, as an adjudication of the cause upon its merits was desired, and objection to the course adopted by the petitioner in making his application for an order of transfer was waived, the court proceeded to examine the cause upon the main question involved: *Howell v. Budd*, 91 Cal. 342, 347; 27 Pac. Rep. 747.

REFERENCES.

Removal to Federal court of actions relating to estates of deceased persons, because of separable controversy: See note 5 L. E. A. (N. S.) 49, 81.

CHAPTER X.

REMOVALS AND SUSPENSIONS IN CERTAIN CASES.

- 443. Suspension of powers of executor.
- 444. Form. Affidavit for removal.
- 445. Form. Order suspending administrator or executor.
- 446. Form. Order suspending powers of administrator or executor until question of waste can be determined.
- 447. Form. Order restoring powers of suspended administrator or executor.
- 448. Revocation of letters when.
- 449. Form. Order revoking letters of administration. (Short form.)
- 450. Form. Order revoking letters for wasting estate.
- 451. Any party interested may appear on hearing.
- 452. Form. Allegations of cause for removal.
- 453. Notice to absconding executors and administrators.
- 454. Form. Order to show cause, and directing notice to absconding administrator or executor.
- 455. Court may compel attendance.

REMOVAL. SUSPENSION. RESIGNATION.

- | | |
|----------------------------|---|
| In general. | 8. Removal of non-resident executors for absence. |
| Vacancy in administration. | 9. What is no cause for removal. |
| Resignation. | 10. Notice. Hearing. Evidence. |
| Province of court. | 11. Order of removal, and its effect. |
| Petition for removal. | 12. Appeal. |
| Suspension. | |
| What is cause for removal. | |

§ 343. **Suspension of powers of executor.** Whenever a judge of a superior court has reason to believe from his own knowledge, or from credible information, that any executor or administrator has wasted, embezzled, or mismanaged, or is about to waste or embezzle the property of the estate committed to his charge, or has committed or is about to commit a fraud upon the estate, or is incompetent to act, or is permanently removed from the state, or has wrongfully neglected the estate, or has long neglected to perform any duty as such executor or administrator, he must, by an order entered upon the minutes of the court, direct such executor or administrator to be cited to appear and show cause why

his letters should not be revoked, and may also suspend the powers of such executor or administrator, until the matter is investigated. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 495), § 1436.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, secs. 783, 784, p. 307.

Arizona. Rev. Stats. 1901, par. 1705.

Colorado. 3 Mills's Ann. Stats., sec. 4707.

Idaho. Code Civ. Proc. 1901, sec. 4099.

Kansas. Gen. Stats. 1905, §§ 2897, 2902.

Montana. Code Civ. Proc., sec. 2540.

Nevada. Comp. Laws, sec. 3026.

New Mexico. Laws 1901, secs. 6, 7, 8, pp. 151, 152.

North Dakota. Rev. Codes 1905, §§ 8064, 8066.

Oklahoma. Rev. Stats. 1903, sec. 1585.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 1121, 1122.

South Dakota. Probate Code 1904, § 133.

Utah. Rev. Stats. 1898, sec. 3837.

Washington. Pierce's Code, § 2460.

Wyoming. Rev. Stats. 1899, sec. 4622.

§ 344. Form. Affidavit for removal.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

State of _____,
County ² of _____, } ss.

_____, being duly sworn, says that he is a creditor ³ of said estate, and is interested therein; that his claim has been approved and filed, and that no part thereof has been paid.⁴

Subscribed and sworn to before me this _____ day of _____, 19____. _____, Notary Public, etc.⁵

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Or other interested person. 4. Here state the facts which authorize the removal of the administrator or executor; such as those which show that he has wasted, embezzled, or mismanaged, or is about to waste or embezzle, the property of the estate; or, has committed, or is about to commit, a fraud upon the estate; or, is incompetent to act; or, has permanently removed from the state; or, has wrongfully neglected the estate; or, has long neglected to perform any act as such administrator or executor. 5. Or other officer taking the oath.

§ 345. Form. Order suspending administrator or executor.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

The undersigned, judge of the ____² court of the county³ of ____, state of ____, having reason to believe, from his own knowledge,⁴ that ____, the administrator⁵ of the above-entitled estate, is wasting, embezzling, and mismanaging the property of the said estate committed to his charge,⁶ —

It is ordered, That the powers of the said ____, as such administrator,⁷ be, and they are hereby, suspended until the matter is investigated.

It is further ordered, That a citation be issued to the said ____, notifying him of such suspension, and requiring him to show cause in the above-entitled court, at the court-room thereof,⁸ on ____,⁹ the ____ day of ____, 19____, why his letters should not be revoked.

Dated ____, 19____. ____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, city and county. 4. Or, from credible information. 5. Or, administratrix; or, administrator or administratrix with the will annexed; or, executor or executrix; or the plural of any of these, according to the fact. 6. Or other act justifying suspension. 7. Or, executor, etc., as the case may be. 8. Give number of department, if any, and location of court-room. 9. Day of week.

§ 346. Form. Order suspending powers of administrator or executor until question of waste can be determined.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

It appearing from the verified petition of ____, now on file in the above-entitled matter, that ____, the administrator² of said estate, is wasting the property thereof, and that petitioner prays that said administrator be required to give further security,³ —

It is ordered, That the powers of ____, as such administrator⁴ of the estate of ____, deceased, be, and they are hereby, suspended until the matter can be heard and de-

terminated; and that a copy of this order be served upon _____, the said administrator.⁵

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. Or, executor, etc., according to the fact. 3. Or, to give bond, where, by the terms of the will, no bond was originally required. 4, 5. Or, executor, etc., as the case may be.

§ 347. Form. Order restoring powers of suspended administrator or executor.

[Title of court.]

[Title of estate.]

{ No. ____.¹ Dept. No. ____
[Title of form.] }

This court having, on the _____ day of _____, 19____, made an order suspending the powers of _____, the administrator of said estate, until certain matters named in said order could be investigated, and said matters having been fully investigated, but it appearing that said administrator³ has not been derelict in his duty toward said estate, —

It is ordered, That his powers as such administrator⁴ be restored, and the same are hereby, restored.

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2-4. Or, administratrix, or, administrator or administratrix with the will annexed; or, executrix or executrix of the last will and testament of _____; or the plural of any of these, according to the fact.

§ 348. Revocation of letters when. If the executor or administrator fails to appear in obedience to the citation, or, if he appears, and the court is satisfied from the evidence that there exists cause for his removal, his letters must be revoked. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 495), § 1437.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, secs. 783, 784, p. 307.

Arizona. Rev. Stats. 1901, par. 1706.

Colorado. 3 Mills's Ann. Stats., sec. 4707.

Idaho. Code Civ. Proc. 1901, sec. 4100.

Kansas. Gen. Stats. 1905, § 2897.

Montana. Code Civ. Proc., sec. 2541.

Nevada. Comp. Laws, sec. 3028.

New Mexico. Laws 1901, secs. 6, 7, 8, pp. 151, 152.

North Dakota. Rev. Codes 1905, § 8064.

Oklahoma. Rev. Stats. 1903, sec. 1586.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 1121, 1122.

South Dakota. Probate Code 1904, § 134.

Utah. Rev. Stats. 1898, sec. 3837.

Washington. Pierce's Code, § 2461.

Wyoming. Rev. Stats. 1899, sec. 4623.

349. Form. Order revoking letters of administration. (short form.)

[Title of court.]

of estate.] { No. ____.¹ Dept. No. ____
[Title of form.]

The court being satisfied that cause exists for the removal
____, as administrator ² of the estate of _____, deceased,
and for the revocation of his letters of administration,³ —
it is hereby ordered, That the letters of administration ⁴
heretofore granted to _____, as administrator ⁵ of the above-
entitled estate, be, and the same are hereby, revoked; and
said _____ is hereby ordered to file an account and report
of his administration within _____ days from the date of this
order.

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. Or, executor, etc., ac-
cording to the fact. 3, 4. Or, letters testamentary. 5. Or, executor,
as the case may be.

350. Form. Order revoking letters for wasting estate.

[Title of court.]

of estate.] { No. ____.¹ Dept. No. ____
[Title of form.]

appearing to the court that a charge of wasting the
estate of _____, deceased, has been preferred against _____,
administrator ² thereof; and the court, on credible in-
formation, having heretofore made an order suspending the
powers of such administrator ³ until such charge could be
investigated; and it being shown to the court that a citation

was duly issued to the said —, notifying him of such suspension, and commanding him to appear⁴ and show cause, at a time and place mentioned; that said citation has been duly served upon said administrator⁵ and returned, as provided by law and as directed by this court; and that —, one of the heirs at law of said deceased, has filed his written allegations showing reasons why the letters of said administrator⁶ should be revoked; that the said administrator⁷ has made answer to said citation and to said written allegations; and said matter having come on regularly for hearing,⁸ and the court having proceeded to hear the allegations and proofs of the parties, and having found that said administrator⁹ has grossly mismanaged such estate and wasted it; —

It is therefore ordered, That the letters of administration¹⁰ heretofore granted to the said — be, and the same are hereby, revoked. —, Judge of the — Court.

Dated —, 19—.

Explanatory notes. 1. Give file number. 2, 3. Or, executor, etc., according to the fact. 4. Before the court, or a judge thereof. 5. Or, executor, etc., as the case may be. 6. Or, letters testamentary. 7. Or, executor. 8. Or, if the matter has been continued, say, "and the hearing of said matter having been regularly postponed to this day." 9. Or, executor, as the case may be. 10. Or, letters testamentary.

§ 351. Any party interested may appear on hearing. At the hearing, any person interested in the estate may appear and file his allegations in writing, showing that the executor or administrator should be removed; to which the executor or administrator may demur or answer, as hereinbefore provided. The issues raised must be heard and determined by the court. **Kerr's Cyc. Code Civ. Proc., § 1438.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, secs. 783, 784, p. 307.

Arizona.* Rev. Stats. 1901, par. 1707.

Idaho.* Code Civ. Proc. 1901, sec. 4101.

Montana.* Code Civ. Proc., sec. 2542.

Nevada. Comp. Laws, sec. 3029.

New Mexico. Laws 1901, secs. 6, 7, 8, pp. 151, 152.

Oklahoma.* Rev. Stats. 1903, sec. 1587.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 1121, 1122.
South Dakota.* Probate Code 1904, § 135.
Washington. Pierce's Code, § 2462.
Wyoming. Rev. Stats. 1899, sec. 4624.

§ 352. Form. Allegations of cause for removal.

[Title of court.]

Title of estate.] { No. ____¹ Dept. No. ____
 { [Title of form.]

____, who is interested in the above-entitled estate,² now comes and files his allegations, in writing, as hereinafter stated, showing why _____, the administrator³ of the estate of said deceased, should be removed.

First. That said administrator⁴ has wasted and is wasting⁵ said estate, in this, ____.⁶

Second. That said administrator⁷ has embezzled and converted to his own use property of said estate committed to his charge,⁸ in this, ____.⁹

Third. That said administrator¹⁰ has mismanaged the property of the estate committed to his charge, in this, ____.¹¹

Fourth. That said administrator¹² has committed¹³ a fraud upon said estate, in this, ____.¹⁴

Fifth. That said administrator¹⁵ is incompetent to act, for the reason that ____.¹⁶

Sixth. That said administrator¹⁷ has permanently removed from the state.¹⁸

Seventh. That said administrator¹⁹ has wrongfully neglected the said estate, in this, ____.²⁰

Eighth. That said administrator²¹ has long neglected to perform any act as such administrator.²²

Wherefore the said ____²³ prays that the letters of said administrator²⁴ be revoked.

____, Attorney for the Said ____.²⁵

Explanatory notes. 1. Give file number. 2. As, creditor, heir at law, etc., according to the fact. 3, 4. Or, executor, etc., as the case may be. 5. Or, is about to waste. 6. State the facts. 7. Or, executor. Or, is about to embezzle, etc., stating how. 9. Giving the facts.

10. Or, executor. 11. State how. 12. Or, executor. 13. Or, is about to commit. 14. Show how. 15. Or, executor. 16. State the reason. 17. Or, executor. 18. Give the facts. 19, Or, executor. 20. Show how. 21, 22. Or, executor. 23. Name of interested party. 24. Or, letters testamentary. 25. Name of interested party.

§ 353. Notice to absconding executors and administrators.

If the executor or administrator has absconded or conceals himself, or has removed or absented himself from the state, notice may be given him of the pendency of the proceedings by publication, in such manner as the court may direct, and the court may proceed upon such notice as if the citation had been personally served. **Kerr's Cyc. Code Civ. Proc., § 1439.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1708.

Idaho.* Code Civ. Proc. 1901, sec. 4102.

Montana.* Code Civ. Proc., sec. 2543.

Nevada. Comp. Laws, sec. 3030.

New Mexico. Laws 1901, secs. 6, 7, 8, pp. 151, 152.

Oklahoma. Rev. Stats. 1903, sec. 1589.

South Dakota. Probate Code 1904, § 137.

Washington.* Pierce's Code, § 2463.

Wyoming. Rev. Stats. 1899, sec. 4625.

§ 354. Form. Order to show cause, and directing notice to absconding administrator or executor.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.] }

It appearing that _____, administrator² of the estate of _____, deceased, has absconded,³ —

It is ordered, That the clerk of this court cause notice to be given to the said _____ to appear before this court, at the court-room thereof,⁴ on _____,⁵ the _____ day of _____, 19____, and then and there show cause, if any he can, why his letters should not be revoked.

It is further ordered, That notice of the proceedings aforesaid be given to the said _____ by publication, and that said notice be published in the _____, a newspaper of general

publication printed in said county,⁶ once a week, for four
 weeks.⁷ ———, Judge of the ——— Court.

Dated ———, 19——.

Explanatory notes. 1. Give file number. 2. Or, executor, etc., according to the fact. 3. Or, concealed himself; or, has removed or absconded himself from the state. 4. Give department, if any, and location of court-room. 5. Day of week. 6. Or, city and county. 7. Or in any other manner that the court may direct. The court may also order a copy of the publication, and a certified copy of the petition for removal, to be mailed, postage prepaid, and registered, directed to any address where the absconding administrator or executor may be found.

§ 355. **Court may compel attendance.** In the proceedings authorized by the preceding sections of this article, for the removal of an executor or administrator, the court may compel his attendance by attachment, and may compel him to answer questions, on oath, touching his administration, and, on his refusal so to do, may commit him until he obey, or may revoke his letters, or both. **Kerr's Cyc. Code Civ. Proc.,** 440.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1709.

Idaho.* Code Civ. Proc. 1901, sec. 4103.

Montana.* Code Civ. Proc., sec. 2544.

Nevada. Comp. Laws, sec. 3031.

North Dakota. Rev. Codes 1905, § 8065.

Oklahoma. Rev. Stats. 1903, sec. 1588.

South Dakota. Probate Code 1904, § 136.

Washington.* Pierce's Code, § 2464.

Wyoming. Rev. Stats. 1899, sec. 4626.

REMOVAL. SUSPENSION. RESIGNATION.

In general.	8. Removal of non-resident executors for absence.
Vacancy in administration.	9. What is no cause for removal.
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Province of court.	11. Order of removal, and its effect.
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What is cause for removal.	

1. In general. A statute which provides that a sworn petition may be presented, setting forth waste by the executor, and praying

that he be required to give bond, and that, when such petition is filed, the powers of the executor may be suspended until the matter can be heard and determined, does not in any way conflict with a statute which gives to the probate court a general power to require a bond in proper cases: *Estate of White*, 53 Cal. 19. An *ex parte* order appointing a special administratrix does not operate as a removal of an executrix previously appointed: *Schroeder v. Superior Court*, 70 Cal. 343, 344; 11 Pac. Rep. 651. Under a statute which provides that any creditor of the estate, or any "person interested" therein, may apply for the removal of an administrator, an attorney who has performed services for the estate has an interest therein sufficient to authorize him to petition for the removal of the administrator; and the court, in passing on the matter, will take judicial notice of its records and prior proceedings in the administration of the estate: *In re Miller's Estate*, 40 Or. 424, sub nom. *Knight v. Hamakar*, 67 Pac. Rep. 107, 109. Under some circumstances, an administratrix is entitled to enjoin the prosecution of a proceeding for her removal. Thus where the administratrix and a county, at the time the proceedings for her removal were instituted in the county court, were engaged in litigation over a claim for a large amount of money, asserted by the county against the estate of which she was administratrix, and the county had brought sundry actions, suits, and proceedings to establish its claim, and the administratrix was making an honest and apparently successful defense thereto, and the county had been unable to establish its claim, but, to prevent the administratrix from making such defense, and to enable it to succeed in the litigation, it instituted a proceeding for her removal, in the court presided over by the person who had been most active in her behalf, and under whose direction the litigation was being conducted, and where, to give it an apparent standing to maintain such proceeding, the county alleged that it was a creditor of the estate, although it had not established the claim to that relationship, and was not entitled to the rights of a creditor, it seems manifest that the proceeding could not have been instituted in good faith, but was instituted for the purpose of vexing, annoying, and harassing the administratrix, and illegally and wrongfully to deprive the estate, represented by her, of the right to defend against the actions and suits brought by the county on an alleged wrongful claim. Under these circumstances, a court of equity should not hesitate to interfere, by injunction, to protect the rights of the administratrix: *Alderman v. Tillamook County (Or.)*, 91 Pac. Rep. 298, 299.

2. Vacancy in administration. There must be a vacancy in the administration before the appointment of a new administrator: *Haynes v. Meeks*, 20 Cal. 288, 311. There is no such thing as the removal of an existing administrator, simply by force of the appoint-

ment of another. The office must first become vacant before a second appointment can be made. A vacancy may arise by operation of law on the happening of certain events, as by lunacy of the administrator, established by judicial decree, or by his conviction of an infamous crime: *Haynes v. Meeks*, 20 Cal. 288, 311. But the sending of an administrator to an asylum for the insane does not create an entire vacancy in the administration of the estate, as that provision of the code which provides that an office becomes vacant on the happening of the incumbent's insanity, "found upon a commission of lunacy issued to determine the fact," has reference to a commission issued out of chancery, and is not the ordinary proceeding taken to send a person to an insane asylum: *Estate of Moore*, 68 Cal. 281, 283; 9 Pac. Rep. 164. If one of several executors or administrators should die, become a lunatic, be convicted of an infamous crime, or otherwise become incapable of executing the trust, the remaining executors or administrators must proceed to complete the execution of the will or administration; and if all the executors or administrators die or become incapable, the court must issue letters to others: *Estate of Moore*, 68 Cal. 281, 283; 9 Pac. Rep. 164. Nor does the fact that a public administrator failed to file an additional bond on taking out letters, as directed by the probate judge, create a vacancy in the office, ipso facto, though it is a ground for declaring a vacancy therein on a judicial ascertainment and declaration of such omission: *In re Craigie's Estate*, 24 Mont. 37; 60 Pac. Rep. 495, 496.

3. Resignation. A resignation is not a matter absolutely in the power of an administrator, to be made at any time he may choose. The statute confers upon him only a conditional right to resign; that "provided he shall first settle his accounts and deliver up all the estate to such person as may be appointed by the court"; but the inference to be drawn from such a statute is, that the permission given in the one case is a negative upon the right in all others: *Haynes v. Meeks*, 20 Cal. 288, 310; *Haynes v. Meeks*, 10 Cal. 110; 70 Cal. Dec. 703. After his appointment, an administrator has no right to resign, except in the manner pointed out in the statute. He cannot resign the trust at his own volition. He has no right to consider his own convenience, merely, in such a case. He must first comply with the requirements of the statute before he has the right to ask leave of the court to resign, and it is not till then that the court can allow it: *Ramp v. McDaniel*, 12 Or. 108; 6 Pac. Rep. 456, 459. If the executor or administrator of an estate resigns his trust, and a new executor is appointed, it must be presumed, on appeal, in favor of the action of the court below, that the former executor or administrator had settled his accounts, delivered up all the assets of the estate to his successor, and that all conditions existed which were necessary to authorize the new appointment: *Lucas v. Todd*, 28 Cal. 182, 185; *Jen-*

nings v. Le Breton, 80 Cal. 8, 18; 21 Pac. Rep. 1127; Estate of Allen, 78 Cal. 581, 21 Pac. Rep. 426. Upon the resignation of the administrator, it is the duty of the court to appoint another, competent to receive the estate from the retiring administrator, and complete its administration: Wilson v. Hernandez, 5 Cal. 437, 443. If a person tenders his resignation as administrator and files, at the same time, his account with the estate, showing his receipts and disbursements, but shortly afterwards certain heirs of the deceased petition for the appointment of an administrator de bonis non, and, at the same time, file objections to the accounts submitted by the administrator, who, on the hearing of such matters, withdraws his resignation, whereupon the petitioners ask for his removal, on the ground that he had wrongfully neglected his duties as administrator, to the detriment of the estate, the heirs have the right to insist upon the revocation of his letters. The administrator, having filed his resignation, and thereby tendered the issue whether or not his letters should be revoked, could not, after the issue had been joined in by the heirs of the estate, withdraw from it by withdrawing his resignation: In re Dietrich's Estate, 39 Wash. 520; 81 Pac. Rep. 1061, 1062. An executor's agreement to resign for a consideration is illegal. Such an agreement is against public policy: Currier v. Clark, 19 Col. App. 250; 75 Pac. Rep. 927. But it is well settled that the renunciation of an executor may be retracted at any time before letters have been actually granted to another: Estate of True, 120 Cal. 352, 353; 52 Pac. Rep. 815. It must be presumed that an order of the probate court, accepting the resignation of an executor or administrator, and discharging him from his trust, is regular. Such resignation cannot therefore be collaterally attacked: Luco v. Commercial Bank, 70 Cal. 339, 342; 11 Pac. Rep. 650; Lucas v. Todd, 28 Cal. 182. An executor or administrator may resign his appointment, having first settled his accounts and delivered up all the estate to the person appointed to receive the same;—but if there be delay in settling the accounts and delivering the estate, or from any other cause the circumstances of the estate, or the rights of those interested require it, the court may, before the settlement and delivery is completed, revoke the letters and appoint an administrator, either general or special: Luco v. Commercial Bank, 70 Cal. 339, 342; 11 Pac. Rep. 650.

REFERENCES.

Agreement to renounce executorship is illegal when: See note 48 Am. Rep. 332, 333.

4. **Province of court.** The probate court, or its judge, as the general supervisor and guardian of estates of deceased persons, has power, by law, to suspend or remove an administrator whenever there is reason to believe, either from personal knowledge or from credible information, that such administrator has fraudulently wasted or mis-

managed the estate, or is about to do so, or has become incompetent to manage it: *Deck's Estate v. Gherke*, 6 Cal. 666, 669; *In re Baldrige*, 2 Ariz. 299; 15 Pac. Rep. 141, 143; *Ramp v. McDaniel*, 12 Or. 108; 6 Pac. Rep. 456, 459. The court by which an executor or administrator is appointed has a very large discretion in determining whether, upon the facts presented to it, the officer shall either be suspended or removed: *Estate of Healy*, 137 Cal. 474, 476; 70 Pac. Rep. 455. A court, after appointing an administrator, has authority to revoke the appointment, not for the purpose of appointing a successor, but for the sole purpose of ending an unnecessary administration: *Murphy v. Murphy*, 42 Wash. 142; 84 Pac. Rep. 646, 648.

5. Petition for removal. A petition for the removal of an administrator is insufficient if it is not presented by persons interested, or does not allege sufficient cause; but where the petition specifically states facts which, if true, conclusively show that the administrator neglected his trust within the cause defined by the statute, it is sufficient: *In re Miller's Estate*, 40 Or. 424, sub nom. *Knight v. Hamakar*, 67 Pac. Rep. 107, 109, 110. As a general rule, where the probate court has once regularly conferred the appointment, it cannot remove the incumbent, except for causes defined in the statute: *In re Miller's Estate*, 40 Or. 424, sub nom. *Knight v. Hamakar*, 67 Pac. Rep. 107, 110. The removal can only be for statutory cause: *Miller v. Hider*, 9 Col. App. 50; 47 Pac. Rep. 406, 409. Where the statute provides that letters of administration may be revoked if the administrator wastes or mismanages the estate, or conducts himself in such a manner as to endanger his co-administrators or sureties, and the language of the petition for the removal is as broad and general as that of the statute, proof of any waste or mismanagement is admissible; but if the petitioner signally fails to establish either waste or mismanagement, it is error for the court to remove the administrator: *Miller v. Hider*, 9 Col. App. 50; 47 Pac. Rep. 406, 409. When an administrator appears in proceedings for his removal, based on a neglect of his duty, and submits an excuse for his neglect, without objecting to the sufficiency of the petition, he thereby waives any objection to the petition on the ground that it does not allege that his neglect to publish notice of his appointment, or to file an inventory within the time required by law, has resulted or would result in probable loss to the petitioner, or that the facts which constitute the claim of the petitioners as creditors are not averred, or that the person whom the court is asked to appoint is not a resident of the county: *In re Barnes' Estate*, 36 Or. 279; 59 Pac. Rep. 464, 465. A demurrer lies to a petition to remove an executor or administrator: *Estate of Carter*, 16 Haw. 784.

6. Suspension. Where the statute provides that an order must be made, suspending the powers of an administrator whenever the judge

"has reason to believe, from his own knowledge or from credible information," that the facts named in the statute as reasons for such order exist, the implication is, that the court is at liberty to examine and consider the "information," for the purpose of determining whether it is "credible," or affords any reason to believe in the truth of the facts alleged. Hence where an application has been filed for the removal of an administrator, and for the revocation of his letters of administration, upon the ground that he has mismanaged the estate, and neglected his duties as administrator thereof, and each of the facts alleged in the petition is distinctly denied by the administrator, the court is not required to make an order of suspension until the truth of the informer's allegations shall have been established: *Estate of Healy*, 137 Cal. 474, 476; 70 Pac. Rep. 455. The judge may suspend the powers of an executor for various causes designated in the statute, one of which is, that if any executor has permanently removed from the state, it then becomes the duty of the judge to cite the executor to appear and show cause why his letters should not be revoked. If he appears, and the court is satisfied that there exists cause for the removal, his letters must be revoked, but it is not necessary that the court first suspend the executor before citing him to appear and show cause why his letters should not be revoked. The suspension looks to the removal of the executor, and is a step toward it, but not a necessary one. Usually the ground of suspension would justify removal, but the former takes place without a hearing, while the latter cannot. As it becomes the duty of the court to issue a citation after its suspension, there seems to be no reason why it may not reach the ultimate object — removal — by direct proceedings: *Estate of Kelley*, 122 Cal. 379, 382; 55 Pac. Rep. 136.

7. What is cause for removal. The court has power to vacate the appointment of an executor or administrator which has been inadvertently granted: *Raine v. Lawlor*, 1 Cal. App. 483; 82 Pac. Rep. 688, 689; or where he is not entitled to administration: *Koury v. Castillo* (N. M.), 79 Pac. Rep. 293, 295. Charges which, if believed by the court, may be ground for suspending the representative, are, if proved upon a hearing, ground for removing him: *Estate of Rathgeb*, 125 Cal. 302, 308; 57 Pac. Rep. 1010. An executor who has no business capacity, who made no effort to collect debts said to be due to the estate, or to find whether in fact they were valid claims of the deceased against the alleged debtors, who never read and did not know the contents of affidavits attached to his reports, who did not know the amount of money due the estate, who mismanaged the affairs of the estate, and who was found, in general, to be incompetent to act as executor, may properly be removed: *In re Courtney's Estate*, 31 Mont. 625; 79 Pac. Rep. 317, 318. An executor may always be removed after his appointment, unless he discharges the duty of his trust faithfully and as

directed by law: *Estate of Bauquier*, 88 Cal. 302, 313; 26 Pac. Rep. 78, 532. He may be removed, on the application of an heir or other person interested in the estate, for unfaithfulness or neglect to the probable loss of the applicant; or the court may, for like cause, upon its own motion, remove such officer; but in either instance he must be permitted to appear and show cause why such action should not be taken, and is thereby accorded a hearing in the premises: *In re Partridge's Estate*, 31 Or. 297; 51 Pac. Rep. 82, 84. If he neglects for four years to file an inventory, or to cause the estate to be appraised, or to give the statutory notice to creditors, and has neglected to require verified vouchers to be presented for money of the estate his account shows he has paid out, such facts abundantly justify his removal, especially where it further appears that he has temporarily removed from the estate, and does not have a residence therein: *In re Dietrich's Estate*, 9 Wash. 520; 81 Pac. Rep. 1061, 1062. Where he has been authorized to sell the real property belonging to the estate for cash, has made a sale thereof under the power conferred, and has falsely reported that he had received the cash therefor, and the court, relying thereon, has confirmed the sale in pursuance of which the administrator has delivered a deed of the premises to the purchaser, such conduct conclusively shows that the administrator has "neglected" his trust, within the cause defined by the statute: *In re Miller's Estate*, 40 Or. 424, sub nom. *Knight v. Hamakar*, 67 Pac. Rep. 107, 110. An executor or administrator may be removed for mismanagement and neglect of the estate, where it appears that he has assumed conflicting duties, or where antagonistic interests disqualify him from acting as executor or administrator: *Estate of Bell*, 135 Cal. 194, 196; 67 Pac. Rep. 123; *Mills' Estate*, 22 Or. 210, sub nom. *Mills v. Mills*, 29 Pac. Rep. 443, 444. Thus if the administrator fails to include in his inventory certain personal property, which he claims to have purchased from the heirs, it is apparent that there is a direct conflict in interest between the estate and the administrator, and he cannot act indifferently in the matter: *Mills' Estate*, 22 Or. 210, sub nom. *Mills v. Mills*, 29 Pac. Rep. 443, 444. So if an executor acts as agent of the mortgagee, and allows the mortgage to be foreclosed, and the sale of the property made to the mortgagee, without interposing any defense to the action, his duties to the estate and to such agent are necessarily conflicting to some extent, and the executor should be removed for permitting such sale, especially where it appears that the mortgaged property was worth twice the amount of the mortgage: *Estate of Bell*, 135 Cal. 194, 195; 67 Pac. Rep. 193. It is the duty of the executor or administrator to state in his inventory the interest of the estate in property, and to have that interest appraised. If he refuses to do so, it is the duty of the court, in its discretion, to remove him: *Mesmer v. Jenkins*, 1 Cal. 151, 154; *In re Holladay's Estate*, 18 Or. 168; 22 Pac. Rep. 750, 751; *In re Barnes' Estate*, 36 Or. 279; 59 Pac. Rep. 464, 465; *Clancy v.*

McLeroy, 30 Wash. 567; 70 Pac. Rep. 1095, 1096. An executor or administrator may be removed for "unfaithfulness or neglect of his trust," to the probable loss of persons interested in the estate, where he has failed to publish the statutory notice to creditors, or to file the inventory within the time prescribed by statute: *In re Barnes' Estate*, 36 Or. 279; 59 Pac. Rep. 464, 465. An executor may also be removed where he has failed for many years, without any satisfactory explanation, to wind up the administration of the estate: *Estate of Moore* (Cal.), 22 Pac. Rep. 653, 654. One whose personal interests are in conflict with his duties as executor or administrator is not a proper person to hold the office. Thus where the estate of a deceased person is insolvent, and it appears that the decedent made a conveyance of land in his lifetime, which there is reasonable ground to believe fraudulent, the creditors have a right to insist that the executor or administrator shall proceed as directed by the statute; and if he refuses to do so, or if his personal interests are such as to prevent him from doing his official duty in this regard, he is not a suitable person to be intrusted with the duties of the office, and should be removed: *Marks v. Coats*, 37 Or. 609; 62 Pac. Rep. 488, 489.

8. Removal of non-resident executors for absence. In some states it is provided by statute that whenever an executor has permanently removed from the state it becomes the duty of the judge to cite the executor to appear and show cause why his letters should not be revoked. The phrase "has permanently removed from the state," in such a statute, may more properly refer to a resident executor who has permanently removed from the state, but the reason for revoking the letters in such case applies equally to a non-resident executor who comes here to receive his appointment, and then permanently withdraws from the state and remains away. It is his permanent absence from the place where the business is to be transacted, beyond the process of the court, and where the creditors of the estate and others having business with it cannot reach him, that creates the disqualification; and this is equally true of both resident and non-resident executors. The statute should be so construed as to give ground of removal of a non-resident executor when he fails to come to this state and personally conduct the business of the estate at such times and as frequently as the interests of the estate and of those concerned in its settlement may require. And the court, exercising a sound judicial discretion, must be the judge as to what will constitute the permanent absence from the state: *Estate of Kelley*, 122 Cal. 379, 382; 55 Pac. Rep. 136. After he has appeared and submitted himself to the jurisdiction of the court, he cannot be removed from the office on the ground of his non-residence, unless he subsequently permanently removes from the state: *Hecht v. Carey*, 13 Wyo. 154; 78 Pac. Rep. 705, 707.

9. **What is no cause for removal.** The removal of an executor or administrator can be made only for statutory cause: *Miller v. Hider*, Col. App. 50; 47 Pac. Rep. 406, 409. While it is the duty of the courts to protect carefully the interests of estates, the rights of those who are appointed to take charge of and to manage them should not be overlooked; and an executor or administrator should not be removed, except for good and sufficient cause: *Estate of Welch*, 86 Cal. 99, 183; 24 Pac. Rep. 943. The fact that he has improperly paid an attorney's fee is no ground for removal: *Estate of Welch*, 110 Cal. 605; 22 Pac. Rep. 1089. The fact that the person who administered upon an estate was a non-resident is not such a fraud as will avoid the administration proceedings. That a person applying for letters is a non-resident is a good ground for opposing his appointment, and good cause for removing him after he has been appointed, but his acts as administrator, when once appointed, are neither void nor voidable, and cannot be set aside for that reason: *Meikle v. Cloquet* (Wash.), 87 Pac. Rep. 841, 843. Nor can he be removed for refusing to give notice to creditors, where no possible good could have been accomplished by publishing such notice, and where no notice to creditors is necessary; and where the estate is of less value than fifteen hundred dollars, and there are no children, and the widow is entitled to have the whole set apart to her without any further proceedings in the administration: *Estate of Atwood*, 127 Cal. 427, 430; 59 Pac. Rep. 770. Where it is found that some of the heirs have power to act, and have made a valid and binding transaction, in which their action was subject to their own control, such as the execution of a mortgage on their interests, this is no ground for depriving the executor of his office in respect to the estate: *In re Ming*, 15 Mont. 79; 38 Pac. Rep. 228.

10. **Notice. Hearing. Evidence.** A court cannot, of its own motion, remove an administrator without giving him an opportunity to be heard; and if he offers to explain a long delay in his administration, by evidence that the administration had been prolonged by reason of litigation, it is error to reject such evidence. For the purpose of showing unavoidable delay and good faith, he has the right to introduce every paper in the case to prove the various proceedings had therein: *Estate of Moore*, 83 Cal. 583, 586; 23 Pac. Rep. 794. Where his powers have been suspended until the matter for which he has been suspended is investigated, notice of such suspension must be given to him, and he must be cited to show cause why his letters should not be revoked. If he fails to appear in obedience to the citation, or if, appearing, the court is satisfied that there exists cause for his removal, his letters must be revoked; but when charges against an executor or administrator are formulated in a sworn statement prior to issuing a citation to show cause, they need not be reiterated in a separate document. The provisions of the statute allowing any

person interested in the estate to appear at the hearing and file charges against the representative cannot be constituted as requiring charges previously made to be filed anew: *Estate of Rathgeb*, 125 Cal. 302, 308; 57 Pac. Rep. 1010. An executrix under a "non-intervention will" may be removed, and letters testamentary be issued to some other person, on the ground that she failed to pay a certain judgment within a specified time, where the evidence warrants a finding that she had in her possession funds belonging to the estate sufficient to pay the judgment, and that it was the only claim: *In re MacDonald's Estate*, 29 Wash. 422; 69 Pac. Rep. 1111, 1113, 1114. For evidence of an administrator's neglect of his trust sufficient to authorize his removal, see *In re Miller's Estate*, 40 Or. 424, sub nom. *Knight v. Hamakar*, 67 Pac. Rep. 107.

11. **Order of removal, and its effect.** An order for the removal of an administrator is not required to be in any particular form. Hence if he has failed to comply with the order of the court to give additional security, an order "that the right of the administrator to the administration of this estate cease" cuts off his powers and rights, and completely ousts him from office, and the order cannot be attacked on the ground that it was made without notice, because no notice is required by the statute, and no notice is necessary: *Barrett v. Superior Court* (Cal.), 47 Pac. Rep. 592, 593. Where three persons were joint administrators of an estate, and one of them had possession of all the funds, but was removed from the administration by the probate court, and three claims presented by him against the estate, having been passed on by the probate court, were appealed to the district court, and the other two administrators, as administrators, brought suit to recover the funds in his hands, and the case was tried before the appeals were determined, and a judgment rendered against the defendant administrator for all the funds in his hands, it was held that the remaining administrators were entitled to the possession of the funds belonging to the estate, pending the litigation on the other claims, and that, as neither party asked to have the contested claims determined in the action, the court committed no error in rendering judgment for the full amount of the assets in the hands of the defendant, leaving the contested claims to be determined in the separate actions pending on appeal: *Gilmore v. Gilmore*, 59 Kan. 19; 51 Pac. Rep. 891. An administrator, after the removal of another administrator, has the right to prosecute a pending appeal and to defend the action: *Kerns v. Dean*, 77 Cal. 555, 560; 19 Pac. Rep. 817. After the letters of an executor or administrator have been revoked, his authority to act for the estate terminates, and he is divested of all power to pay any claim against it: *Rutenic v. Hamakar*, 40 Or. 444; 67 Pac. Rep. 196, 200.

12. Appeal. The powers of an executor or administrator terminate at the date of his removal from office, and the administration of the estate remaining unadministered immediately devolves upon a co-executor or co-administrator, if there be one, and if not, upon the person to whom letters shall be granted; and an appeal does not restore him to that office, pending its determination, in the absence of a statute to that effect. During the pendency of the appeal, his authority is suspended, and he has no power to control or to manage the affairs of the estate until reinstated by an order of the appellate tribunal: *Knight v. Hamakar*, 33 Or. 154; 54 Pac. Rep. 659, 660; and see *Alderman v. Tillamook County (Or.)*, 91 Pac. Rep. 298, 300. Pending the appeal of an administrator from an order removing him, he is suspended from office, and it is within the power of the court to appoint a special administrator to act during the period of suspension, but not to appoint a general administrator until such order of removal becomes final: *Estate of Moore*, 86 Cal. 72, 73; 24 Pac. Rep. 846. When the administrator is displaced, he ceases to have either interest in or power over the estate. He thereafter ceases to have any connection with the estate, and a judgment relating to its affairs cannot be rendered against him. He is as completely separated from the business of the estate as if he were dead, and has no right to appear in or be a party, in any court, to a suit which the law confides to the representative of the deceased: *Moore v. Moore*, 127 Cal. 460, 462; 59 Pac. Rep. 823. If, after the removal of an administrator, a judgment is rendered against him, for an amount found to be due from him to the estate, and he takes an appeal from the judgment, he must give an appeal bond, required of the appellants in civil suits, notwithstanding a statute that, on an appeal by an administrator on all questions relating to probate, no bonds will be required of him: *Fuller v. Fuller's Estate*, 7 Col. App. 755; 44 Pac. Rep. 72. The revoking of the letters of an administrator affects him personally, and he is not exempted by the statute from giving an appeal bond, if he desires to stay the proceedings. Where he has taken an appeal from an order revoking his letters, the decision of the probate court on the sufficiency of the evidence to justify the removal will not be reviewed on a writ of certiorari, if the evidence is not set out in the petition, and there was any evidence to support the issue of fact found by the probate judge: *In re Henriques*, 5 N. M. 169; 21 Pac. Rep. 80, 82. The appellate court has no original jurisdiction in the matter of the removal of executors. Its jurisdiction is purely appellate. It has no jurisdiction or authority to go into the lower court and remove an executor; and although it is empowered by the statute, in certain cases, to render such judgment as the court below should have rendered, it can only do so when the issue has first been heard and determined by the inferior court, and is before the appellate court upon proper proceedings in error. It certainly cannot do so where no issue involving miscon-

duct upon the part of the executor was determined by the court below, and where the only issue had or determined was a question of his non-residence; but where the executor was erroneously removed on the sole ground that he was a non-resident, and the fact of non-residence was admitted, his right to the office becomes purely a question of law, and the appellate court may reverse the order removing the executor without having all of the evidence before it: *Hecht v. Carey*, 13 Wyo. 154; 78 Pac. Rep. 705, 708. All the cases agree that the appellate court will interfere with the exercise of the power conferred upon the probate judge in respect to the removal of executors or administrators only when there has been gross abuse of discretion: *Estate of Healy*, 137 Cal. 474, 476; 70 Pac. Rep. 455; *Estate of Moore*, 83 Cal. 583, 587; 23 Pac. Rep. 794; *In re Holladay's Estate*, 18 Or. 168; 22 Pac. Rep. 750, 751; *In re Baldrige*, 2 Ariz. 299; 15 Pac. Rep. 141. Unless the statute authorizes an appeal from an order refusing to remove an administrator, the appeal will be dismissed: *Estate of Moore*, 68 Cal. 394; 9 Pac. Rep. 315; and see *Estate of Moore*, 86 Cal. 72, 73; 24 Pac. Rep. 846.

PART V.

INVENTORY AND COLLECTION OF EFFECTS OF DECEDENT.

CHAPTER I.

INVENTORY, APPRAISEMENT, AND POSSESSION OF ESTATE.

- § 356. Inventory to include homestead.
- § 357. Appraisement, and pay of appraisers.
- § 358. Oath of appraisers. Inventory, how made.
- § 359. Form. Order appointing appraisers.
- § 360. Form. Certificate of appointment of appraisers.
- § 361. Form. Oath of appraisers to appraise property.
- § 362. Form. Inventory and appraisement.
- § 363. Form. Oath of administrator as to property.
- § 364. Form. Certificate of appraisers.
- § 365. Form. Bill of appraisers, and oath thereto.
- § 366. Inventory and appraisement. Money.
- § 367. Effect of naming a debtor executor.
- § 368. Discharge or bequest of debt against executor.
- § 369. Oath to inventory.
- § 370. Letters may be revoked for neglect of administrator.
- § 371. Form. Order directing notice to show cause why letters should not be revoked for neglecting to return inventory.
- § 372. Form. Order of removal for neglecting to file inventory.
- § 373. Inventory of after-discovered property.
- § 374. Form. Order to show cause why administrator should not be removed for not causing after-discovered property to be appraised and inventoried.
- § 375. Administrator or executor to possess all real and personal estate.
- § 376. Executor or administrator to deliver real estate to heirs or devisees when.
- § 377. Surviving heirs may collect money deposited in bank.
- § 378. Form. Affidavit to collect bank deposit of deceased depositor.

EFFECTS OF DECEDENTS. INVENTORY, APPRAISEMENT, AND POSSESSION OF ESTATE.

- | | |
|--------------------------------|-----------------------------------|
| 1. Effects of decedents. | (2) Interference with estate. Ir- |
| (1) Administration in general. | regular accounts. |

- | | |
|---|--|
| (3) What are assets. In general. | 2. Inventory and appraisement. |
| (4) Same. Notwithstanding what. | (1) In general. |
| (5) Estoppel to deny. | (2) Affidavit. |
| (6) What are not assets. | (3) Return. |
| (7) Discovery of assets. | (4) Must include what. |
| (8) Collection of assets. | (5) Second or further inventory. |
| (9) Collection of, by domiciliary, ancillary, and foreign executor. | (6) As evidence of value. |
| (10) Custody and control of assets. | (7) Appraisement. |
| (11) Widow takes as trustee when. | (8) No estoppel from filing inventory. |
| (12) Realty. Personalty. Equitable conversion. | 3. Possession of estate. |
| (13) Remainder in fee after homestead. | (1) Right to, and nature of. |
| | (2) Statute of limitations. Loss of right. |
| | (3) Domiciliary executors. |
| | (4) Recovery of possession. |

§ 356. **Inventory to include homestead.** Every executor or administrator must make and return to the court, within three months after his appointment, a true inventory and appraisement of all the estate of the decedent, including the homestead, if any, which has come to his possession or knowledge. *Kerr's Cyc. Code Civ. Proc.*, § 1443.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 801, p. 310.
Arizona. Rev. Stats. 1901, par. 1710.
Colorado. 3 Mills's Ann. Stats., secs. 4737, 4814.
Idaho. Code Civ. Proc. 1901, sec. 4104.
Kansas. Gen. Stats. 1905, §§ 2905, 2913.
Montana.* Code Civ. Proc., sec. 2550.
Nevada. Comp. Laws, sec. 2871.
New Mexico. Laws 1901, sec. 18, p. 154.
North Dakota. Rev. Codes 1905, § 8078.
Oklahoma. Rev. Stats. 1903, sec. 1592.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1139.
South Dakota. Probate Code 1904, § 138.
Utah. Rev. Stats. 1898, sec. 3841.
Washington. Pierce's Code, § 2500.
Wyoming. Rev. Stats. 1899, sec. 4680.

§ 357. **Appraisement, and pay of appraisers.** To make the appraisement, the court, or a judge thereof, must appoint three disinterested persons (any two of whom may act), who are entitled to receive a reasonable compensation for their services, not to exceed five dollars per day, to be

allowed by the court or judge. The appraisers must, with the inventory, file a verified account of their services and disbursements. If any part of the estate is in any other county than that in which letters issued, appraisers thereof may be appointed, either by the court or judge having jurisdiction of the estate, or by the court or judge of such other county, on request of the court or judge having jurisdiction. No clerk or deputy, nor any person related by consanguinity or affinity to or connected by marriage or in business with the judge of the court, shall be appointed or shall be competent to act as appraiser in any estate, or matter or proceeding pending before such judge or in said court. **Kerr's Cyc. Code Civ. Proc., § 1444.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 803, p. 311.

Arizona. Rev. Stats. 1901, par. 1711.

Colorado. 3 Mills's Ann. Stats., secs. 4812, 4815.

Idaho. Code Civ. Proc. 1901, sec. 4105.

Kansas. Gen. Stats. 1905, §§ 2916, 2927.

Montana. Code Civ. Proc., sec. 2551.

Nevada. Comp. Laws, sec. 2872.

New Mexico. Comp. Laws 1897, sec. 1971; Laws 1905, p. 98, sec. 1.

North Dakota. Rev. Codes 1905, § 8084.

Oklahoma. Rev. Stats. 1903, sec. 1593.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1141.

South Dakota. Probate Code 1904, § 139.

Utah. Rev. Stats. 1898, sec. 3842.

Washington. Pierce's Code, § 2501.

Wyoming. Rev. Stats. 1899, sec. 4681.

§ 358. Oath of appraisers. Inventory, how made. Before proceeding to the execution of their duty, the appraisers must take and subscribe an oath, to be attached to the inventory, that they will truly, honestly, and impartially appraise the property exhibited to them, according to the best of their knowledge and ability. They must then proceed to estimate and appraise the property; each item of property must be set down separately, with the value thereof in dollars and cents, in figures, opposite the items respectively.

[Contents of inventory.] The inventory must contain all the estate of the decedent, real and personal, a statement of all debts, bonds, mortgages, notes, and other securities for the payment of money belonging to the decedent, specifying the name of the debtor in each debt or security, the date, the sum originally payable, the indorsement thereon (if any), with their dates, and the sum which, in the judgment of the appraisers, may be collected on each debt or security; and a statement of the interest of the decedent in any partnership of which he was a member, to be appraised as a single item. The inventory must also show, so far as the same can be ascertained by the executor or administrator, what portion of the property is community property and what portion is the separate property of the decedent. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 495), § 1445.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 802, p. 310; secs. 804, 805, p. 311; sec. 790, p. 308.

Arizona. Rev. Stats. 1901, par. 1712.

Colorado. 3 Mills's Ann. Stats., secs. 4737, 4813, 4814.

Idaho. Code Civ. Proc. 1901, sec. 4106.

Kansas. Gen. Stats. 1905, §§ 2905, 2918-2921.

Montana. Code Civ. Proc., sec. 2552.

Nevada. Comp. Laws, sec. 2873.

New Mexico. Laws 1901, secs. 20, 21, p. 154.

North Dakota. Rev. Codes 1905, §§ 8078, 8081, 8084, 8085.

Oklahoma. Rev. Stats. 1903, sec. 1594.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 1128, 1140, 1142, 1143.

South Dakota. Probate Code 1904, § 140.

Utah. Rev. Stats. 1898, sec. 3843.

Washington. Pierce's Code, §§ 2481, 2502.

Wyoming. Rev. Stats. 1899, sec. 4682.

§ 359. Form. Order appointing appraisers.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

It is hereby ordered, That ———, ———, and ———, three disinterested persons, competent and capable to act, be, and

They are hereby, appointed appraisers of the estate of _____,
deceased. _____, Judge of the _____ Court.

Dated _____, 19____.

Explanatory notes. 1. Give file number. This form should be attached to or printed on the inventory and appraisement.

§ 360. Form. Certificate of appointment of appraisers.

[Title of court.]

Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

I, _____, county clerk of the county² of _____, and ex officio clerk of the _____³ court thereof, do hereby certify that _____, _____, and _____ were duly appointed appraisers of the estate of _____, deceased, by order of the said _____⁴ court, duly entered and recorded on the _____ day of _____, _____.

Witness my hand and the seal of said _____⁵ court this _____ day of _____, 19____. _____, Clerk.

[Seal] By _____, Deputy Clerk.⁶

Explanatory notes. 1. Give file number. 2. Or, city and county. 3. Title of court. 4. This form should be attached to or printed on the inventory and appraisement.

§ 361. Form. Oath of appraisers to appraise property.

[Title of court.]

Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Estate of _____,
County² of _____, } ss.

_____, _____, and _____, duly appointed appraisers of the estate of _____, deceased, being duly sworn, each for himself says that he will truly, honestly, and impartially appraise the property of said estate which shall be exhibited to him, according to the best of his knowledge and ability.

_____ } Appraisers.

Subscribed and sworn to before me this ____ day of ____,
19____, _____, Deputy County Clerk.

Explanatory notes. 1. Give file number. 2. Or, city and county. This form should be attached to or printed on the inventory and appraisalment.

§ 362. Form. Inventory and appraisalment.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.]

Inventory and Appraisalment of the Property of the Estate
of ____, Deceased.

Real Estate.

[Give specific description, location, and value of each
parcel.]

Personal Property.

Moneys belonging to the said deceased, which have come
to the hands of the administrator,² ____ dollars (\$____).

Total value of property, ____ dollars (\$____).

All of the property mentioned in the foregoing inventory
is community³ property.⁴

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Or, separate property, according to the fact. 4. The inventory and appraisalment should have attached to it, or printed thereon, the following six forms: (1) Order appointing appraisers. (2) Certificate of appointment of appraisers. (3) Oath of appraisers to appraise property. (4) Oath of administrator or executor as to property. (5) Certificate of appraisers. (6) Bill of appraisers, and oath thereto.

§ 363. Form. Oath of administrator as to property.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.]

State of ____, }
County² of ____, } ss.

____, administrator³ of the estate of ____, deceased,
being duly sworn, says that the annexed inventory contains
a true statement of all the estate of said deceased which has
come to the knowledge and possession of said ____, adminis-

ator,⁴ and particularly of all money belonging to the said deceased, and of all just claims of the said deceased against the said affiant.

Subscribed and sworn to before me this ____ day of ____, 19____, Deputy County Clerk.

Explanatory notes. 1. Give file number. 2. Or, City and County. 4. Or, executor. This oath must be indorsed on or annexed to the inventory and appraisement: See § 369, post.

§ 364. Form. Certificate of appraisers.

[Title of court.]

Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.]

We, the undersigned, duly appointed appraisers of the estate of ____, deceased, hereby certify that the property mentioned in the foregoing inventory has been exhibited to ____, and that we appraise the same at the sum of ____ dollars (____).

Dated this ____ day of ____, 19____.

____ } Appraiser.²
____ }
____ }

Explanatory notes. 1. Give file number. 2. This form should be annexed to or printed on the inventory and appraisement.

§ 365. Form. Bill of appraisers, and oath thereto.

[Title of court.]

Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.]

Estate of ____, Deceased.

To ____, ____, and ____, Appraisers, Dr.
No compensation for services in appraising said estate. Items as follows:

____ days' service, at \$____ per day, each.... \$____
Necessary disbursements, as follows: ____² ____

Total \$____

State of _____,
County^s of _____, } ss.

_____, _____, and _____, the appraisers above named, being duly sworn, each for himself says that the foregoing bill of items is correct and just, and that the services have been duly rendered as herein set forth.

_____ } Appraisers.

Subscribed and sworn to before me this _____ day of _____,
19____, _____, Deputy County Clerk.

Explanatory notes. 1. Give file number. 2. Itemize them. 3. Or, City and County. This form should be attached to or printed on the appraisal and inventory.

§ 366. Inventory and appraisal. Money. The inventory must also contain an account of all moneys belonging to the decedent which have come to the hands of the executor or administrator, and if none, the fact must be so stated in the inventory. If the whole estate consists of money, there need not be an appraisal, but an inventory must be made and returned as in other cases. **Kerr's Cyc. Code Civ. Proc., § 1446.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 805, p. 311.
- Arizona.*** Rev. Stats. 1901, par. 1713.
- Colorado.** 3 Mills's Ann. Stats., sec. 4737.
- Idaho.*** Code Civ. Proc. 1901, sec. 4107.
- Kansas.** Gen. Stats. 1905, § 2922.
- Montana.*** Code Civ. Proc., sec. 2553.
- Nevada.** Comp. Laws, sec. 2873.
- North Dakota.** Rev. Codes 1905, § 8078.
- Oklahoma.*** Rev. Stats. 1903, sec. 1595.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1143.
- South Dakota.*** Probate Code 1904, § 141.
- Utah.** Rev. Stats. 1898, sec. 3842.
- Washington.** Pierce's Code, § 2503.
- Wyoming.** Rev. Stats. 1899, sec. 4682.

§ 367. Effect of naming a debtor executor. The naming of a person as executor does not thereby discharge him from

any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same, as for so much money in his hands, when the debt or demand becomes due. **Kerr's Cyc. Code Civ. Proc.**, § 1447.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 806, p. 311.
- Arizona.*** Rev. Stats. 1901, par. 1714.
- Colorado.** 3 Mills's Ann. Stats., sec. 4669.
- Idaho.*** Code Civ. Proc. 1901, sec. 4108.
- Kansas.** Gen. Stats. 1905, § 2939.
- Montana.*** Code Civ. Proc., sec. 2554.
- Nevada.** Comp. Laws, sec. 2874.
- New Mexico.** Laws 1901, sec. 22, p. 155.
- North Dakota.** Rev. Codes 1905, § 8080.
- Oklahoma.*** Rev. Stats. 1903, sec. 1596.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1144.
- South Dakota.*** Probate Code 1904, § 142.
- Utah.*** Rev. Stats. 1898, sec. 3845.
- Washington.** Pierce's Code, § 2504.
- Wyoming.*** Rev. Stats. 1899, sec. 4683.

§ 368. **Discharge or bequest of debt against executor.** The discharge or bequest in a will, of any debt or demand of the testator against the executor named, or any other person, is not valid against the creditors of the decedent, but is a specific bequest of the debt or demand. It must be included in the inventory, and, if necessary, applied in the payment of the debts. If not necessary for that purpose, it must be paid in the same manner and proportion as other specific legacies. **Kerr's Cyc. Code Civ. Proc.**, § 1448.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 807, p. 311.
- Arizona.*** Rev. Stats. 1901, par. 1715.
- Colorado.** 3 Mills's Ann. Stats., sec. 4669.
- Idaho.*** Code Civ. Proc. 1901, sec. 4109.
- Kansas.** Gen. Stats. 1905, § 2938.
- Montana.*** Code Civ. Proc., sec. 2555.
- Nevada.** Comp. Laws, sec. 2875.
- New Mexico.** Laws 1901, sec. 23, p. 155.
- North Dakota.** Rev. Codes 1905, § 8082.

- Oklahoma.*** Rev. Stats. 1903, sec. 1597.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1145.
South Dakota.* Probate Code 1904, § 143.
Utah.* Rev. Stats. 1898, sec. 2806.
Washington.* Pierce's Code, § 2505.
Wyoming.* Rev. Stats. 1899, sec. 4684.

§ 369. **Oath to inventory.** The inventory must be signed by the appraisers, and the executor or administrator must take and subscribe an oath before an officer authorized to administer oaths, that the inventory contains a true statement of all the estate of the decedent which has come to his knowledge and possession, and particularly of all money belonging to the decedent, and of all just claims of the decedent against the affiant. The oath must be indorsed upon or annexed to the inventory. **Kerr's Cyc. Code Civ. Proc., § 1449.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 805, p. 311.
Arizona.* Rev. Stats. 1901, par. 1716.
Colorado. 3 Mills's Ann. Stats., sec. 4814.
Idaho.* Code Civ. Proc. 1901, sec. 4110.
Kansas. Gen. Stats. 1905, §§ 2926, 2928.
Montana.* Code Civ. Proc., sec. 2556.
Nevada. Comp. Laws, sec. 2876.
North Dakota. Rev. Codes 1905, § 8079.
Oklahoma.* Rev. Stats. 1903, sec. 1598.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1143.
South Dakota.* Probate Code 1904, § 144.
Utah. Rev. Stats. 1898, sec. 3844.
Washington. Pierce's Code, § 2506.
Wyoming.* Rev. Stats. 1899, sec. 4685.

§ 370. **Letters may be revoked for neglect of administrator.** If an executor or administrator neglects or refuses to return the inventory within the time prescribed, or within such further time, not exceeding two months, which the court or judge shall, for reasonable cause, allow, the court may, upon notice, revoke the letters testamentary or of administration, and the executor or administrator is liable on his bond for any injury to the estate, or any person interested

therein, arising from such failure. **Kerr's Cyc. Code Civ. Proc., § 1450.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1717.
Idaho.* Code Civ. Proc. 1901, sec. 4111.
Kansas. Gen. Stats. 1905, §§ 2929-2931.
Montana.* Code Civ. Proc., sec. 2557.
Nevada. Comp. Laws, sec. 2877.
Oklahoma.* Rev. Stats. 1903, sec. 1599.
South Dakota.* Probate Code 1904, § 145.
Washington. Pierce's Code, § 2507.
Wyoming. Rev. Stats. 1899, sec. 4686.

§ 371. Form. Order directing notice to show cause why letters should not be revoked for neglecting to return inventory.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
 [Title of form.] }

It appearing to the court that _____, the administrator ² of the above-entitled estate, has neglected to return the inventory of such estate within the time prescribed by law,³ —

It is ordered, That the clerk of this court cause notice to be served on the said _____ to show cause before the court, at the court-room thereof,⁴ on _____,⁵ the _____ day of _____, 19____, at _____ o'clock in the forenoon⁶ of said day, why he should not be removed from his office of administrator⁷ of said estate, because of such failure.

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. Or, executor, etc., according to the fact. 3. Or, within such further time, not exceeding two months, as the court or judge shall, for reasonable cause, allow. 4. Give department, if any, and location of court-room. 5. Day of week. 6. Or, afternoon. 7. Or, executor, according to the fact.

§ 372. Form. Order of removal for neglecting to file inventory.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
 [Title of form.] }

It being shown to the court that _____, administrator ² of the estate of _____, deceased, neglected to return the in-

ventory of such estate within the time prescribed by law; ⁸ that notice to show cause why he should not be removed from his office as administrator ⁴ for such failure was served upon the said ____; and that said administrator ⁵ failed to show cause at the time and place prescribed in said notice, or otherwise, —

It is ordered, That the letters of administration ⁶ heretofore granted to the said ____, as administrator ⁷ of the estate of ____, deceased, be, and the same are hereby, revoked; that ____ be, and he is hereby, appointed administrator ⁸ of said estate; and that letters of administration ⁹ issue to him upon his taking the oath, and giving a bond in the sum of ____ dollars (\$____), with sureties, to be approved by the judge of this court.

Dated ____, 19____. ____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2. Or, executor, etc., according to the fact. 3. Or, within such further time, not exceeding two months, as the court or judge shall, for reasonable cause, allow. 4, 5. Or, executor, etc., according to the fact. 6. Or, letters testamentary. 7, 8. Or, executor, as the case may be. 9. Or, letters testamentary.

§ 373. Inventory of after-discovered property. Whenever property not mentioned in an inventory that is made and filed, comes to the possession or knowledge of an executor or administrator, he must cause the same to be appraised in the manner prescribed in this article, and an inventory thereof to be returned within two months after the discovery; and the making of such inventory may be enforced, after notice, by attachment or removal from office. **Kerr's Cyc. Code Civ. Proc., § 1451.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 808, p. 311.

Arizona.* Rev. Stats. 1901, par. 1718.

Colorado. 3 Mills's Ann. Stats., sec. 4738.

Idaho. Code Civ. Proc. 1901, sec. 4112.

Kansas. Gen. Stats. 1905, § 2935.

Montana.* Code Civ. Proc., sec. 2558.

Nevada. Comp. Laws, sec. 2878.

New Mexico. Laws 1901, sec. 24, p. 155.

North Dakota. Rev. Codes 1905, § 8086.

Oklahoma.* Rev. Stats. 1903, sec. 1600.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1146.

South Dakota.* Probate Code 1904, § 146.

Utah. Rev. Stats. 1898, sec. 3841.

Washington. Pierce's Code, § 2508.

Wyoming.* Rev. Stats. 1899, sec. 4687.

§ 374. Form. Order to show cause why administrator should not be removed for not causing after-discovered property to be appraised and inventoried.

[Title of court.]

[Title of estate.]

{ No. ____.¹ Dept. No. ____
[Title of form.] }

It being shown to the court ² that the inventory made and filed in the said estate does not mention certain personal property, to wit, ____; ³ that said personal property has come to the knowledge and possession of ____, the administrator ⁴ of said estate; and that he has not, within two months after such discovery, caused such property to be appraised in the manner prescribed by law, and an inventory thereof to be returned to this court, —

It is ordered, That the clerk of this court cause notice to be served upon the said ____ to show cause before this court, at the court-room thereof, ⁵ on ____, ⁶ the ____ day of ____, 19__, at ____ o'clock in the forenoon ⁷ of said day, why he should not be removed as administrator ⁸ of said estate for such failure.

It is further ordered, That said notice be served at least ____ days before the time set for hearing, and that a copy of the affidavit ⁹ be served with said notice.

Dated ____, 19__. ____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2. By affidavit of ____; or otherwise. 3. Give detailed description and value. 4. Or, executor, etc., according to the fact. 5. Give number of department, if any, and location of court-room. 6. Day of week. 7. Or, afternoon. 8. Or, executor, as the case may be. 9. If one is used.

§ 375. Administrator or executor to possess all real and personal estate. The executor or administrator is entitled to

Probate — 33

the possession of all the real and personal estate of the decedent, and to receive the rents and profits of the real estate until the estate is settled or until delivered over by the order of the court to the heirs or devisees; and must keep in good tenantable repair all houses, buildings and fixtures thereon which are under his control.

[Not to recover from heir when.] After the expiration of the time for the presentation of claims, he is not entitled to recover the possession of any property of the estate from any heir, who has succeeded to the property in his possession or from any devisee, or legatee, to whom the property has been devised or bequeathed, or from the assignee of any such heir, devisee, or legatee, unless he proves that the same is necessary for the payment of debts or legacies, or of expenses of administration already accrued, or for distribution to some other heir, devisee, or legatee entitled thereto.

[Heirs may sue to recover estate.] The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against any one except the executor or administrator; but this section shall not be so construed as requiring them so to do. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 496), § 1452.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 809, p. 311.
- Arizona.** Rev. Stats. 1901, par. 1719.
- Colorado.** 3 Mills's Ann. Stats., sec. 4721.
- Idaho.** Code Civ. Proc. 1901, sec. 4113.
- Montana.** Code Civ. Proc., sec. 2559.
- Nevada.** Comp. Laws, sec. 2879.
- North Dakota.** Rev. Codes 1905, §§ 8071, 8159.
- Oklahoma.** Rev. Stats. 1903, sec. 1601.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1147.
- South Dakota.** Probate Code 1904, § 147.
- Utah.** Rev. Stats. 1898, sec. 3912.
- Washington.** Pierce's Code, § 2499.
- Wyoming.** Rev. Stats. 1899, sec. 4688.

§ 376. Executor or administrator to deliver real estate to heirs or devisees when. Unless it satisfactorily appear to the court that the rents, issues, and profits of the real estate for a longer period are necessary to be received by the executor or administrator, wherewith to pay the debts of the decedent, or that it will probably be necessary to sell the real estate for the payment of such debts, the court, at the end of the time limited for the presentation of claims against the estate, must direct the executor or administrator to deliver possession of all the real estate to the heirs at law or devisees. **Kerr's Cyc. Code Civ. Proc., § 1453.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 1720.

Idaho.* Code Civ. Proc. 1901, sec. 4114.

Montana.* Code Civ. Proc., sec. 2560.

Oklahoma.* Rev. Stats. 1903, sec. 1602.

South Dakota. Probate Code 1904, § 148.

Utah.* Rev. Stats. 1898, sec. 3951.

§ 377. Surviving heirs may collect money deposited in bank. The surviving husband or wife of any deceased person, or, if no husband or wife is living, then the children of such decedent, may, without procuring letters of administration, collect of any bank any sum which said deceased may have left on deposit in such bank at the time of his or her death; provided, such deposit shall not exceed the sum of five hundred dollars. Any bank, upon receiving an affidavit stating that said depositor is dead, and that affiant is the surviving husband or wife, as the case may be, or stating that decedent left no husband or wife, and that affiant is or affiants are the children of said decedent, and that the whole amount that decedent left on deposit in any and all banks of deposit in this state does not exceed the sum of five hundred dollars, may pay to said affiant or affiants any deposit of said decedent, if the same does not exceed the sum of five hundred dollars, and the receipt of such affiant is sufficient acquittance therefor. **Kerr's Cyc. Code Civ. Proc.** (new section; see **Kerr's Stats. and Amdts.**, p. 496), § 1454.

§ 378. Form. Affidavit to collect bank deposit of deceased depositor.

State of _____, }
County of _____, } ss.

_____,¹ being duly sworn, deposes and says: That _____² was a depositor in the _____³ bank; that said _____ is now dead; that she died at _____,⁴ on or about the _____ day of _____, 19____; that affiant is the surviving husband;⁵ and that the whole amount that said decedent left on deposit in any and all banks of deposit in this state does not exceed the sum of five hundred dollars (\$500).

Affiant therefore asks that all moneys on deposit to the credit of said decedent in said bank may be paid to _____,⁶ according to the statute.

Subscribed and sworn to before me this _____ day of _____, 19____. _____, Notary Public, etc.⁷

Explanatory notes. 1. Give name or names of affiants. 2. Give name of deceased depositor. 3. Give name of bank. 4. Give name of place of death. 5. Or, is the surviving wife, of the deceased depositor; or, that said deceased depositor left no surviving husband or wife, and that affiant is, or affiants are, the only surviving child or children of said deceased depositor. 6. Affiant; or as the case may be. 7. Or other officer taking the oath. See Cal. Stats. 1895, p. 32; *Henning's General Laws*, p. 440.

**EFFECTS OF DECEDENTS. INVENTORY, APPRAISEMENT,
AND POSSESSION OF ESTATE.**

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1. Effects of decedents.

(1) **Administration in general.** "The rights of creditors to the assets of a deceased person's estate is the principal reason for requiring official administration, and courts therefore sanction the disposition of the property of a decedent without the appointment of an administrator, where it is certain that no debts are owing": *Murphy v. Murphy*, 42 Wash. 142; 84 Pac. Rep. 646, 648, quoting *Woerner's Law of Administration*, sec. 201. In Kansas, no administration of the personal estate of an intestate is necessary, when there are no creditors. The heirs, in such case, may divide the assets of the estate among themselves, in kind or otherwise, by mutual agreement. When so divided, each will become the owner in severalty of the portion so received: *Brown v. Baxter* (Kan.), 94 Pac. Rep. 155; but administration seems to be necessary to establish the existence of creditors or heirs; and whatever may be the law in other jurisdictions, there is nothing in the probate law of California which would, either expressly or by implication, exempt the property of a decedent from the requirement of administration. The whole subject-matter of dealing with the assets of deceased persons is, however, one of statutory regulation, and the policy and intent of the statute very clearly contemplates that property of a decedent, left undisposed of at death, except in the instance of the homestead acquired under certain circumstances as provided by the statute, shall, for the purposes of ascertaining and protecting the rights of creditors and heirs, and properly transmitting the title of record, be subjected to the process of administration in the probate court. Indeed, there is no other method provided by the statute whereby the existence of creditors or heirs of decedents may be conclusively established, and such administration may be initiated and had at the instance of any person entitled under the law to administer upon the estate: *Estate of Strong*, 119 Cal. 663, 665; 51 Pac. Rep. 1078. And the provisions of the probate law all look to a speedy close of administration. Thus the executor or administrator must collect all debts due to the estate; the debts of the decedent, if there are funds for the purpose, are to be paid within a comparatively brief time after the administration of the estate begins; and, as soon as the estate is in proper condition to be closed, the administrator must render a final account and pray final settlement. The object of probate proceedings is to administer, settle, and distribute the estates of deceased persons, and the whole statutory system provided therefor contemplates that this object shall be accomplished with reasonable dispatch: *Maddock v. Russell*, 109 Cal. 417, 423; 42 Pac. Rep. 139. But the probate laws

of California have no application to the estates of persons who died before their passage, because, under the Mexican law previously enforced, the heir succeeded immediately to the estate, and became personally answerable for the debts of the decedent: *Coppinger v. Rice*, 33 Cal. 408; *Ryder v. Cohn*, 37 Cal. 69, 90; *McNeil v. First Congregational Society*, 66 Cal. 105; 4 Pac. Rep. 1096. Administration on the estate of a living person is void: *Fay v. Costa*, 2 Cal. App. 240, 244; 83 Pac. Rep. 275. It was decided in *Scott v. McNeal*, 5 Wash. 309; 31 Pac. Rep. 873, 874, as against a living person, that he was dead, and that the probate court had power to dispose of his estate; but this case was reversed on writ of error: See *Scott v. McNeal*, 154 U. S. 34; 38 L. ed. 896. Administration may lawfully be had on the estate of a dead person, but not upon that of one living. Until death occurs, there is "no subject-matter" over which it is possible to exercise jurisdiction. It is true that the court of probate, before issuing letters of administration, must determine affirmatively the question of death; but, notwithstanding such determination, the fact that the supposed intestate is alive may still be shown, and when shown, it establishes the nullity of the entire proceedings: *Stevenson v. Superior Court*, 62 Cal. 60, 61.

REFERENCES.

Probate of will or letters of administration, when void for want of jurisdiction: See note 33 Am. Dec. 239-243. Power to administer a living person's estate: See note § 216, head-line 14, subd. 10, ante. What assets will give jurisdiction to appoint administrator: See note 24 L. R. A. 684-689.

(2) **Interference with estate. Irregular accounts.** Where a person or corporation, before the granting of letters of administration, sells or alienates any of the property of the decedent which is covered by a chattel mortgage, he or it is chargeable therewith, and liable to an action by the administrator of the estate for double the value of the property so sold or alienated: *Litz v. Exchange Bank*, 15 Okl. 564; 83 Pac. Rep. 790. The public officers of a county have no right to dispose of the money of a deceased person, except in the manner authorized by the statute. If all the essential requirements of the statute are not followed, the rights of the legal representative to such money will remain unaffected. Thus where the coroner is required by the statute to deliver the money or effects found on the body of a deceased person to the county treasurer, the treasurer has no authority to pay over a sum so delivered to him to the administrator without an order of the county court, where the statute makes such order a prerequisite to such payment: *Chow v. Brockway*, 21 Or. 440, sub nom. *Oh Chow v. Brockway*, 28 Pac. Rep. 384, 387. The law does not contemplate that the claims of an administrator for reimbursement for moneys expended before his appointment can be established by his uncontradicted evi-

dence: *Estate of Heeney*, 3 Cal. App. 548; 86 Pac. Rep. 842, 844. If the debtor of an estate makes an unauthorized payment to the administrator thereof, such payment does not discharge the debtor from his liability to the estate. The money so paid by him is his own, and not that of the estate, and the debtor, but not the estate, can recover the same of the administrator: *McCoy v. Ayres*, 2 Wash. Ter. 307; 5 Pac. Rep. 843, 844.

(3) **What are assets. In general.** A debt due from an executor or administrator to a decedent is an asset in his hands, applicable to the payment of debts: *United States v. Egglestone*, 4 Saw. 199; Fed. Cas., No. 15,027. When he has been charged, upon the settlement of his accounts, with a personal debt he owed the deceased, whether by virtue of a statute, as in Oregon, or without a statute, as in some other jurisdictions, the sureties on his bond are bound for the payment thereof, and insolvency or inability to pay is no defense: *United Brethren First Church etc. v. Akin*, 45 Or. 247; 77 Pac. Rep. 748. The rents and profits of real property belonging to a decedent are assets of his estate: *Washington v. Black*, 83 Cal. 290, 295; 23 Pac. Rep. 300; *Head v. Sutton*, 31 Kan. 616; 3 Pac. Rep. 280, 282; and the rents of mortgaged property are general assets of the estate, on which the mortgage is not a lien, and in which it is entitled to no preference under the statute giving a preference to mortgage debts. Such statute limits the preference to the proceeds arising from the property mortgaged, either upon a foreclosure sale or a sale by the administrator: *Estate of McDougald*, 146 Cal. 196, 202; 79 Pac. Rep. 875. In a general sense, every part of the estate which comes under the law to an executor or administrator is assets: *Washington v. Black*, 83 Cal. 290, 295; 23 Pac. Rep. 300. The general rule of law is well settled, that, for the purpose of founding administration, all simple contract debts are assets at the domicile of the debtor, and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable: *Moore v. Jordan*, 36 Kan. 271; 13 Pac. Rep. 337, 339; citing *Wyman v. Halstad*, 109 U. S. 564; 3 Sup. Ct. Rep. 417; and other authorities. If an appeal bond has been given in an action to recover property alleged to belong to an estate, and the heirs sue on such bond, and recover judgment, such judgment should be paid to the administrator as an asset of the estate, though the administrator refused to bring an action to recover the property of the estate: *Bem v. Shoemaker*, 10 S. D. 453; 74 N. W. Rep. 239, 240, 241. A claim for damages by one who has sustained personal injuries from the negligence or wrongful act of another, is an asset of the estate, justifying an appointment of an executor or adminis-

trator: *Missouri Pac. Ry. Co. v. Bennett's Estate*, 5 Kan. App. 231; 47 Pac. Rep. 183. The fund recovered by the personal representative of a deceased person, for negligence causing the latter's death, is the property of the estate: *Olston v. Oregon etc. Ry. Co. (Or.)*, 96 Pac. Rep. 1095, 1097. See *In re Lowham's Estate*, 30 Utah, 436; 85 Pac. Rep. 445, 446; *Southern Pac. Co. v. Wilson (Ariz.)*, 85 Pac. Rep. 401, 403. At common law, the executor or administrator was the legal beneficiary in all policies of insurance payable to the insured. The policy descended to him. Our system differs, in that personalty descends to the heirs, with a special interest in the administrator. But, so far as affects this question, the difference is purely ideal. In either case, the personal representative must collect and administer upon it. Although set apart under the statute, the money is administered upon, and until so set apart, is a part of the estate. The order setting it apart is a species of distribution: *Estate of Miller*, 121 Cal. 353, 354; 53 Pac. Rep. 906. See *Yore v. Booth*, 110 Cal. 238; 58 Am. St. Rep. 81; 42 Pac. Rep. 808. See subd. 5, *infra*, showing what are not assets. If a policy of life insurance is payable to and collected by the estate of a deceased person, the estate is the beneficiary, and the money is exempt from execution. It is therefore assets of the deceased exempt from execution, and is properly set apart to the widow as being so exempt: *Holmes v. Marshall*, 145 Cal. 777, 780; 104 Am. St. Rep. 86; 79 Pac. Rep. 534; 69 L. R. A. 67; 2 Am. & Eng. Ann. Cas. 88. A judgment is assets of the estate for the purposes of administration: *Low v. Horner*, 10 Haw. 531, 535.

REFERENCES.

Right of action for the negligent killing of a person is an asset of his estate: See note 1 L. R. A. (N. S.) 885. What assets pass to the administrator *de bonis non*: See note 40 L. R. A. 71-74.

(4) **Same. Notwithstanding what.** Where two creditors of decedent's estate, after the death of an intestate, enter into an oral contract, whereby one of them agrees to pay all the debts and expenses of administration in consideration that the other creditor will acknowledge payment of a judgment against said estate, and of the heirs of the estate conveying a certain tract of land to such judgment creditor, and also conveying other lands to the creditor, who further agrees to pay the other debts and expenses of administration after all of such conveyances have been made in accordance with said contract, such contract, after it has been ratified by the heirs making the conveyances as required by it, becomes an asset of the estate, it being made for the benefit thereof: *Stewart v. Rogers*, 71 Kan. 53; 80 Pac. Rep. 58. Where a husband takes notes, securities, or real estate in the name of his wife, that fact, alone and unexplained, raises the presumption that he intended the same as a gift to or provision for her, but such presumption may be overcome by evidence which shows a

motive or design on the part of the husband inconsistent with such presumed intent, and that such property was so placed in his wife's name for purposes of convenience and advantage to himself; and, in an action to have property standing in the wife's name declared to be the property of her deceased husband, and to be disposed of as such, where the court concludes, upon the evidence, that the money, notes, and securities described in the plaintiff's complaint were placed in the wife's name by the husband for purposes of advantage and convenience to himself, and not with the intention or for the purpose of making a gift to her or settlement upon her, the same belong to and should be distributed as a part of the estate of the deceased husband: *Bem v. Bem*, 4 S. D. 138; 55 N. W. Rep. 1102. Where there is an attempt to make a disposition of property to take effect after death, which can only be done by a properly executed will, and there is nothing in the instrument to show any present vested interest or estate in the property in controversy, such property, after death, becomes an asset of the decedent's estate, and may be recovered by his administrator: *Demartini v. Alleghetti*, 146 Cal. 214, 218; 79 Pac. Rep. 871; it is only those things in which the decedent had a beneficial interest at his death which are assets, not those which he holds in trust, or as a bailee or factor of another. Property held in trust by the intestate remains that of the cestui que trust: *In re Belt's Estate*, 29 Wash. 535; 70 Pac. Rep. 74, 76.

(5) **Estoppel to deny.** An executor or administrator is estopped to deny that rents collected and received by him are assets of the estate: *Kothman v. Markson*, 34 Kan. 542; 9 Pac. Rep. 218, 223; but where an administratrix recovers judgment in an action commenced by her intestate as a trustee, she is not estopped, as against the creditor of the estate, from setting up that the funds recovered are not the property of the estate. A trust fund, not being an asset of the estate, is a fund in which the creditor of the estate is not interested: *In re Belt's Estate*, 29 Wash. 535; 70 Pac. Rep. 74, 77.

(6) **What are not assets.** A gift made to the widow of a decedent personally, by his former employers, is not an asset of the estate, whether she knew it was a gift to her or not: *Estate of Stevens*, 83 Cal. 322, 324; 17 Am. St. Rep. 252; 23 Pac. Rep. 379. Property which was disposed of in decedent's lifetime by a valid gift causa mortis is not an asset of the estate, and in such a case there is no legal objection to a delivery to an agent or trustee for the donor, although the donee does not, at the time, declare his acceptance thereof. It is sufficient if he avails himself of the provision when it becomes known to him, even subsequently to the decease of the donor: *Denaff v. Helms*, 42 Or. 161; 70 Pac. Rep. 390, 392. So where land of the estate has been sold at private sale, and not at public sale, as directed in the order of sale, the purchaser's deposit of purchase-money with the

executor is not received by the executor in his representative capacity, and is not an asset of the estate; for, the sale being void on the face of the record, the executor had no right to demand or to receive such deposit: *Schlicker v. Hemenway*, 110 Cal. 579, 581; 52 Am. St. Rep. 116; 42 Pac. Rep. 1063. Neither are damages recovered by an administrator for the death of decedent, caused by neglect, assets of the estate. Such damages are for the benefit of the heirs: *Munro v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515, 528; 18 Am. St. Rep. 248; 24 Pac. Rep. 303. Section 2269 of the Revised Statutes of the United States provides that "where a party entitled to claim the benefits of the pre-emption laws dies before consummating his claim by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to file the necessary papers to complete the same. But the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a payment and a patent thereon shall cause the title to inure to such heirs as if their names had been specially mentioned." The title thus given by the patent is not to the estate of the decedent, but, by the terms of the section, the patent shall "cause the title to inure to such heirs." The heirs do not take the title by descent from their ancestor, but the land is conveyed to them directly from the United States, by virtue of the privilege of purchase given to them expressly by the provisions of this section. The land is not subject to devise by the pre-emptor, nor can it be sold in satisfaction of his debts, or for the expenses of administration: *Wittenbrock v. Wheadon*, 128 Cal. 150, 152; 79 Am. St. Rep. 32; 60 Pac. Rep. 664. If a probate homestead has been set apart for the use of the family of the deceased, it ceases to be a part of the assets of the estate: *Estate of Orr*, 29 Cal. 101, 104; *Estate of Burns*, 54 Cal. 223, 228; *Estate of Hamilton*, 120 Cal. 421, 426; 52 Pac. Rep. 708. So the right to the use of a homestead assigned to the innocent party in divorce proceedings does not constitute an asset of the estate of such party: *Neary v. Godfrey*, 102 Cal. 338, 341; 36 Pac. Rep. 655. Partnership property is an asset of the firm, and subject to the exclusive management and control of the surviving partner. It is not an asset of the estate in the hands of the administrator: *Tompkins v. Weeks*, 26 Cal. 50, 66; *Theller v. Such*, 57 Cal. 447, 459. The assets which passed to the executor or administrator in such cases consist of the individual estate of the decedents. Partnership assets, as such, form no part of such individual estate; the residuum only, after satisfying liabilities and advances, if any, made by the survivor, becomes the property of the estate: *Andrade v. Superior Court*, 75 Cal. 459, 463; 17 Pac. Rep. 531; *Theller v. Such*, 57 Cal. 447, 459. Property held by a trustee or fiduciary officer is not an asset of the estate in the hands of his executors, administrators, or assignees: *In re Belt's Estate*, 29 Wash. 535; 70 Pac. Rep. 74, 76; *Pierce v. Robinson*, 13 Cal.

116; see *Swift v. San Francisco Stock etc. Board*, 67 Cal. 567; 8 Pac. Rep. 94, 101. The proceeds of an insurance policy are no part of the assets of the estate, where the proceeds of such policy are payable to the widow and children; and the executors have no right to collect such proceeds: *Heydenfeldt v. Jacobs*, 107 Cal. 373, 377; 40 Pac. Rep. 492; and see *Swift v. San Francisco Stock etc. Board*, 67 Cal. 567; 8 Pac. Rep. 94, 102. A benefit certificate in a mutual benefit society is not an asset of the deceased member's estate: *Burke v. Modern Woodmen*, 2 Cal. App. 611; 84 Pac. Rep. 275, 276. The proceeds of an insurance policy payable to the "legal heirs" of an intestate, collected by an administrator, are not assets of the estate. The money does not belong to the creditors. It belongs to the heirs, and the administrator should pay it to them: *Estate of Scrimgeour*, 17 Haw. 122, 125. If goods, money, or securities belonging to another person lie among the goods of the deceased, capable of identification, and they come together to the hands of the personal representative, such other person's things are not to be reckoned among assets of the estate. Nor is money collected by an attorney, factor, or agent, and kept distinct and unmixed with the rest of the property: *In re Belt's Estate*, 20 Wash. 555; 70 Pac. Rep. 74, 76; citing *Schouler on Executors and Administrators*, 3d ed., sec. 205.

(7) **Discovery of assets.** Under the statute of Washington, where a person is charged with concealing the assets of a decedent, it is the court which cites such person to appear, and it is the court who may examine him on oath upon the matters suggested in the complaint. The object of the statute is to elicit testimony for the purpose of furnishing the administrator with sufficient knowledge on which to base a formal complaint against the defendant. The defendant is not, in such case, entitled to any more than the statute accords him, and it does not accord him, either in terms or by necessary implication, the right to a formal procedure in such a case. The statute does not require that all the interrogatories shall be reduced to writing and submitted before the answering of any of them: *Main v. Hadfield*, 41 Wash. 504; 84 Pac. Rep. 12, 14.

REFERENCES.

Summary proceedings to discover or recover property of estates of decedents: See note 115 Am. St. Rep. 208-219.

(8) **Collection of assets.** The executor or administrator shall take into his possession all the estate of the deceased, real and personal, and shall collect all debts due to the deceased. Money on deposit in a bank to the credit of the deceased may not constitute a "debt," in a strict technical sense. But whether it be so or not, the statute contemplates that the executor or administrator shall reduce into his

possession, with all reasonable dispatch, the property of the estate; and if he finds money on deposit, even though the bank is one of admitted safety and of undoubted credit, he must be allowed to exercise his discretion, in good faith, as to the propriety of reducing the money into his actual possession, so as to be ready to meet any exigency in the affairs of the estate: *Estate of McQueen*, 44 Cal. 584, 589. Assets cannot be collected upon distribution of the estate: *Estate of Cook*, 77 Cal. 220, 232, 233; 11 Am. St. Rep. 267; 17 Pac. Rep. 923; 19 Pac. Rep. 431; 1 L. R. A. 567; *Estate of Smith*, 108 Cal. 115, 122; 40 Pac. Rep. 1037; and the court has no power to attempt to make such collection by making an improper deduction from the distributive share of the devisee: *Estate of Smith*, 108 Cal. 115, 122; 40 Pac. Rep. 1037. If debts are evidenced by negotiable promissory notes, and such notes are, at the time of decedent's death, situated in a designated county in one state, and the same are there taken possession of by the administrator of the estate in that county, and by him duly accounted for to the proper court, such notes are properly payable in that state, and any moneys paid upon them would be rightfully paid to such administrator therein; and the fact that certain of these notes are secured by mortgages on real estate in another state would not change the rights of the holder thereof: *McCoy v. Ayres*, 2 Wash. Ter. 307; 5 Pac. Rep. 843, 845. The California statute of set-off relates to the situation of the parties "at the commencement of the action," and the death of one of the parties to the demand, though such death occurs before the maturity of the demand, does not change the relative rights of the parties in pleading a counterclaim, or in compensating the claims so far as they equal each other, provided the set-off be due when the action is commenced. Thus in an action by an executor to recover from a bank the amount of a deposit made by the decedent, the defendant who had loaned the decedent money on a note, which matured after the death of the decedent, and before the commencement of an action by the executor, has the right to use the note as a counterclaim, and the two demands, so far as they equal each other, are to be deemed "compensated": *Ainsworth v. Bank of California*, 119 Cal. 470, 471; 63 Am. St. Rep. 135; 51 Pac. Rep. 952; 39 L. R. A. 686. It is said in the dissenting opinion of Beatty, C. J., in *Murphy v. Clayton*, 114 Cal. 526, 529; 43 Pac. Rep. 613; 46 Pac. Rep. 460, that the law does not authorize an executor or administrator "to commence an action for which there is no apparent necessity. He cannot sue to recover assets for the estate, unless it appear that there is an actual deficiency of assets. But when he has property in his hands which was in the possession of the intestate at the time of his death, and which has regularly devolved upon him,—property which, if necessary, is applicable to the purposes of administration,—it is his duty to retain the possession until it appears that it will

not be needed." On the other hand, if the administrator, when he commences an action to recover assets, must show a necessity for their recovery, by parity of reasoning the party who seeks by an action to deprive him of assets should at least be required to show that they will not be needed for purposes of administration. If such property is not needed for purposes of administration, the vendee of the decedent has an ample remedy in the probate court without action; if it is needed for purposes of administration, he has no right to the property. His position with respect to it is no better than that of an heir with respect to the unsold property of the estate of the intestate. It is his, if not needed for the payment of debts, and, like the heir, he should wait till that fact is ascertained: *Murphy v. Clayton*, 114 Cal. 526, 530; 43 Pac. Rep. 613; 46 Pac. Rep. 460, per Beatty, C. J., dissenting.

(9) Collection of, by domiciliary, ancillary, and foreign executor. It is the duty of a domiciliary administrator to take reasonable means, under existing circumstances, for collecting and realizing the assets out of his jurisdiction, and it is the duty of the court to compel him to account for wilful neglect to perform such duty; and all the authorities agree that the residuum of the foreign assets must finally be collected and distributed by the domiciliary executor: *Estate of Ortiz*, 86 Cal. 306, 315; 21 Am. St. Rep. 44; 24 Pac. Rep. 1034. If there be assets in another state or states than that in which the principal letters are granted, an administration may be obtained there, and such administration will be regarded as ancillary to the administration of the domicile, and, as a general rule, the excess of the assets resulting from such ancillary administration, after the payment of local debts, expenses of administering, and local legacies, if any, in the jurisdiction of the ancillary administration, will be transmitted to the administrator of the domicile, to be there distributed according to the law of vicinage: *Estate of Apple*, 66 Cal. 432; 6 Pac. Rep. 7; *McCully v. Cooper*, 114 Cal. 258, 261; 55 Am. St. Rep. 66; 46 Pac. Rep. 82; 35 L. R. A. 492. An ancillary administrator, in this state, may recover from the domiciliary administrator, who is temporarily here, the possession of assets of the estate. The very object of the ancillary or local administration in this state is to collect the assets of the estate here locally situated, and it is the bounden duty of the ancillary administrator so to collect them, and to pay therefrom the demand of local creditors, if any there be. Whether there are any such creditors can only be determined by giving the notice to creditors required by our law: *McCully v. Cooper*, 114 Cal. 258, 263; 55 Am. St. Rep. 66; 46 Pac. Rep. 82; 35 L. R. A. 492. Nor has the domiciliary executor, as against the ancillary administrator, any power to dispose of the personal property which has its situs in a foreign jurisdiction, where

an ancillary administrator has been appointed. Even at common law, where an ancillary administrator has been appointed in a foreign jurisdiction, the title to personal property which has its situs in such foreign country is in the ancillary administrator. This must necessarily be so. There cannot be two independent administrations of the same property, nor could it be tolerated that the domiciliary administrator should be able practically to nullify the administration in a foreign country by assigning the personal property there situated: *Murphy v. Crouse*, 135 Cal. 14, 17; 87 Am. St. Rep. 90; 66 Pac. Rep. 971. Foreign executors cannot sue in California without first having obtained ancillary letters testamentary or of administration: *Lewis v. Adams* (Cal.), 8 Pac. Rep. 619, 620; though he may sue personally here on a foreign judgment: *Lewis v. Adams*, 70 Cal. 403; 59 Am. Rep. 423; 11 Pac. Rep. 833; and he may sue, as mortgagee, under the terms of a mortgage, to recover a trust fund, without taking out letters testamentary in the jurisdiction within which the mortgaged property is situated: *Fox v. Tay*, 89 Cal. 339, 350; 23 Am. St. Rep. 474; 24 Pac. Rep. 855; 26 Pac. Rep. 897. If there be assets of the estate of the testator in this state, administration may be had, the administrator having power to reduce the same to possession by suit or otherwise, and if the testator was a non-resident, the administration would be treated as ancillary, and after the payment of the local debts and expenses the surplus may, by order of the court, be delivered to the executor or administrator of the domicile, and to that end the executor or administrator of the domicile may doubtless apply to the court, in this state, for such order. But beyond that no authority over such assets here seems to have been given to the executor or administrator of the domicile: *Lewis v. Adams* (Cal.), 8 Pac. Rep. 619, 621. Although a foreign executor may have no coercive power in the collection of assets in the jurisdiction in which he resides, yet if assets situated in that jurisdiction come into his possession by a voluntary payment or administration, he is bound to account for them in the domiciliary jurisdiction: *Fox v. Tay*, 89 Cal. 339, 348; 23 Am. St. Rep. 474; 24 Pac. Rep. 855; 26 Pac. Rep. 897.

(10) **Custody and control of assets.** The custody of the assets of an estate is in the executor or administrator, and not in the court. There is no law which authorizes a probate judge to direct him where and how he shall keep the assets of an estate, and surely there ought to be no such law. The representative is liable for their safety on his bond. If the court could lawfully take charge of them, it would deprive interested parties of this security. If goods are lost, it may be a question whether they have been properly cared for. If they have been placed where the judge has directed, and then lost, he will have prejudged the case before the trial. Execu-

tors and administrators cannot be deprived of the actual custody of the assets of an estate by such an order: *Estate of Welch*, 110 Cal. 605, 608; 42 Pac. Rep. 1089. Property and all assets of the decedent pass to his heirs, subject to a right of possession in the executor or administrator for purposes of administration only: *Maddock v. Russell*, 109 Cal. 417, 422; 42 Pac. Rep. 139. But the representative of the estate has no right to give its assets away, even though he may consider them worthless, and his attorney has no right to receive such a gift from his hands: *Estate of Radovich*, 74 Cal. 536; 16 Pac. Rep. 321, 322; 5 Am. St. Rep. 466.

(11) **Widow takes as trustee when.** The aid of a court of equity may be invoked to have certain land adjudged to be the property of the estate of a decedent, where the widow holds the legal title; and the court cannot be held to have abused its discretion because it does not proceed to close the estate and settle the administration after determining that the title is in the estate, and that the widow holds as trustee for the estate. It is proper for the court to allow those matters to reach their natural termination in the tribunal and proceeding in which they are pending: *Burton v. Burton*, 79 Cal. 490; 21 Pac. Rep. 847, 848, stating facts under which the widow will be held to take as trustee for the estate.

(12) **Realty. Personalty. Equitable conversion.** A contract for the sale of real estate, which is valid and enforceable in equity, operates as a conversion. The vendor's interest thereafter, in equity, is in the unpaid purchase price, and is treated as personalty; the vendee's interest is in the land, and is realty. Upon the death of the vendor, his interest passes to his executors as personalty, and continues as such for the purposes of administration: *Clapp v. Tower* (N. D.), 93 N. W. Rep. 862. Real estate acquired by an administrator in obtaining satisfaction of judgments forming a part of the assets of the estate in his hands for settlement is to be treated for purposes of administration as personal property: *Weir v. Bagby*, 72 Kan. 67; 82 Pac. Rep. 585. Where a person dies intestate, having a title or interest in lands, for a term of years, such interest is, under the statute of Colorado, to be regarded and treated as real estate by the administrator: *McKee v. Howe*, 17 Col. 538; 31 Pac. Rep. 115.

REFERENCES.

Real estate acquired by executor or administrator for benefit of estate as realty or personalty: See note 7 Am. & Eng. Ann. Cas. 703.

(13) **Remainder in fee after homestead.** An order setting apart, as a homestead, a life estate in certain real property does not remove the remainder in fee in that property beyond the reach of

creditors of the estate. The homestead estate is so removed and excluded because it has ceased to be subject to any of the purposes of administration. It is freed from the debts of the creditors. It is freed from the possession of the administrator; but it does not follow therefrom that the title in fee embraced in the remainder over to the heirs is likewise removed from administration, and there is nothing either in the statute or in the decisions to warrant such a construction: *Estate of Tittel*, 139 Cal. 149, 150, 153; 72 Pac. Rep. 909.

2. Inventory and appraisement.

(1) **In general.** When a question arises, in the administration of an estate, whether property shall be inventoried as a part of the estate or not, the probate court may hear evidence sufficient to determine whether the property in question belongs to the estate, or whether the estate has any interest therein, or has reasonable claim thereto, which claim may become an asset of the estate; not for the purpose of judicially determining the title of any property claimed by any third person, but to determine the good faith of the claim. The statute does not require property or money to be inventoried, unless it belongs to the estate, and the court will not require money to be inventoried which does not belong to the estate and is not an asset thereof: *In re Belt's Estate*, 29 Wash. 535; 70 Pac. Rep. 74, 76. "The executor or administrator can be required to inventory only the property that belongs to the decedent, at the time of his death, in his own right, or to which the personal representative is entitled in his official capacity, as distinguished from the heir, legatee, widow, or donee mortis causa of the testator or intestate. The court has no power, therefore, to compel the administrator to inventory property not clearly belonging to the estate. On the other hand, the court should not reject an inventory exhibited because it contains property, the title of which is in dispute," as the court has no power to try the title of property between the personal representatives and a stranger: *In re Belt's Estate*, 29 Wash. 535; 70 Pac. Rep. 74, 76, quoting from 2 *Woerner's Law of Administration*, 2d ed., sec. 317. The court has jurisdiction to determine *prima facie* whether or not the property belongs to the estate and is an asset thereof. This adjudication is not binding upon any person afterwards claiming the property in another forum, but is only for the purpose of determining whether the administrator shall be forced to make an inventory thereof: *In re Belt's Estate*, 29 Wash. 535; 70 Pac. Rep. 74, 77. The inventory is required to set forth all the estate which shall have come to the "knowledge," as well as that which shall have come to the possession, of the administrator, though he is to be charged in his account with only such portion of the estate as may come to his possession at the value of the appraisement: *Estate of Simmons*, 43 Cal. 543, 549. A clause in the statute

under which the administrator is required to file an inventory and appraisement within three months after his appointment is directory, and does not render them invalid when subsequently filed: *Phelan v. Smith*, 100 Cal. 158, 169; 34 Pac. Rep. 667. The notice to creditors may be given before the inventory is filed: *Paterson v. Schmidt*, 111 Cal. 457, 458; 44 Pac. Rep. 161. Although the executor or administrator may, upon notice, have his letters testamentary or of administration revoked by the court for his failure to file an inventory and appraisement within the time allowed by the statute, such statute is directory, rather than mandatory, and the court has a discretion in the matter of removal for such cause, which will not be interfered with on appeal, except in cases where a gross abuse of discretion has occurred: *Estate of Graber*, 111 Cal. 432, 434; 44 Pac. Rep. 165. The duties as imposed by the statute upon executors and administrators cannot affect the rights of creditors of the deceased, or change the mutual relations existing between such creditors and the estate: *Ainsworth v. Bank of California*, 119 Cal. 470, 477; 63 Am. St. Rep. 135; 51 Pac. Rep. 952; 39 L. R. A. 686. The administrator cannot, without being duly authorized by the probate court, assign a mortgage given to the deceased in his lifetime, as indemnity to him as surety, to the principal creditor. Such a mortgage must be listed in the inventory of appraisement as a credit in the hands of the administrator, to be applied as an offset against the debit caused by the instrument upon which the deceased was surety: *Pierce v. Batten*, 3 Kan. App. 396; 42 Pac. Rep. 924.

(2) **Affidavit.** The object of requiring an affidavit by the executor or administrator to accompany the inventory and appraisement is, apparently, not to give any validity to the inventory as such, but to furnish evidence that it contains all the property in the knowledge or possession of affiant, thus serving as a check on the administrator: *Phelan v. Smith*, 100 Cal. 158, 168; 34 Pac. Rep. 667. An inventory may be said to be completed when the work of the appraisers has been concluded, and the instrument showing the result of their labor has been signed and delivered by them. The purpose of the statute in requiring an affidavit is to furnish an additional assurance that the inventory contains a full account of all the property of the estate known to the executor or administrator, and also to obtain his solemn admission that he is properly chargeable in his accounts with all the property that is described in the inventory; and while the court may, upon its own motion, or upon the application of any person interested in the estate, compel the executor or administrator to comply with the statute requiring him to make an affidavit, yet the failure of an executor or administrator to discharge this duty would not render the inventory, properly signed and delivered by the appraisers, of no effect as an inventory: *Estate of Lux*, 100 Cal. 593, 601; 35 Pac. Rep. 341.

(3) **Return.** An inventory is returned, within the meaning of the law, when it has been completed by the appraisers and presented to the judge or court for information, and as a basis for some judicial action to be taken in the proceeding for the settlement of the estate to which it relates. Nor is the filing of the inventory with a clerk an indispensable requisite to its return. The filing of an inventory with the clerk of a proper court would certainly constitute its return, but while this is so, such filing is not an indispensable step which must be taken in order to effect the return of such a paper: *Estate of Lux*, 100 Cal. 593, 600; 35 Pac. Rep. 341.

(4) **Must include what.** The law treats a debt or demand due from the executor or administrator from the time it becomes due as so much money in his hands, and it requires him so to report it: *Estate of Walker*, 125 Cal. 242; 73 Am. St. Rep. 40; 57 Pac. Rep. 991; *Treweek v. Howard*, 105 Cal. 434, 446; 39 Pac. Rep. 20; *Estate of Miner*, 46 Cal. 564; *Estate of Thomas*, 140 Cal. 397; 73 Pac. Rep. 1059; but the sureties on his bond are not liable beyond the representative's ability to pay: *Sanchez v. Forster*, 133 Cal. 614; 65 Pac. Rep. 1077; *Estate of Thomas*, 140 Cal. 397; 73 Pac. Rep. 1059; *Estate of Walker*, 125 Cal. 242; 73 Am. St. Rep. 40; 57 Pac. Rep. 991. The interest of a decedent in a partnership must be included in the inventory of his estate, and be appraised as other property: *Painter v. Estate of Painter*, 68 Cal. 395, 396; 9 Pac. Rep. 450. The inventory must also state the interest of the estate in property of third persons: *Mesmer v. Jenkins*, 61 Cal. 151, 154. The inventory should also include money transferred by the husband before his death to his wife in trust: *Sprague v. Walton*, 145 Cal. 228, 236; 78 Pac. Rep. 645. A judgment in favor of the estate should be inventoried by the executor or administrator: *In re Conser's Estate*, 40 Or. 138; 66 Pac. Rep. 607, 609.

(5) **Second or further inventory.** If the first inventory is in proper form, and the second involves no additions or changes, it is merely surplusage; but it may often occur, from the discovery of other property, the destruction or loss of a portion of the property, and from various other causes, that a second or further inventory or appraisal is desirable. In all cases, the court, under the powers conferred upon it, may doubtless inform itself, by means of a new or further inventory and appraisal, of the true condition of the estate: *Phelan v. Smith*, 100 Cal. 158, 169; 34 Pac. Rep. 667.

(6) **As evidence of value.** The valuation of the "inventory" is evidently not intended to be conclusive for any purpose: *Estate of Hinckley*, 58 Cal. 457, 516; *McNabb v. Wixom*, 7 Nev. 163; *In re Belt's Estate*, 29 Wash. 535; 70 Pac. Rep. 74, 76; *Estate of Fernandez*,

119 Cal. 579, 584; 51 Pac. Rep. 851; *In re Conser's Estate*, 40 Or. 138; 66 Pac. Rep. 607, 610. It is only prima facie evidence of the value of the estate: *Wheeler v. Bolton*, 92 Cal. 159, 170; 28 Pac. Rep. 558; *Estate of Fernandez*, 119 Cal. 579, 584; 51 Pac. Rep. 851. The appraisers make a preliminary estimate for the information of the court, and if property not included in the original inventory is discovered, it is made the duty of the executor or administrator to cause the value of such property to be estimated by the appraisers: *Estate of Hinckley*, 58 Cal. 457, 516; *In re Conser's Estate*, 40 Or. 138; 66 Pac. Rep. 607, 609.

(7) **Appraisement.** An appraisement must be made of property discovered subsequently to the filing of the inventory: *Estate of Hinckley*, 58 Cal. 457, 516; *In re Conser's Estate*, 40 Or. 138; 66 Pac. Rep. 607, 609. The executor or administrator is chargeable, in his account, for the whole of the estate of the decedent which may come into his possession, at the value of the appraisement contained in the inventory: *Estate of Gianelli*, 146 Cal. 139; 79 Pac. Rep. 841, 842; but it is not negligent for him to fail to appraise mortgaged property where it would have been a useless expense, as where it would not, if sold, have brought the amount of the mortgage: *Estate of Strong*, 125 Cal. 603, 606; 58 Pac. Rep. 183. If personal property has been disposed of by the executor or administrator in accordance with the expressed wish of the decedent, and without including such property in the inventory, though he does not make a supplemental inventory thereof on final settlement, the court may determine its value, without having it appraised as other property of the estate: *Estate of Garrity*, 108 Cal. 463; 38 Pac. Rep. 628, 630; 41 Pac. Rep. 485. The fact of non-appraisement of certain property of the estate does not affect the validity of the final account if all the property received, or which by reasonable diligence should have been received, has been punctiliously accounted for: *In re Conser's Estate*, 40 Or. 138; 66 Pac. Rep. 607, 609.

(8) **No estoppel from filing inventory.** The filing of an inventory by an executor, who represents, in his petition for letters testamentary, that certain property included therein belongs to the estate, is not estopped from afterwards claiming such property as his own: *Anthony v. Chapman*, 65 Cal. 73, 76; 2 Pac. Rep. 889. So if outside lands are inventoried by an administratrix as of her deceased husband, which were in truth not his estate, but the property of the administratrix, such fact does not estop her from claiming the property as her own, where she made the inventory by mistake of law and in ignorance of her rights: *Baker v. Brickell*, 87 Cal. 329, 342; 25 Pac. Rep. 489, 1067. It is quite possible for property to be erroneously included in an inventory by one acting under pure

mistake of facts or in ignorance of legal rights. Such conditions in no way change the fact of the real ownership, and incidentally do not affect the right of possession attached to such ownership. Hence where property included in the inventory of the estate is claimed by the administrator, who had possession before he became administrator, he is not estopped from disputing the title of his successor: *In re Murphy's Estate* (Wash.), 70 Pac. Rep. 107, 109. And if the filing of an inventory is not conclusive against the claim of an administrator to property therein contained, certainly where the administrator comes into possession of property, and refuses to inventory it, upon the claim that it does not belong to the estate, but belongs to some third person or to himself, no estoppel as to the title can be pleaded, simply because the property was received in a representative capacity: *In re Belt's Estate*, 29 Wash. 535; 70 Pac. Rep. 74, 76.

3. Possession of estate.

(1) *Right to, and nature of.* Immediately upon the issuance of letters of administration to an executor or administrator, he is entitled to have the possession of the estate of deceased, both real and personal, to the end that the rents and profits, and if need be the proceeds of the property itself, be applied to the payment of debts and charges, and the balance, if any, distributed and by him delivered to the party entitled: *Page v. Tucker*, 54 Cal. 121, 123; *Meeks v. Hahn*, 20 Cal. 620, 628; *Jahns v. Nolting*, 29 Cal. 507, 510; *Murphy v. Crouse*, 135 Cal. 14; 87 Am. St. Rep. 90; 66 Pac. Rep. 971; *Webb v. Winter*, 135 Cal. 455, 458; 67 Pac. Rep. 691; *In re Higgins' Estate*, 15 Mont. 474; 39 Pac. Rep. 506; *Bank of Ukiah v. Rice*, 143 Cal. 265; 76 Pac. Rep. 1020. An administrator is entitled to the possession of the property of the deceased, real and personal, for the purposes of administration: *Butler v. Smith*, 20 Or. 126; 25 Pac. Rep. 381. He takes charge of the entire estate, whether it passes to the heir or is otherwise disposed of: *Ward v. Moorey*, 1 Wash. Ter. 104. Not only is the executor or administrator entitled to the possession of all the real and personal estate of the decedent, but it is made his duty to reduce it into possession, and his right of action must be commensurate with the right and duties thus imposed upon him by the statute: *Collins v. O'Laverty*, 136 Cal. 31, 34; 68 Pac. Rep. 327. The possession of the administrator does not divest the heir or devisee of the fee. His possession is for the heirs or devisees who are the owners and seised in fee, subject to the temporary right of the administrator to the possession, and subject to the defined statutory authority and powers of sale given to the administrator: *Ryer v. Fletcher Ryer Co.*, 126 Cal. 482, 484; 58 Pac. Rep. 908. At common law, the administrator was entitled to the possession of the personal estate of the deceased until disposed of in due course of administration. The title vested in him, but here

the title vests in the heir. At common law, the title vested in the administrator, by relation, at the time of the death of the deceased; but here the administrator's control of the property, by relation, extends back to the same point of time, and he is deemed in law from that time to have the possession, or to be entitled to the possession, of the personal property, as the case may require: *Jahns v. Nolting*, 29 Cal. 507, 511. The right to the possession of the real property of an intestate remains exclusively with the administrator until the estate is settled, or until distribution is directed by order of the probate court: *Meeke v. Hahn*, 20 Cal. 620, 628. And the court cannot deprive an executor or administrator of his possession of the property of the estate, except in the manner provided by law: *Estate of Welch*, 110 Cal. 605, 609; 42 Pac. Rep. 1089. An executor, however, has no right of possession as against a chattel mortgagee who has the right of possession under the terms of a contract. The death of the mortgagor does not affect the rights of the mortgagee under the contract, and the executor possesses no new rights to the property, or to the possession of it, that were not in the mortgagor in his lifetime. On default in payment, the mortgagee has the right of possession of the property, as well against the executor of the mortgagor as against the mortgagor himself: *Mathew v. Mathew*, 138 Cal. 334, 337; 71 Pac. Rep. 344. An executor or administrator is not a co-tenant with a devisee or heir, and he is entitled to the possession against the devisee or heir: *Webb v. Winter*, 135 Cal. 455, 458; 67 Pac. Rep. 691. Upon the death of one owning personal property, the property passes at once to his heirs, devisees, or legatees, but subject to the control of the probate court and the possession of the administrator or executor, for the purposes of administration; and the title of the heirs is subject to the performance by the executor or administrator of all his trusts, among which is the payment of the debts of the decedent; and the heirs finally come into the possession and enjoyment of only such portion as may remain after the execution of such trusts by the representative: *Estate of Vance* (Cal.), 93 Pac. Rep. 1010, 1011.

(2) **Statute of limitations. Loss of right.** The statute of limitations runs against the executor's or administrator's right of possession. The right of possession resting in the representative is barred in the same way as the right of possession in any other trustee: *Webb v. Winter*, 135 Cal. 455, 457; 67 Pac. Rep. 691. The executor or administrator ceases to be entitled as of course to the possession of the property of the estate, where it has been put into the hands of devisees or legatees under the provisions of the statute, upon their giving bonds for the payment of their proportion of the debts: *Estate of Woodworth*, 31 Cal. 595, 619. Where the objection of the bar of the statute of limitations does not appear upon the face of

the complaint, and the objection is not raised by the answer, it is, for the purposes of the action, to be regarded as abandoned. Such is the rule where the action is upon a demand arising upon contract, and in our system of practice the same rule must apply where the action is to enforce a right to the possession of real property: *Meeks v. Hahn*, 20 Cal. 620, 627.

(3) Domiciliary executors. It is the duty of the domiciliary executor to take possession of foreign assets of his testator, so far as he is able to do so: *Estate of Ortiz*, 86 Cal. 306, 316; 21 Am. St. Rep. 44; 24 Pac. Rep. 1034; and, where no conflicting grant of authority appears, the domiciliary appointee of another state may take charge of and control personal property of the deceased in the state of its situs: *Estate of Ortiz*, 86 Cal. 306, 315; 21 Am. St. Rep. 44; 24 Pac. Rep. 1034.

(4) Recovery of possession. Where the executor or administrator has the exclusive right to the possession of the property of the estate of a decedent until the final order of the court, and where he has the right to bring suit to recover any property belonging to the estate held adversely by others, and where the possession of the heirs is made subject to the possession of the executor or administrator for the purpose of administration, the executor or administrator has a right to maintain an action to recover the property of his intestate: *Jenkins v. Jensen*, 24 Utah, 108; 56 Pac. Rep. 773, 776; *Roury v. Duffield*, 1 Ariz. 509. He may recover the possession from an heir or devisee: *Page v. Tucker*, 54 Cal. 121, 122. And the executor or administrator, being entitled to the possession of the estate of the deceased, may maintain ejectment: *Curtis v. Herrick*, 14 Cal. 117; 73 Am. Dec. 632; *McClelland v. Dickenson*, 2 Utah, 100; but see *Emerie v. Penniman*, 26 Cal. 119; *Carrhart v. Montana etc. Co.*, 1 Mont. 245. He may also bring an action to quiet title to the real estate of his decedent: *Pennie v. Hildreth*, 81 Cal. 127, 130; 22 Pac. Rep. 398; *Collins v. O'Lavery*, 136 Cal. 31; 68 Pac. Rep. 327. If a person, before his death, was entitled to a conveyance of land, a conveyance of it to his administrator, as such, vests the legal title thereto in the administrator: *In re Smith*, 4 Nev. 254. The executor or administrator may maintain an action necessary either to protect his possession or to reduce into possession property of the estate held by others. In the application of this rule, "the difference between legal and equitable estates is of no practical importance. They are both estates originating by law, and held under law, and in that sense are legal estates." There is therefore no room, in an action by the administrator of a deceased person to set aside and cancel a deed executed by the decedent in her lifetime, for any distinction between legal actions brought on the title, and equitable actions

brought to recover property of which the legal title as well as the possession is in another. The sole test of the administrator's right of action is the right of the estate to the possession of the property. If the right exists, then the right of action exists; and it will make no difference if, in order to recover property, to the possession of which the estate is entitled, it should become necessary to cancel a voidable deed, or otherwise, according to the equity practice, to dispose of an outstanding legal title: *Collins v. O'Lavery*, 136 Cal. 31, 35; 68 Pac. Rep. 327. In an action by an executor or administrator for the possession of the real estate of his decedent, it is not necessary to set out the inventory and appraisement in the complaint, if the making of an inventory is not a prerequisite of the right to take possession of the estate: *Black v. Story*, 7 Mont. 238; 14 Pac. Rep. 703. An executor or administrator, however, is not entitled to institute partition proceedings, unless expressly authorized by the statute: *Ryer v. Fletcher Ryer Co.*, 126 Cal. 482, 484, 485; 58 Pac. Rep. 908. If the executor or administrator has a right to sue, and omits that duty, the beneficiary is then barred, and his remedy is against the administrator or his bondsmen. If the administrator fails to sue to recover land of the estate, or to set aside a sale within three years next following it,—the administration so long continuing,—then the heirs, as well as himself, are barred, even though the heirs are minors; and this on the ground that, under our system, the administrator represents the heirs; he the trustee, they the cestuis: *Dennis v. Dint*, 122 Cal. 39, 44; 68 Am. St. Rep. 17; 54 Pac. Rep. 378. If an administrator negligently allows the statute of limitations to run so as to bar his rights as such, he lays himself liable to the heir or any one else by his failure to perform his duty: *Jenkins v. Jensen*, 24 Utah, 108; 66 Pac. Rep. 773, 778. The possession of an administrator may be tacked to that of heirs to make out a five years' continuous adverse possession, because the possession of the administrator is that of the heir: *Spotts v. Hanley*, 85 Cal. 155, 167; 24 Pac. Rep. 738. An executor or administrator is entitled to the possession of the real estate of his decedent, and may maintain an action therefor: *In re Higgins' Estate*, 15 Mont. 474; 39 Pac. Rep. 506, 509.

REFERENCES.

Possession of personal assets: See note 112 Am. St. Rep. 731. Administrator's right to possession of personal property of his decedent and to recover it: See note 3 L. R. A. (N. S.) 704.

CHAPTER II.

EMBEZZLEMENT AND SURRENDER OF PROPERTY OF ESTATE.

- § 379. Embezzlement of estate before issuance of letters.
- § 380. Citation to persons suspected of having embezzled estate, etc.
- § 381. Form. Complaint charging concealment, embezzlement, etc., of estate.
- § 382. Form. Citation to answer for alleged embezzlement of estate, etc.
- § 383. Refusal to obey citation. Penalty.
- § 384. Form. Commitment for contempt.
- § 385. Citation to account for estate.

EMBEZZLEMENT OF PROPERTY OF ESTATE.

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| 1. Definition. | 3. Indictment. Petition. |
| 2. Construction and validity of statute. | 4. Power of court. |

§ 379. Embezzlement of estate before issuance of letters.
 If any person embezzles, conceals, smuggles, or fraudulently disposes of any of the moneys, goods, chattels, or effects of a decedent, he is chargeable therewith, and liable to an action by the executor or administrator of the estate for double the value of the property so embezzled, concealed, smuggled, or fraudulently disposed of, to be recovered for the benefit of the estate. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 497), § 1458.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 814, p. 312.
- Arizona.** Rev. Stats. 1901, par. 1721.
- Colorado.** 3 Mills's Ann. Stats., sec. 4815d.
- Idaho.** Code Civ. Proc. 1901, sec. 4115.
- Montana.** Code Civ. Proc., sec. 2570.
- Nevada.** Comp. Laws, sec. 2381.
- North Dakota.** Rev. Codes 1905, §§ 8073, 8162.
- Oklahoma.** Rev. Stats. 1903, sec. 1603.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1152.
- South Dakota.** Probate Code 1904, § 149.

Utah. Rev. Stats. 1898, sec. 3926.

Washington. Pierce's Code, § 2510.

Wyoming. Rev. Stats. 1899, sec. 4689.

§ 380. **Citation to persons suspected of having embezzled estate, etc.** If any executor, administrator, or other person interested in the estate of a decedent, complains to the superior court, or a judge thereof, on oath, that any person is suspected to have concealed, embezzled, smuggled, or fraudulently disposed of any moneys, goods, or chattels of the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings, which contain evidences of or tend to disclose the right, title, interest, or claim of the decedent to any real or personal estate, or any claim or demand, or any lost will, the said court or judge may cite such person to appear before such court, and may examine him on oath upon the matter of such complaint. If such person is not in the county where the decedent died, or where letters have been granted, he may be cited and examined either before the superior court of the county where he is found, or before the superior court of the county where the decedent died, or where letters have been granted. But if he appears and is found innocent, his necessary expenses must be allowed him out of the estate. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 497), § 1459.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 810, p. 312.

Arizona. Rev. Stats. 1901, par. 1722.

Colorado. 3 Mills's Ann. Stats., sec. 4815d.

Idaho. Code Civ. Proc. 1901, sec. 4116.

Kansas. Gen. Stats. 1905, § 3071.

Montana. Code Civ. Proc., sec. 2571.

Nevada. Comp. Laws, sec. 2882.

New Mexico. Laws 1907, secs. 5, 6, p. 158.

North Dakota. Rev. Codes 1905, §§ 8076, 8162.

Oklahoma. Rev. Stats. 1903, sec. 1604.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1148.

South Dakota. Probate Code 1904, § 150.

Utah. Rev. Stats. 1898, sec. 3927.

Washington. Pierce's Code, § 2511.

Wyoming. Rev. Stats. 1899, sec. 4690.

§ 381. Form. Complaint charging concealment, embezzlement, etc., of estate.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Now comes —, and, complaining to the court, alleges:

That he is the duly appointed, qualified, and acting administrator² of the estate of —, deceased;

That he suspects that — has concealed, smuggled, and conveyed away certain goods and chattels of the decedent to wit, —;³

That he suspects that said — has in his possession, and has knowledge of, certain deeds, conveyances, bonds, contracts, and other writings, to wit, —,⁴ which contain evidences of, and tend to disclose, the right, title, interest, and claim of decedent to certain real and personal property, and in certain claims and demands;⁵ and that the said — has knowledge of a lost will of said decedent.⁶

Complainant, furthermore, is informed and believes, and upon such information and belief alleges the fact to be, that said — has had in his possession certain personal property of said estate, to wit, —,⁷ but that the said — neglected and refuses to deliver said property, or any part thereof, to said administrator,⁸ but has fraudulently embezzled, converted, and appropriated the same to his own use.

Wherefore complainant prays that the said — be cited to appear before this court, that he may be examined on oath concerning the matters alleged in this complaint.

—, Attorney for Complainant. —, Complainant

[Add ordinary verification.]

Explanatory notes. 1. Give file number. 2. Or, executor of the will, etc. 3. Insert description thereof. 4. Give brief description. 5. State them. 6. Give particulars, as far as possible. 7. Insert description. 8. Or, executor.

§ 382. Form. Citation to answer for alleged embezzlement of estate, etc.

[Title of court.]

[Title of proceeding.]

{ No. ____¹ Dept. No. ____
[Title of form.] }

The People of the State of ____.

To ____, Greeting.

You are hereby cited to be and appear in the ____ court of the ____ county² of ____, at the court-room of Department No. ____, in ____,³ on ____,⁴ the ____ day of ____, 19____, at ____ o'clock in the forenoon⁵ of said day, then and there to show cause, if any you have, why you should not be examined concerning property of the above estate alleged to have been embezzled by you.⁶

By order of the ____ court, this ____ day of ____, A. D. 19____.

Attest: ____, Clerk.

[Seal]

By ____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Or, city and county. 3. Give location of court-room. 4. Give day of the week. 5. Or, afternoon. 6. Or, concealed, smuggled, or fraudulently disposed of by you; or, concerning your possession or knowledge of possession of certain deeds, bonds, contracts, or other writings which contain evidence of, or tend to disclose some right, title, or interest of the above decedent to, certain real or personal property; or, concerning an alleged lost will of the above decedent.

§ 383. Refusal to obey citation. Penalty. If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him, touching the matters of the complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court, or is discharged according to law.

[Compelling disclosure by commitment.] If, upon such examination, it appears that he has concealed, embezzled, smuggled, or fraudulently disposed of any moneys, goods, or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings containing evidences of or tending to disclose the right, title, interest, or claim of the decedent to any real or

personal estate, claim, or demand, or any lost will of the decedent, the court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with, or he is discharged according to law;

[Interrogatories and answers to be in writing.] And all such interrogatories and answers must be in writing, signed by the party examined, and filed in the court. In addition to the examination of the party, witnesses may be produced and examined on either side. **Kerr's Cyc. Code Civ. Proc.** (**Kerr's Stats. and Amdts.**, p. 497), § 1460.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, secs. 811, 812, p. 312.

Arizona. Rev. Stats. 1901, par. 1723.

Colorado. 3 Mills's Ann. Stats., sec. 4815d.

Idaho. Code Civ. Proc. 1901, sec. 4117.

Kansas. Gen. Stats. 1905, §§ 3072-3074.

Montana. Code Civ. Proc., sec. 2572.

Nevada. Comp. Laws, sec. 2883.

New Mexico. Laws 1907, secs. 5, 6, p. 158.

North Dakota. Rev. Codes 1905, §§ 8077, 8162.

Oklahoma. Rev. Stats. 1903, sec. 1605.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 1149, 1150.

South Dakota. Probate Code 1904, § 151.

Utah. Rev. Stats. 1898, secs. 3927, 3928.

Washington. Pierce's Code, § 2512.

Wyoming. Rev. Stats. 1899, sec. 4691.

§ 384. Form. Commitment for contempt.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

This court, after due and legal proceedings had, having made and entered its order on the ____ day of ____, 19__, that ____ appear before this court to be examined on oath concerning the matters alleged in a complaint filed herein on the ____ day of ____, 19__, wherein the said ____ was charged with concealing and embezzling certain estate of decedent;² and it being shown to the court that due and

legal notice of said order was given to the said —; that he has neglected and refused, and still neglects and refuses, to obey said order; and that it is in his power to obey it, —

It is ordered, adjudged, and decreed, That the said — be committed to the county jail of said county,³ there to remain until said order is complied with, or until he is discharged according to law, and that the sheriff of said county⁴ take charge of the said —, and him safely keep and imprison in accordance with the terms of this order.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or whatever the order may have been. 3, 4. Or, city and county.

§ 385. Citation to account for estate. The superior court, or a judge thereof, upon the complaint, on oath, of any executor or administrator, may cite any person who has been intrusted with any part of the estate of the decedent to appear before such court, and require him to render a full account, on oath, of any moneys, goods, chattels, bonds, accounts, or other property or papers belonging to the estate, which have come to his possession in trust for the executor or administrator, and of his proceedings thereon; and if the person so cited refuses to appear and render such account, the court may proceed against him as provided in the preceding section. **Kerr's Cyc. Code Civ. Proc.**, § 1461.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 813, p. 312.

Arizona.* Rev. Stats. 1901, par. 1724.

Idaho.* Code Civ. Proc. 1901, sec. 4118.

Kansas. Gen. Stats. 1905, § 2893.

Montana.* Code Civ. Proc., sec. 2573.

Nevada. Comp. Laws, sec. 2884.

New Mexico. Laws 1907, secs. 5, 6, p. 158.

North Dakota. Rev. Codes 1905, § 8162.

Oklahoma.* Rev. Stats. 1903, sec. 1606.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1151.

South Dakota.* Probate Code 1904, § 152.

Washington. Pierce's Code, § 2513.

Wyoming. Rev. Stats. 1899, sec. 4692.

EMBEZZLEMENT OF PROPERTY OF ESTATE.

- | | |
|--|--------------------------|
| 1. Definition. | 3. Indictment. Petition. |
| 2. Construction and validity of statute. | 4. Power of court. |

1. **Definition.** To embezzle the property of an estate is to appropriate fraudulently to one's own use and to conceal the effects of the estate, which such person has in his possession; and to alienate, signifies to transfer wrongfully such property to another. Such embezzlement or alienation is a wrongful conversion of the property, for which an action of trover was maintainable at common law. An action of the nature of an action of trover may be brought by the administrator without the aid of the statute, against any person who has embezzled or alienated the personal property of the estate, prior to the granting of administration. The statute does not give a new right of action, nor create a remedy where one did not previously exist, but it merely increases the measure of damages, in case the tortious conversion has been committed at a particular time when the property is peculiarly exposed to loss,—that is, the time intermediate the death of the deceased and the issuing of the letters of administration: *Jahns v. Nolting*, 29 Cal. 507, 511.

REFERENCES.

See note § 646, post.

2. **Construction and validity of statute.** The statutory proceedings whereby an executor or administrator may recover property of the estate of a decedent, alleged to have been embezzled by the defendant and converted to his own use, are remedial and not penal in their nature, and do not contravene any provisions of the state constitution: *Levy v. Superior Court*, 105 Cal. 600, 606; 38 Pac. Rep. 965; 29 L. R. A. 811; dismissed for want of jurisdiction, 167 U. S. 175; 42 L. ed. 126.

3. **Indictment. Petition.** An indictment which charges that the defendant received into his hands, as administrator, the sum of seventeen hundred and ninety-four dollars, but in rendering his final account charged himself with only seventeen hundred dollars, does not, in the absence of all averments of other necessary inculpatory facts, charge the defendant with the crime of embezzlement: *People v. Gale*, 77 Cal. 120; 19 Pac. Rep. 231. The petition of an administrator, under the statute of Montana, alleged that decedent, at the time of his death, was indebted to a designated bank; that, as security for such indebtedness, he had, in his lifetime, given certain mortgages and deeded certain real property to the bank; that the administrator had since paid all the indebtedness and had received a reconveyance of a part of said realty; but that the bank had refused

to reconvey the same; and concluded as follows: "That the following-named persons have some knowledge relating to the title to these interests in the said properties, and said administrator asks that this court make an order citing the following-named persons to appear before said court at a time and place where they may be examined under oath, and that they be required to bring all title deeds, books, memorandums, and entries in books in relation to all matters alleged in said complaint," after which follow the names of the persons;— is fatally defective, in that it fails to allege that any of these persons has in his possession or has knowledge of any book, deed, conveyance, bond, contract, or other writing which contains evidence of, or tends to disclose the right, title, interest, or claim of the decedent to, any part of the real estate described therein. A subsequent allegation to this effect is necessary, in order to set the machinery of the court in operation; and the court erred in issuing a citation upon such insufficient petition: *State v. District Court (Mont.)*, 89 Pac. Rep. 62, 63. Where the plaintiff in an action for the wrongful taking of the personal estate of a decedent has averred the facts entitling him to recover damages according to the measure as enhanced by the statute, and has claimed the same in his prayer for relief, they should be awarded to him accordingly, if the evidence sustains the allegations of the complaint; and if he fails to prove the allegations which bring the case within the statutory rule of damages, but sustains the issues upon the remaining allegations, the recovery should be as in ordinary actions for trover and conversion: *Jahns v. Nolting*, 29 Cal. 507, 513.

4. Power of court. While the statute provides for a citation and examination of parties alleged to have in their possession property belonging to an estate, it does not declare that the court may, after such examination, when the title to the property is in dispute, order such effects to be delivered up to the executor or administrator, or deposited where the court may order. Thus the court has no power to order a person to deposit a sum of money, claimed to belong to the estate of a decedent, in a bank, subject to the order of the court, where such person claims a right to the money: *Ex parte Casey*, 71 Cal. 269, 271; 12 Pac. Rep. 118. So where money was paid to an attorney at law, as a retainer and for services, by the one who employed him, the fact that the attorney failed to comply with his contract, or to perform the agreed services, does not authorize the court to commit him to prison for refusing to refund the money that had been paid to him, especially where the court acts without trial, and without giving the petitioner a right to a defense in the ordinary way. In making such an order the court exceeds its jurisdiction: *Tomsky v. Superior Court*, 131 Cal. 620, 623; 63 Pac. Rep. 1020. The probate court has no jurisdiction over a contest for the proceeds of

an insurance policy payable, by its terms, to the widow and minor children of the deceased. Such fund is not a part of the estate of the deceased: *Heydenfeldt v. Jacobs*, 107 Cal. 373, 377; 40 Pac. Rep. 492. For other cases involving the same principle, see *Ex parte Hollis*, 59 Cal. 405; *Stuparich Mfg. Co. v. Superior Court*, 123 Cal. 290, 292; 55 Pac. Rep. 985. A person in possession of personal property, under a claim of ownership, cannot be summarily deprived thereof by an order of court based on the affidavits of an adverse claimant, but he has the right to have his title determined in an appropriate action by the verdict of a jury or the findings of a court upon issues framed for that purpose: *Stuparich Mfg. Co. v. Superior Court*, 123 Cal. 290, 292; 55 Pac. Rep. 985.

PART VI.
SUPPORT OF FAMILY. EXEMPT PROPERTY.
HOMESTEAD.

CHAPTER I.

SUPPORT OF FAMILY. EXEMPT PROPERTY.

- § 386. Right to remain in possession of homestead, etc.
- § 387. Form. Order making provision for support of family until return of inventory.
- § 388. All property exempt from execution to be set apart for use of family.
- § 389. Form. Petition for decree setting apart homestead for use of family.
- § 390. Form. Order setting apart recorded homestead of value less than five thousand dollars. Community property.
- § 391. Form. Order setting apart recorded homestead, of value less than five thousand dollars, selected by decedent out of his or her separate property.
- § 392. Form. Order setting apart recorded homestead, of value less than five thousand dollars, selected by the survivor only, out of decedent's separate property.
- § 393. Form. Order setting apart homestead where none was recorded.
- § 394. Form. Order setting apart property exempt.
- § 395. Form. Petition for order setting apart personal property for use of family and for family allowance.
- § 396. Form. Affidavit of posting notice of hearing of petition for family allowance.
- § 397. Form. Notice of hearing petition for family allowance.
- § 398. Form. Order for family allowance.
- § 399. Extra allowance may be made.
- § 400. Payment of allowance.
- § 401. Property set apart, how apportioned between widow and children.
- § 402. Administration when estate does not exceed fifteen hundred dollars.

- § 403. Form. Order that summary administration be had.
- § 404. Form. Notice to creditors. Summary administration.
- § 405. Form. Order to show cause why entire estate should not be assigned to widow and minor children.
- § 406. Form. Notice of application for order to set aside all of decedent's estate for the benefit of his family.
- § 407. Form. Notice of time and place of hearing application for setting aside entire estate for use and support of family.
- § 408. Form. Affidavit of posting of notice of petition for assignment of estate for use and support of family.
- § 409. Form. Order assigning entire estate for use and support of family of deceased.
- § 410. When all property other than homestead to go to children.

FAMILY ALLOWANCE.

- | | |
|--|--|
| <ul style="list-style-type: none"> 1. In general. Exempt property. (1) Widow's quarantine. (2) Exempt property. (3) Same. Homestead. (4) Paramount nature of right. (5) Application or petition. "Family." (6) Proof of right. (7) Notice not required. (8) Considerations in fixing. (9) Objections. Exceptions. (10) Fixing amount. When not excessive. (11) To be made when. (12) Widow is entitled to, when. (13) Widow is not entitled to, when. (14) To children. (15) Order. In general. (16) Order. Duration, modification, cessation, and suspension. (17) Order. Validity. | <ul style="list-style-type: none"> (18) Order. Finality, conclusiveness. (19) Paid without order of court. (20) Contest of allowance. Collateral attack. (21) Vacating allowance. Fraud. (22) Liens. Contracts to pay out. (23) Further allowance. (24) Motion for new trial. (25) Appeal. Review. 2. Assignment of estate less in value than fifteen hundred dollars. (1) In general. (2) Notice to creditors, and to show cause. (3) What property may be set apart. (4) Apportionment, and rights of children. (5) Liens, outstanding titles, etc. (6) Appeal. (7) Death pending appeal. Abatement. |
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§ 386. Right to remain in possession of homestead, etc.
 When a person dies leaving a widow or minor children, the widow or children, until letters are granted and the inventory is returned, are entitled to remain in possession of the homestead, of all the wearing apparel of the family, and of all the household furniture of the decedent, and are also entitled to a reasonable provision for their support, to be al-

lowed by the superior court, or a judge thereof. **Kerr's Cyc. Code Civ. Proc., § 1464.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska.* Carter's Code, sec. 815, p. 313.

Arizona.* Rev. Stats. 1901, par. 1725.

Colorado. 3 Mills's Ann. Stats., sec. 4791.

Idaho.* Code Civ. Proc. 1901, sec. 4119.

Kansas. Gen. Stats. 1905, § 2923.

Montana. Code Civ. Proc., sec. 2580.

Nevada. Comp. Laws, sec. 2885.

New Mexico. Comp. Laws 1897, sec. 1993.

North Dakota. Rev. Codes 1905, § 8087.

Oklahoma. Rev. Stats. 1903, sec. 1607.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1153.

South Dakota. Probate Code 1904, § 153.

Utah. Rev. Stats. 1898, sec. 3846.

Washington. Pierce's Code, § 2521.

Wyoming.* Rev. Stats. 1899, sec. 4733.

§ 387. Form. Order making provision for support of family until return of inventory.

[Title of court.]

[Title of estate.]

{ No. ____.¹ Dept. No. ____
[Title of form.] }

A petition for letters of administration ² on the estate of _____, deceased, having been filed in this court, from which it appears that said _____ died on or about the _____ day of _____, 19____; that at the time of his death he was a resident of said county ³ and state, and that he left a widow and _____ minor children; and it being shown to the court that said widow and minor children have no means of support until such letters ⁴ are granted, and the return of the inventory of said estate, and that the sum of _____ dollars (\$____) would be a reasonable sum for such support, —

It is hereby ordered, That the sum of _____ dollars (\$____) per month be appropriated out of said estate for the support of said family until the return of said inventory, and _____, the said administrator,⁵ is hereby directed to pay the same monthly, on the _____ day of each and every month,

to —, the widow of said deceased, until said inventory be returned, or until the further order of this court.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, letters testamentary. 3. Or, city and county. 4. Or, letters testamentary. 5. Or, executor.

§ 388. All property exempt from execution to be set apart for use of family. Upon the return of the inventory, or at any subsequent time during the administration, the court may, on its own motion, or on petition therefor, set apart for the use of the surviving husband or wife, or, in case of his or her death, to the minor children of the decedent, all the property exempt from execution, including the homestead, selected, designated, and recorded; provided, such homestead was selected from the common property, or from the separate property, of the persons selecting or joining in the selection of the same. If none has been selected, designated, and recorded, or, in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court must select, designate, and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife and the minor children; or if there be no surviving husband or wife, then for the use of the minor children, in the manner provided in article two of this chapter, out of the common property, or if there be no common property, then out of the real estate belonging to the decedent. **Kerr's Cyc. Code Civ. Proc., § 1465.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 816, p. 313.

Arizona. Rev. Stats. 1901, par. 1726.

Colorado. 3 Mills's Ann. Stats., sec. 1465.

Idaho. Code Civ. Proc. 1901, sec. 4120.

Kansas. Gen. Stats. 1905, §§ 2923, 2924.

Montana. Code Civ. Proc., sec. 2581.

Nevada. Comp. Laws, sec. 2886.

New Mexico. Comp. Laws 1897, secs. 1993, 2041, 2042.

North Dakota. Rev. Codes 1905, §§ 8087, 8089.

Oklahoma. Rev. Stats. 1903, secs. 1607-1610.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1154.

South Dakota. Probate Code 1904, §§ 154, 155.

Utah. Rev. Stats. 1898, sec. 3846.

Washington. Pierce's Code, §§ 2521, 2522.

Wyoming. Rev. Stats. 1899, sec. 4737.

§ 389. Form. Petition for decree setting apart homestead for use of family.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To the Honorable the ____² Court of the County³ of ____, State of ____.

The petition of ____, the administrator⁴ of the estate of ____, deceased, respectfully shows:

That said deceased was a resident of the county⁵ of ____ at the time of his death, and left estate in the said county⁶ and state;

That letters of administration were issued to ____, the said administrator,⁷ on the ____ day of ____, 19____, and that on the ____ day of ____, 19____, said administrator⁸ duly returned an inventory and appraisalment of said estate to said ____⁹ court;

That a certain quantity of land in said inventory, and hereinafter particularly described, together with the dwelling-house thereon and its appurtenances, was selected from the community property of said spouses¹⁰ by said deceased in his lifetime, and was duly declared and recorded as a homestead by declaration recorded in the office of the county recorder of the county of ____ on the ____ day of ____, 19____, in volume ____ of declarations of homestead, at page ____; that said declaration of homestead remained in full force and effect at the time of the death of deceased;¹¹

That said premises do not exceed in value the sum of five thousand dollars (\$5,000), and were appraised, as appears

by said inventory and appraisement, at the sum of _____ dollars (\$_____) only;

That the family of said deceased consists of his widow, _____, and three minor children, viz., _____, _____, and _____; and that said widow was the wife of deceased at the time said homestead was declared and recorded as aforesaid;

That the said quantity of land is situated in said county ¹² of _____, state of _____, and is particularly described as follows, to wit: _____.¹³

Wherefore your petitioner prays that the said homestead, consisting of said quantity of land, together with the dwelling-house thereon and its appurtenances, be set apart for the use of the family of said deceased.¹⁴

Dated _____, 19____. _____, Petitioner.
_____, Attorney for Petitioner.¹⁵

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, city and county. 4. Or, executor. 5, 6. Or, city and county. 7, 8. Or, executor. 9. Title of court. 10. Or, from the separate property of the deceased. 11. Or, if no homestead had ever been selected, designated, and recorded as required by law, during the life of said deceased, by either said deceased or his surviving spouse, that a certain quantity of land in said inventory, and hereinafter described, with the dwelling-house thereon and appurtenances, was occupied by deceased and his family as a homestead at the time of his death, and is still so occupied by the widow and children of said deceased, and is in every respect fit and proper to be so used and occupied. 12. Or, city and county. 13. Describe the land. 14. Or, be set apart to _____, the widow of said deceased. 15. Give address.

§ 390. Form. Order setting apart recorded homestead of value less than five thousand dollars. Community property.

[Title of court.]

[Title of estate.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

The inventory and appraisement herein having been duly made and filed, and the following described real estate having been appraised therein at not exceeding five thousand dollars (\$5,000) in value, and having been duly selected and

recorded as a homestead in the lifetime of said decedent, and being community property, —

Now, on motion of —, it is ordered by the court, That the same be set off to —, the surviving widow ² of said decedent, as her property, subject to no other liability of said decedent than such as exists or has been created by law.³

Said land is described as follows, to wit: —.⁴

Entered —, 19—.

—, County Clerk.

By —, Deputy.

Explanatory notes. 1. Give file number. 2. Or as the case may be. 3. Refer to particular provision. 4. Describe the land.

§ 391. Form. Order setting apart recorded homestead, of value less than five thousand dollars, selected by decedent out of his or her separate property.

[Title of court.]

[Title of estate.]

{ No. —.¹ Dept. No. —
[Title of form.]

The inventory and appraisement herein having been duly made and filed, and the following described real estate having been appraised therein at not exceeding five thousand dollars (\$5,000) in value, and having been duly selected and recorded as a homestead by said decedent during his life, out of his separate property, —

Now, on motion of —, the administrator ² of said deceased, it is ordered by the court, That the said premises be set off to —, the surviving widow ³ of said decedent, as her property, subject to no other liability of said decedent than such as may exist under provisions of law,⁴ if any such liability there be.

Said land is described as follows, to wit: —.⁵

Entered —, 19—.

—, County Clerk.

By —, Deputy.⁶

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Or as the case may be. 4. Refer to particular provision. 5. Description. 6. That orders need not be signed by the judge, see note § 77, ante. Compare *Weinrich v. Hensley*, 121 Cal. 647; 54 Pac. Rep. 254; *Estate of Fath*, 132 Cal. 609; 64 Pac. Rep. 995.

§ 392. Form. Order setting apart recorded homestead, of value less than five thousand dollars, selected by the survivor only, out of decedent's separate property.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

The inventory and appraisement herein having been duly made and filed in this court, and the following described real estate having been appraised therein at not exceeding five thousand dollars (\$5,000) in value, and having been duly selected and recorded as a homestead by the wife of said decedent during his life, out of his separate property, the said decedent not having joined in said selection, —

Now, on motion of —, it is ordered, That the same be set off for the period of — years² from this date to the family of said decedent, namely, —, his widow, and — and —, his minor children.

Said land is described as follows, to wit: —.³

Entered —, 19—.

—, County Clerk.

By —, Deputy.⁴

Explanatory notes. 1. Give file number. 2. The period may be limited to the life of the survivor: Estate of Schmidt, 94 Cal. 334, 336; 29 Pac. Rep. 714; Estate of Firth, 145 Cal. 236, 238; 78 Pac. Rep. 643. But in no case can it extend beyond the life of the person to whom the homestead is set apart: Hutchinson v. McNally, 85 Cal. 619, 621; 24 Pac. Rep. 1071. Compare Weinrich v. Hensley, 121 Cal. 647; 54 Pac. Rep. 254; Estate of Fath, 132 Cal. 609; 64 Pac. Rep. 995. 3. Insert description. 4. That orders need not be signed by the judge, see note § 77, ante.

§ 393. Form. Order setting apart homestead where none was recorded.

[Title of court.]

[Title of proceeding.]

{ No. ____¹ Dept. No. ____
[Title of form.]

The inventory and appraisement herein having been duly made and filed, and it having been shown to the court that no homestead had been selected and recorded during the life of said decedent, —

On motion of —, it is ordered, That the real estate hereinafter described be, and it is hereby, selected, designated, and set apart by the court as a homestead for the use of —, the surviving spouse, and —, the minor child, of said decedent.

Said property is community property,² and is described as follows: —.³ —, County Clerk.

Entered —, 19—.

By —, Deputy.⁴

Explanatory notes. 1. Give file number. 2. Or, is separate property of the decedent, and is hereby set apart as a homestead for the period of — years from this date. 3. Describe the land. 4. That orders need not be signed by the judge, see note § 77, ante.

§ 394. Form. Order setting apart property exempt.

[Title of court.]

[Title of estate.]

{ No. —.¹ Dept. No. —
[Title of form.]

It appearing to the court that said deceased left surviving him —, his widow, —

Now, on motion of said widow, it is ordered, That there be set apart, for the use of said widow, the wearing-apparel and household furniture of the deceased, which furniture is described as follows, to wit: —.²

Entered —, 19—.

—, County Clerk.

By —, Deputy.

Explanatory notes. 1. Give file number. 2. Describe the property.

§ 395. Form. Petition for order setting apart personal property for use of family and for family allowance.

[Title of court.]

[Title of estate.]

{ No. —.¹ Dept. No. —
[Title of form.]

To the Honorable the Judge of the —² Court of the County³ of —, State of —.

The petition of —, administrator⁴ of the estate of —, deceased, respectfully shows:

That on the — day of —, 19—, an inventory and appraisalment of said estate were duly returned to said —⁵ court;

That, as appears by said inventory and appraisement, said estate has been appraised at the sum of _____ dollars (\$_____);

That the debts of said estate do not exceed, in all probability, the sum of _____ dollars (\$_____), and that said estate is solvent;⁶

That your petitioner is advised and believes that the following personal property, belonging to said estate, and mentioned in said inventory and appraisement, is by law exempt from execution, to wit: _____;⁷

That the amount of said personal property which is by law exempt from execution is insufficient for the support of the family of said deceased; that an allowance out of the said estate is necessary for the maintenance of the said family; and that the sum of _____ dollars (\$_____) per month is a reasonable allowance, according to the circumstances of said family.

Wherefore your petitioner prays that all of the said personal property may be set apart for the use of the said family; and that an allowance of _____ dollars (\$_____) per month be made for the maintenance of said family, out of said estate, during the progress of the settlement of said estate.

_____, Petitioner.

Dated _____, 19____.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, city and county. 4. Or, executor. 5. Title of court. 6. Or, insolvent, as the case may be. 7. Describe it.

§ 396. Form. Affidavit of posting notice of hearing of petition for family allowance.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.]

State of _____,
County ² of _____, } ss.

_____, deputy county clerk of said county,³ being duly sworn, says that on the _____ day of _____, 19____, he posted correct and true copies of the within notice in three of the most public places in said county,⁴ to wit: one of the said

copies at the place at which the court is held,⁵ one at _____,⁶
and one at _____,⁷ in said county.⁸

Subscribed and sworn to before me this _____ day of
_____, 19____. _____, Deputy County Clerk.

Explanatory notes. 1. Give file number. 2-4. Or, city and county.
5. Naming it. 6, 7. Other public places; as, the city hall, land-office,
United States post-office, etc. 8. Or, city and county.

§ 397. Form. Notice of hearing petition for family allowance.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.]

Notice is hereby given, That _____, the administrator²
of the estate of _____, deceased, has filed herein his petition
paying for an order of this court granting a family allow-
ance out of the estate of said deceased, and that _____,³
the _____ day of _____, 19____, at _____ o'clock in the fore-
noon⁴ of said day, at the court-room of said court, at the
court-house,⁵ in said county,⁶ has been fixed for the hearing
of such petition, at which time and place any person inter-
ested in said estate may appear and file his exceptions in
writing to the said petition and contest the same.

Dated this _____ day of _____, 19____. _____, Clerk.

By _____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Day
of week. 4. Or, afternoon. 5. Give location of court-house. 6. Or,
city and county.

§ 398. Form. Order for family allowance.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.]

It appearing to the satisfaction of the court that the
exempt property set apart to the widow is insufficient for
the support of the widow and children of the deceased, —

It is ordered, That there be allowed and paid to the said
widow, for the maintenance of the family of said deceased,
the sum of _____ dollars (\$_____) per month, beginning on

the first day of —, 19—, and continuing until the further order of the court. —, County Clerk.

Entered —, 19—.

By —, Deputy.²

Explanatory notes. 1. Give file number. 2. That orders need not be signed by the judge, see note § 77, ante.

§ 399. **Extra allowance may be made.** If the property set apart is insufficient for the support of the widow and children, or either, the court or a judge thereof must take such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not be longer than one year after granting letters testamentary or of administration. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 498), § 1466.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 817, p. 313.

Arizona. Rev. Stats. 1901, par. 1727.

Idaho. Code Civ. Proc. 1901, sec. 4121.

Montana. Code Civ. Proc., sec. 2582.

Nevada. Comp. Laws, sec. 2887.

New Mexico. Comp. Laws 1897, sec. 1993.

North Dakota. Rev. Codes 1905, § 8091.

Oklahoma. Rev. Stats. 1903, sec. 1611.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1155.

South Dakota. Probate Code 1904, § 157.

Utah. Rev. Stats. 1898, sec. 3846.

Washington. Pierce's Code, § 2522.

Wyoming. Rev. Stats. 1899, sec. 4734.

§ 400. **Payment of allowance.** Any allowance made by the court or judge, in accordance with the provisions of this article, must be paid in preference to all other charges, except funeral charges and expenses of administration; and any such allowance, whenever made, may, in the discretion of the court or judge, take effect from the death of the decedent. **Kerr's Cyc. Code Civ. Proc., § 1467.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1728.
Idaho.* Code Civ. Proc. 1901, sec. 4122.
Montana.* Code Civ. Proc., sec. 2583.
Nevada. Comp. Laws, sec. 2888.
North Dakota. Rev. Codes 1905, § 8092.
Oklahoma.* Rev. Stats. 1903, sec. 1612.
South Dakota.* Probate Code 1904, § 158.
Utah. Rev. Stats. 1898, sec. 3846.
Washington. Pierce's Code, § 2523.
Wyoming.* Rev. Stats. 1899, sec. 4735.

§ 401. **Property set apart, how apportioned between widow and children.** When property, other than the homestead selected and recorded during the lifetime of the decedent, is set apart to the use of the family, in accordance with the provisions of this chapter, such property, if the decedent left a surviving spouse and no minor child, is the property of such spouse. If the decedent left also a minor child or children, the one half of such property belongs to the surviving spouse, and the remainder to the child, or in equal shares to the children, if there are more than one. If there is no surviving spouse, the whole belongs to the minor child or children. If the property set apart is a homestead, selected from the separate property of the decedent, the court can set it apart only for a limited period, to be designated in the order, and, subject to such homestead right, the property remains subject to administration. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 498), § 1468.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 816, p. 313.
Arizona. Rev. Stats. 1901, par. 1729.
Idaho. Code Civ. Proc. 1901, sec. 4123.
Kansas. Gen. Stats. 1905, § 2924.
Montana. Code Civ. Proc., sec. 2584.
Nevada. Comp. Laws, sec. 2889.
Oklahoma. Rev. Stats. 1903, sec. 1613.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1154.
South Dakota. Probate Code 1904, § 159.

Utah. Rev. Stats. 1898, sec. 3847.

Washington. Pierce's Code, §§ 2521, 2524.

Wyoming. Rev. Stats. 1899, sec. 4738.

§ 402. Administration when estate does not exceed fifteen hundred dollars. If, upon the return of the inventory of the estate of a deceased person, it shall appear therefrom that the value of the whole estate does not exceed the sum of fifteen hundred dollars, and if there be a widow or minor children of the deceased, the court, or a judge thereof, shall, by order, require all persons interested to appear on a day fixed, to show cause why the whole of said estate should not be assigned for the use and support of the family of the deceased. Notice thereof shall be given and proceedings had in the same manner as provided in sections one thousand six hundred and thirty-three, one thousand six hundred and thirty-five, and one thousand six hundred and thirty-eight of this code. If, upon the hearing, the court finds that the value of the estate does not exceed the sum of fifteen hundred dollars, it shall, by a decree for that purpose, assign to the widow of the deceased, if there be a widow, if no widow, then to the minor children of the deceased, if there be minor children, the whole of the estate, subject to whatever mortgages, liens, or encumbrances there may be upon said estate at the time of the death of the deceased, after the payment of the expenses of the last illness of the deceased, funeral charges, and expenses of administration, and the title thereof shall rest absolutely in such widow or minor children, subject to whatever mortgages, liens, or encumbrances there may be upon said estate at the time of the death of the deceased, and there must be no further proceedings in the administration, unless further estate be discovered. **Kerr's Cyc. Code Civ. Proc., § 1469.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 818, p. 313.

Arizona. Rev. Stats. 1901, par. 1730.

Idaho. Code Civ. Proc. 1901, sec. 4124.

Kansas. Gen. Stats. 1905, § 3048.

Montana. Code Civ. Proc., sec. 2585.

Nevada. Comp. Laws, sec. 2890.

Oklahoma. Rev. Stats. 1903, sec. 1614.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1156.

South Dakota. Probate Code 1904, § 160.

Utah. Rev. Stats. 1898, sec. 3847.

Washington. Pierce's Code, § 2520.

Wyoming. Rev. Stats. 1899, sec. 4739.

§ 403. Form. Order that summary administration be had.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

It appearing to the court, upon the return of the inventory and appraisement of the estate of —, deceased, herein filed on this day, that the value of all of said estate does not exceed the sum of five hundred dollars (\$500); and that the said deceased left surviving him a widow and — minor children, —

It is ordered, That a summary administration of said estate be had, and that the administrator² of said estate make final settlement thereof at the end of six months from the date of this order. —, Judge.³

Dated —, 19—.

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Form appropriate in Montana.

§ 404. Form. Notice to creditors. Summary administration.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Notice is hereby given, That the above-entitled court has ordered a summary administration of the estate of —, deceased, a copy of which order is as follows, to wit, —; that letters of administration² on said estate were granted to — on the — day of —, 19—, and bear said date; and that in pursuance of said order I will make final settlement of said estate on the — day of —, 19—.

Notice is further given to the creditors of, and to all persons having claims against, said estate to exhibit their claims, for allowance, to the said administrator,³ at —, on

or before the said _____ day of _____, 19____; and that all claims not so exhibited will be forever barred.

Dated _____, 19____.

_____, Administrator ⁴ of the Estate of _____, Deceased.

Explanatory notes. 1. Give file number. 2. Or, letters testamentary. 3, 4. Or, executor.

§ 405. Form. Order to show cause why entire estate should not be assigned to widow and minor children.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.] }

The inventory and appraisement of the estate of said deceased having been returned and filed in this court, and it appearing therefrom that the value of all of said estate does not exceed fifteen hundred dollars (\$1,500), —

It is ordered, That all persons interested in the estate of _____, deceased, appear in department _____ of the _____² court of the county³ of _____, state of _____, on _____,⁴ the _____ day of _____, 19____, at _____ o'clock in the forenoon⁵ of said day, then and there to show cause, if any they have, why all of the estate of said deceased should not be assigned for the use and support of _____,⁶ the _____⁷ of said deceased.

Let the clerk give notice of said hearing by posting notices thereof in three public places in this county,⁸ at least ten days⁹ prior to said day of hearing.

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, city and county. 4. Day of week. 5. Or, afternoon. 6. Insert names. 7. Widow and minor children. 8. Or, city and county. 9. Or other time fixed by the court.

§ 406. Form. Notice of application for order to set aside all of decedent's estate for the benefit of his family.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.] }

Notice is hereby given, That _____, administrator² of the estate of _____, deceased, will, on the _____ day of _____,

19—, apply to the above-entitled court, at the hour of ——— o'clock in the forenoon³ of said day, for an order to set aside all of the estate of ———, deceased, for the benefit of decedent's family. ———, Clerk of the ——— Court.

Dated ———, 19—.

Explanatory notes. 1. Give file number. 2. Or, executor; or, ———, the widow of said deceased. 3. Or, afternoon.

§ 407. Form. Notice of time and place of hearing application for setting aside entire estate for use and support of family.

[Title of court.]

[Title of estate.] { No. ———¹ Dept. No. ———
[Title of form.]

Notice is hereby given, That ———,² the ——— day of ———, 19—, at ——— o'clock in the forenoon³ of said day, and the court-room of department ——— of the ———⁴ court, in the court-house⁵ in the county⁶ of ———, state of ———, have been fixed as the time and place when and where all persons interested in the estate of ———, deceased, may appear and show cause, if any they have, why the entire estate of said deceased should not be assigned for the use and support of the family of said deceased. ———, Clerk.

Dated ———, 19—. By ———, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Day of week. 3. Or, afternoon. 4. Title of court. 5. State location of court-house. 6. Or, city and county.

§ 408. Form. Affidavit of posting of notice of petition for assignment of estate for use and support of family.

[Title of court.]

[Title of estate.] { No. ——— Dept. No. ———
[Title of form.]

State of ———,
County¹ of ———, } ss.

———, deputy county clerk of said county,² being duly sworn, says that on the ——— day of ———, 19—, he posted correct and true copies of the within notice in three of the

most public places in said county,³ to wit: one of said copies at the place at which the court is held,⁴ one at _____,⁵ and one at _____,⁶ in said county.⁷

Subscribed and sworn to before me this _____ day of _____, 19____. _____, Deputy County Clerk.

Explanatory notes. 1-3. Or, City and County. 4-6. Name the public places; as, the city hall, land-office, United States post-office, or as the case may be. 7. Or, city and county.

§ 409. Form. Order assigning entire estate for use and support of family of deceased.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

It appearing to the satisfaction of the court that notice of the order requiring all persons interested in said estate to appear on the _____ day of _____, 19____, to show cause why all of said estate should not be assigned for the use and support of the family of said deceased, has been duly given as required by law and by the order of the court;² and upon hearing the court finds that the value of the entire estate of said deceased does not exceed the sum of fifteen hundred dollars (\$1,500), and that the expenses of the last illness of said deceased, funeral charges, and expenses of administration have been paid, —

It is therefore ordered, adjudged, and decreed, That the entire estate of said _____, deceased, be, and the same is hereby, assigned to, and that the title thereof shall vest absolutely in, _____, the widow ³ of said deceased, subject to whatever mortgages, liens, or encumbrances there may have been thereon at the time of the death of said deceased.

The said property consists of the personal property described in the inventory.⁴

_____, County Clerk.

Entered _____, 19____.

By _____, Deputy.⁵

Explanatory notes. 1. Give file number. 2. If the matter has been continued, say, "that the hearing thereof has been regularly continued by the court to this day. 3. Or, the widow, if any, and _____, the minor child or children of said deceased. 4. And, if any, the following described real estate, giving its description. 5. See note § 77, ante, showing that orders need not be signed by the judge.

§ 410. When all property other than homestead to go to children. If the widow has a maintenance derived from her own property equal to the portion set apart to her by the preceding sections of this article, the whole property so set apart, other than the homestead, must go to the minor children. **Kerr's Cyc. Code Civ. Proc., § 1470.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 1731.

Idaho. Code Civ. Proc. 1901, sec. 4125.

Montana.* Code Civ. Proc., sec. 2586.

Nevada. Comp. Laws, sec. 2891.

Oklahoma. Rev. Stats. 1903, sec. 1615.

South Dakota. Probate Code 1904, § 161.

Utah. Rev. Stats. 1898, sec. 3847.

Wyoming.* Rev. Stats. 1899, sec. 4740.

FAMILY ALLOWANCE.

- | | |
|--|---|
| 1. In general. Exempt property. | (18) Order. Finality, conclusiveness. |
| (1) Widow's quarantine. | (19) Paid without order of court. |
| (2) Exempt property. | (20) Contest of allowance. Collateral attack. |
| (3) Same. Homestead. | (21) Vacating allowance. Fraud. |
| (4) Paramount nature of right. | (22) Liens. Contracts to pay out. |
| (5) Application or petition. | (23) Further allowance. |
| "Family." | (24) Motion for new trial. |
| (6) Proof of right. | (25) Appeal. Review. |
| (7) Notice not required. | 2. Assignment of estate less in value |
| (8) Considerations in fixing. | than fifteen hundred dollars. |
| (9) Objections. Exceptions. | (1) In general. |
| (10) Fixing amount. When not excessive. | (2) Notice to creditors, and to show cause. |
| (11) To be made when. | (3) What property may be set apart. |
| (12) Widow is entitled to, when. | (4) Apportionment, and rights of children. |
| (13) Widow is not entitled to, when. | (5) Liens, outstanding titles, etc. |
| (14) To children. | (6) Appeal. |
| (15) Order. In general. | (7) Death pending appeal. Abatement. |
| (16) Order. Duration, modification, cessation, and suspension. | |
| (17) Order. Validity. | |

1. In general. Exempt property.

(1) Widow's quarantine. Whatever may be the widow's remedy to enforce her statutory right of remaining in her husband's house

for one year after his death without being chargeable with rent therefor, such right is not enforceable in an action of forcible entry and detainer: *Aiken v. Aiken*, 12 Or. 203; 6 Pac. Rep. 682, 683. If she gives away personal property of the deceased between the time of his death and the issuance of letters of administration, such gift does not confer upon the donee either title to or the right of possession of such property as against the administrator: *Jahns v. Nolting*, 29 Cal. 507, 514.

(2) **Exempt property.** The court has power to set apart for the use of the widow of decedent the farming utensils and implements of husbandry used by the decedent in the operation of his farm, as property exempt from execution; and it may set off such exempt property to her without reference to any question as to the sufficiency of funds in the estate with which the widow may be supported: *Estate of Slade*, 122 Cal. 434; 55 Pac. Rep. 158. But a grain-drill, not used nor kept by decedent during his lifetime for the purpose of carrying on his trade or business of keeping a city hotel, is not exempt for the use of his widow and minor children, as it was not exempt to the decedent at the time of his death: *Reed v. Cooper*, 30 Kan. 574; 1 Pac. Rep. 822. Exemptions are the creatures of statutes, and exceptions to the general rule. No property is exempt, unless made so by express provision of law. Hence life-insurance policies, the annual premiums of which exceed five hundred dollars, cannot, as to any portion thereof, be set apart to the widow and minor children as property exempt from execution: *Estate of Brown*, 123 Cal. 399, 401, 402; 69 Am. St. Rep. 74; 55 Pac. Rep. 1055. But where money received by an administrator for a policy of insurance upon the life of a decedent is an asset of the estate, and the annual premiums do not exceed five hundred dollars, the money is exempt from execution, and is properly set apart to decedent's widow: *Estate of Miller*, 121 Cal. 353, 355; 53 Pac. Rep. 906; *Holmes v. Marshall*, 145 Cal. 777, 781; 104 Am. St. Rep. 86; 79 Pac. Rep. 534; 69 L. R. A. 67; 2 Am. & Eng. Ann. Cas. 88. After the proceeds of a policy of insurance have been set apart to a widow as being property exempt from execution, the money is exempt from execution in her hands. It is exempt from execution as to all strangers or parties who have no claim to it without any provisions of the statute. It was intended to exempt it from the debts of the parties to whom it was payable, and who procured title to it by the death of the insured. It was not the intention that the insured might die leaving a small insurance and a dependent family, and that the insurance-money should be subject to execution for the debts of the wife, even if she is the beneficiary named in the policy: *Holmes v. Marshall*, 145 Cal. 777, 779; 104 Am. St. Rep. 86; 79 Pac. Rep. 534; 69 L. R. A. 67; 2 Am. & Eng. Ann. Cas. 88. A policy of insurance belongs to the estate of the decedent, although it was made payable to his

administrator: Estate of Miller, 121 Cal. 353, 354; 53 Pac. Rep. 906. Where the decedent left a widow, but no minor child, property set apart by the probate court for the use of the family becomes the absolute property of such surviving widow: *Fore v. Fore's Estate*, 2 N. D. 260; 50 N. W. Rep. 712. While it is the duty of the probate court to set apart, for the use of the family of the decedent, personal property, in addition to specific articles mentioned in the statute, not to exceed in value the sum of fifteen hundred dollars, the property so set apart does not belong to the assets of the estate to be distributed to the heirs of the decedent: *Fore v. Fore's Estate*, 2 N. D. 260; 50 N. W. Rep. 712.

(3) **Same. Homestead.** Upon the return of the inventory, or at any time thereafter during the administration, the court may (but this means "must"), on its own motion or on petition, set apart for the use of the family all the property exempt from execution and the homestead, if one has been selected and recorded. If no homestead has been selected and recorded, etc., the court must select, designate, set apart, and cause to be recorded, a homestead for the surviving husband or wife and the minor children; and if there be no husband or wife, then for the use of the minor children. If the amount thus set apart be insufficient for the support of the family, then, and then only, the court is required to make such reasonable allowance out of the estate as shall be necessary. But it was not the legislative intent to make the subsequent allowance which might become necessary a charge or lien upon the exempt or homestead property which the court is required to set apart to the family. This should, in regular order, be set apart at once upon the coming in of the inventory showing its existence; but if not then done, it may be done at any subsequent time during administration. A family allowance subsequently allowed cannot impair the right of the surviving husband or wife and children to a homestead. A family allowance made before exempt property and the homestead are set apart, by parity of reasoning, is made subject to the right of the designated beneficiary to have a homestead and the exempt property set apart for their benefit: *Estate of Still*, 117 Cal. 509, 516; 49 Pac. Rep. 463. The wife and the minor child of deceased are entitled to have set apart to them, as their absolute property, a homestead, if petitioned for, and all exempt personal property of the estate. The statute is mandatory, and was evidently intended to secure and preserve the home for the benefit of the family, where they may live and be protected against creditors and heirs: *In re Syndergaard's Estate* (Utah), 88 Pac. Rep. 616, 617; and see *Dooley v. Stringham*, 4 Utah, 107; 7 Pac. Rep. 405. Whether the homestead be set apart or not, the court has power, in its discretion, to make such reasonable allowance out of the estate as shall be necessary for the main-

tenance of the family according to their circumstances during the progress of the settlement of the estate. The circumstances and condition of the family, as well as those of the estate, may be such that the court would more wisely exercise its discretion in making a pecuniary allowance for the support of the family out of the estate than setting apart to it a homestead; and if the widow is content with such allowance, without having a homestead set apart to her, it would seem that the other heirs ought not to complain. A homestead is primarily a place of abode for the family, and it might be, that, although, if one were set apart, they would thus be furnished with an abiding-place, they would not receive a sufficient income for their support, and the expense of maintaining the homestead would be disproportionate to their necessities; while, on the other hand, the widow might be better cared for by receiving an allowance sufficient for her support and residing elsewhere than upon a portion of the property of the estate: *Estate of Garrity*, 108 Cal. 463, 467; 38 Pac. Rep. 628; 41 Pac. Rep. 485. The surviving widow or minor children are entitled to a homestead estate, to the extent prescribed by the statute, in the property owned and occupied by the decedent, at the time of his death, as a family home, although the homestead exceeds in value the statutory limits of the homestead exemption: *Calmer v. Calmer* (N. D.), 106 N. W. Rep. 684. In determining the value of the homestead for the purpose of ascertaining and selecting therefrom the homestead exemption or estate, the amount of existing mortgages or liens thereon cannot be deducted from the value of the property: *Calmer v. Calmer* (N. D.), 106 N. W. Rep. 684. When a party dies seised in fee of land occupied and used by himself and family as a homestead at the time of his death, his surviving widow is entitled, as against his heirs or devisees, to occupy and possess the whole of such homestead as long as she preserves its homestead character by maintaining her home thereon, and the fact of her second marriage does not impair this right: *Fore v. Fore's Estate*, 2 N. D. 260; 50 N. W. Rep. 712. Where the homestead is indivisible, without material injury, the surviving husband or wife, or minor children, as the case may be, are entitled, as against the heirs or devisees, to hold the entire premises as a homestead estate, even though the property exceeds five thousand dollars in value: *Calmer v. Calmer* (N. D.), 106 N. W. Rep. 684.

(4) **Paramount nature of right.** The right of a widow to a family allowance is not only statutory, but it is one strongly favored. She is entitled to her allowance even before letters of administration are granted. After the issuance of such letters in a solvent estate, she is entitled to a family allowance during the progress of the settlement of the estate: *Estate of Welch*, 106 Cal. 427, 432; 39 Pac. Rep. 805. The power of testamentary disposition of property, as con-

ferred and defined by statute, is not paramount, but is subordinate to the authority conferred upon the probate court to appropriate the property for the support of the family of the testator, and for a homestead for the widow and minor child or children, as well as for the payment of the debts of the estate. In other words, section 1465 of the Code of Civil Procedure of California, which provides that all property exempt from execution, including the homestead, shall be set apart for the use of the family, is paramount to the right of testamentary disposition: *Sulzberger v. Sulzberger*, 50 Cal. 385; *Estate of Davis*, 69 Cal. 458, 460; 10 Pac. Rep. 671; *Estate of Lahiff*, 86 Cal. 151; 24 Pac. Rep. 850. The section mentioned is a limitation upon the power of testamentary disposition, and operates to vest the title to the homestead in the heirs at law, and so to withdraw it from the disposition made by the testator under his will: *Estate of Walkerly*, 108 Cal. 627, 655; 49 Am. St. Rep. 97; 41 Pac. Rep. 772. Thus, despite the fact that a farm has been specifically devised, one half to the widow and the other half to two children, it is competent for the probate court to set it aside as a homestead, for the right of a testator to devise is subordinate to the power of the probate court to sequester and set apart the property for the shelter, care, and support of the family: *Estate of Hurlsmann*, 127 Cal. 275, 276; 59 Pac. Rep. 776. The right of testamentary disposition is itself only a right given by statute, and may be restrained, modified, or abrogated entirely. But, still, it is unquestionably the general policy of our law to allow full power of testamentary disposition, save as that power may be abridged by specific enactments. The code provisions making disposition of the homestead and of estates in value less than fifteen hundred dollars are instances of the limitations put by the legislature upon the free power of testamentary disposition, and from the lack of uniformity and harmony in their terms, these homestead provisions have presented questions of much doubt and vexation to the courts: *Estate of Walkerly*, 108 Cal. 627, 653; 49 Am. St. Rep. 97; 41 Pac. Rep. 772. In some states of the Union, there are statutes conferring on probate courts power to provide an allowance for the support of the family for longer or shorter periods. Some of these statutes limit a family allowance to cases of intestacy, or to cases in which no provision is made by a will, or, if made, where such provision is waived by the widow. The California statute is not so limited: *Estate of Walkerley*, 77 Cal. 642, 645; 20 Pac. Rep. 150. And the word "heirs," in the California statute, does not include devisees: *Estate of Walkerly*, 108 Cal. 627, 655; 49 Am. St. Rep. 97; 41 Pac. Rep. 772. The right of a widow, who is a member of the family of the deceased, and entitled to support from him at the time of his death, to have such family allowance from the estate as may be reasonably necessary for her support during the settlement of the estate, being fixed by the statute, it is not within

the power of the husband, by any provision of his will, to deprive her of this right, or in any wise to limit the power of the court in the exercise of its proper discretion to fix the amount to be allowed: *Estate of Bump* (Cal.), 92 Pac. Rep. 643, 644. Nor can the executor or administrator legally enter into any agreement, or make any arrangement with the widow, or any one else interested in the fund growing out of a family allowance, for its application to the payment or satisfaction of his personal obligations. Such an arrangement, which appropriates a fund for the support of the family of the deceased, would be subversive of the policy of the law, and void. Therefore the consent of the widow, if such consent was given, that the personal obligation of the administrator might be satisfied out of the family allowance, would not make valid what the law pronounces void. The allowance is as much for the advantage of the children of the deceased as for the widow, and it cannot be affected by any agreement or understanding between the widow and the administrator which would have the effect of depriving the children of it, or to divert it to any other use than that specified in the law: *Moore v. Moore*, 60 Cal. 526, 530.

(5) **Application or petition. "Family."** It is not necessary that the widow herself should petition for the allowance. The order may be made upon a petition by any one in her behalf, and the fact that the executor was also her son should not prevent a petition made by him on her behalf from receiving the same consideration by the court as though he had not held that office: *Estate of Garrity*, 108 Cal. 463, 468; 38 Pac. Rep. 628; 41 Pac. Rep. 485. A petition to set aside a homestead which sets forth a making and return of the inventory of the decedent; the description and ownership of the real property returned in the inventory; that such property was that of the deceased; that its value would not exceed five thousand dollars; and that no homestead had ever been designated or selected by deceased or his widow during his lifetime,—is sufficient, under the statute of Idaho, to entitle the widow to have the property therein described set off as a probate homestead: *In re McVay's Estate* (Ida.), 93 Pac. Rep. 28. The word "family," in its ordinary signification, refers to two or more persons, and includes those living under the same roof as kindred or dependents, and under one head; but this word, as used in the statute concerning probate homesteads, is not to be so restricted in its meaning as to exclude the only survivor of the family of which the deceased was a member. The object of the statute is to preserve the family home for the use and benefit of the survivor or survivors of those occupying it as such, and the right of the surviving husband or wife to retain this home for such period as the court may direct does not depend upon the fact that there are children or others who may share in its use:

Estate of Lamb, 95 Cal. 397, 407; 29 Am. St. Rep. 121; 30 Pac. Rep. 568. The term "family" is used as synonymous with and as representing the surviving wife or husband and children, if any; and when the term "family" is used in the decree setting apart the homestead, it expresses the meaning, and is used in the sense of that word in the statute, and is therefore sufficiently explicit to describe the widow and children: *Phelan v. Smith*, 100 Cal. 158, 170; 34 Pac. Rep. 667. A judgment denying a family allowance to a widow precludes her from proceeding further under the original petition, and inures to the benefit of all creditors of the decedent: *Estate of Bell* (Cal.), 95 Pac. Rep. 378.

(6) **Proof of right.** Of course, there must be proof of the applicant's right to a family allowance. Whether or not the petitioner is a child of the decedent is a question of fact for the court to determine before denying or granting the application, and the mere fact that the petitioner's status as a child of the decedent is denied does not deprive the court of jurisdiction to make the order of allowance, if the facts showing the petitioner's right are proved by competent evidence: *Estate of Blythe*, 99 Cal. 472, 474; 34 Pac. Rep. 108. And the widow is a competent witness to prove any fact respecting the family allowance. The statute providing that "parties to an action or proceeding, or in whose behalf a proceeding is prosecuted, against an executor or administrator upon a claim or demand against the estate of the deceased," does not apply to such a case. That statute refers to an action or proceeding which is adverse to the estate, by which some relief is sought which will diminish or impair the estate. But an application for a family allowance is not an action or proceeding against an executor or administrator. It is similar to an application for a partial or final distribution of the estate, or the payment of a legacy: *Estate of McCausland*, 52 Cal. 568, 576.

(7) **Notice not required.** As the widow is entitled to an allowance as a matter of right, no notice of the court's intention or action in the matter is required, nor is a formal application absolutely necessary: *In re Dougherty's Estate*, 34 Mont. 336; 86 Pac. Rep. 38, 40. The legislature has full power to provide that a part of the estate shall thus be subject to the order of a probate court without notice other than the notice of the application for administration thereon. The statute, in so far as it authorizes the making of orders setting apart exempt property and the homestead to the widow, and for the payment of money to her out of the estate for her support, without notice to the heirs, devisees, or legatees, is not unconstitutional as being against due process of law. The making of such orders without notice is a part of the statutory proceeding of the administration

of the estate, which is initiated by the giving of a general notice as prescribed by the statute. These notices constitute due process of law, and are sufficient to give the court jurisdiction to make all the subsequent orders in the proceeding, as to which special additional notice is not required. The right of inheritance and testamentary disposition is entirely the creation of the statute, and the heirs, devisees, and legatees take the property subject to such burdens as the legislature has seen fit to fix upon it, among which is the burden of supporting the widow and children of the deceased whenever the court having jurisdiction of the estate shall make an order to that effect: *Estate of Bump* (Cal.), 92 Pac. Rep. 643, 644. If the statute in any particular jurisdiction requires notice, and an order has been made *ex parte* without notice, but there is a hearing of objections, after due notice given, a *nunc pro tunc* order may be made covering the same items included in the former order, if they were proper ones for allowance under the law: *In re Murphy's Estate*, 30 Wash. 9; 70 Pac. Rep. 109, 110.

(8) **Considerations in fixing.** The court is not restricted, in making a family allowance, to a bare support of the widow. Regard should be had to the mode in which she lived during the lifetime of her husband. The allowance is to be sufficient to provide all the necessities of life, and this will include all those things which are reasonable and proper for use in the home and in social intercourse, in view of the condition and value of the estate and station and surroundings of the family: *Estate of Stevens*, 83 Cal. 322, 325; 17 Am. St. Rep. 252; 23 Pac. Rep. 379; *Estate of Lux*, 100 Cal. 593, 605; 35 Pac. Rep. 341. The court may also take into consideration the character and amount of the estate left, and the provision the husband sought to make for the benefit of the widow, as well as her actual necessities: *In re Drasdo's Estate*, 36 Wash. 478; 78 Pac. Rep. 1022, 1023. In fixing the amount of the allowance, the ages of the survivor or survivors, their health, their social position and standing, the education of the children, the value of the estate, and its solvency or insolvency, are proper subjects for consideration: *In re Pugley's Estate*, 27 Utah, 489; 76 Pac. Rep. 560, 562.

(9) **Objections. Exceptions.** Where a reasonable period has elapsed, after a family allowance has been made to the widow, for the settlement of the estate, persons who are interested therein have the right to object to a continuation of the allowance, although they could have compelled the administrator to settle and distribute the estate promptly, but failed to do it. And indulgence in the matter is no excuse for the neglect of the administrator to settle the estate: *In re Dougherty's Estate*, 34 Mont. 336; 86 Pac. Rep. 38, 41. Under the Utah statute, where there is no property answering to the statu-

tory specifications which might be turned over to the widow, she is entitled to an equal value of money or other property, at her election. And she must elect; but upon her election to take either the property or the money, it becomes the duty of the administrator or of the court to allow it to her. The duty is not discretionary; it is mandatory; and an exception by a bank, to the report of the administrator, showing a money allowance to the widow, on the ground that she "had elected" to take money in lieu of the statutory property, is a solemn admission by the bank that she had made her election and so entitled herself to the money; and such admission is conclusive upon the bank and upon the court: *Western Nat. Bank v. Rizer*, 12 Col. App. 202; 55 Pac. Rep. 268, 269.

(10) **Fixing amount. When not excessive.** The fact that the administrator has not in his hands sufficient money to pay the family allowance does not deprive the court of the power to fix the amount to be paid. If there is other estate which can be subjected to this payment, the court can make a proper order therefor: *Estate of Carriger* (Cal.), 41 Pac. Rep. 700, 701. Where an estate was of the value of fifty thousand dollars, and produced an income of over fifteen hundred dollars per month, an allowance to the widow of the household goods, furniture, wearing-apparel, and personal effects of the testator, and two hundred and fifty dollars a month for her maintenance, pending the settlement of the estate, is not excessive: *Estate of Drasdo*, 36 Wash. 478; 78 Pac. Rep. 1022, 1023.

(11) **To be made when.** A widow is not to be denied a family allowance because she has sufficient property of her own to support herself. The court must make a reasonable allowance out of the estate, if the portion set apart for the family allowance is insufficient for her support; and for the court to hold that no allowance shall be made to the widow if she has sufficient property of her own, although the property set apart to her is insufficient of itself for her support, would be, in effect, an amendment of the law by judicial construction: *Estate of Lux*, 100 Cal. 593, 603; 35 Pac. Rep. 341. The widow is entitled to have such reasonable allowance as is necessary for her maintenance during the progress of the settlement of her husband's estate: *Estate of Roberts*, 67 Cal. 349; 7 Pac. Rep. 733, 734. She is entitled to this, notwithstanding provision has been made for her in the will, and until such time as the disposition of property contained in the will becomes available for her use: *Estate of Walkerley*, 77 Cal. 642, 646; 20 Pac. Rep. 150. But, under the statute of Utah, where the estate is solvent and out of debt, the value of such part of the homestead as may be set aside to the widow should be deducted from her distributive share, as provided for in the statute. She cannot have both, unless such design on the part of

the testator clearly appears from the will: In re Little, 22 Utah, 204; 61 Pac. Rep. 899. Where the widow, under the statute, is entitled to certain enumerated property, and the deceased does not have such property, she is entitled to other property, or the value of the articles specified in the statute, and it is the duty of the administrator or of the probate court to allow the value in money, or other personal property, at the widow's election: *Western Nat. Bank v. Rizer*, 12 Col. App. 202; 55 Pac. Rep. 268. The statute providing for a family allowance was doubtless intended to make immediate provision for the family when the head of it is removed by death, and such provision is to continue during the administration of decedent's estate. But where there is no family, no allowance can be made; as, where the husband and wife had, for many years prior to the husband's death, been living separate and apart from each other, and had so lived up to the time of his death, and the wife had never been, during such period, dependent upon him for support, she does not constitute the "immediate" family of the deceased, and the court may properly refuse to make an allowance to her as the widow of the deceased: *Hilton v. Stewart*, 25 Utah, 161, sub nom. *In re Park's Estate*, 69 Pac. Rep. 671. Funeral expenses must be paid before the family allowance is made: *In re Thorn's Estate*, 24 Utah, 209; 67 Pac. Rep. 22, 23.

(12) **Widow is entitled to, when.** The widow has an absolute right to a reasonable provision for her support during the administration of her husband's estate: *Estate of Stevens*, 83 Cal. 322, 325; 17 Am. St. Rep. 252; 23 Pac. Rep. 379; *In re Pugley's Estate*, 27 Utah, 489; 76 Pac. Rep. 560, 562; and it makes no difference that the widow has sufficient property of her own out of which to support herself: *Estate of Lux*, 100 Cal. 593; 35 Pac. Rep. 341, 344; *Estate of Bump (Cal.)*, 92 Cal. 643, 644. The right to allowance is not affected by the separate estate of the widow. Even a non-resident widow is entitled to a family allowance, notwithstanding she has abundant means of her own with which to support herself: *Griesemer v. Boyer*, 13 Wash. 171; 43 Pac. Rep. 17, 18. The right of the widow and children is paramount to that of creditors, and does not depend upon the solvency or the insolvency of the estate: *Griesemer v. Boyer*, 13 Wash. 171; 43 Pac. Rep. 17, 19. The widow's delay in demanding a family allowance does not forfeit her right to it; and she has a right to a family allowance when a special administrator has been appointed after the suspension or removal of the general administrator: *Estate of Welch*, 106 Cal. 427, 432, 433; 39 Pac. Rep. 805. The right of the widow to a family allowance is not lost because of her immoral conduct during marriage. The husband's legatees cannot cut her off from her rights as widow by showing that her ways were not the ways of continence and sobriety:

In *re Drasdo's Estate*, 36 Wash. 478; 78 Pac. Rep. 1022, 1023. She is entitled to a family allowance, although she wrongfully appropriated the money of her husband to her own use during his lifetime, and she is also entitled to the rights of a widow where she has refused to abide by the terms of her husband's will, notwithstanding previous allowances made to her: *Estate of Bump* (Cal.), 92 Pac. Rep. 643, 645. Of course, if a wife accepts a devise conditioned that she will relinquish all further claims to her husband's estate, she must abide thereby; but until she does elect to take under the devise, she is entitled to the enjoyment of her statutory rights and to the allowance made to her thereunder: *Estate of Lufkin*, 131 Cal. 291, 293; 63 Pac. Rep. 469; and see *Estate of Bump* (Cal.), 92 Pac. Rep. 643, 644. In Oregon, where the property of the estate exempt from execution has been devised and bequeathed by the testator to his children, and the estate is sufficient to satisfy all the debts and liabilities of the deceased, and to pay the expenses of administration, together with a monthly allowance to the widow and children, the right of the county court to order a monthly allowance to the widow cannot be successfully controverted: *Dekum's Estate*, 28 Or. 97, sub nom. *Dekum v. Dekum*, 41 Pac. Rep. 159, 160. The widow is not chargeable, as executrix, with profits received from the subletting of rooms in a house hired by her, the rental of which was paid out of her monthly allowance: *Estate of Stevens*, 83 Cal. 322, 326; 17 Am. St. Rep. 252; 23 Pac. Rep. 379.

REFERENCES.

Widow's right to exemption or allowance for support out of personal assets of estate of deceased husband, who was a non-resident: See note 11 L. R. A. (N. S.) 361-363.

(13) **Widow is not entitled to, when.** A family allowance should not be made to the widow of decedent, where she, at the time of his death, was not a member of his immediate family, as where the husband and wife were voluntarily living apart under an agreement for separation: *Estate of Noah*, 73 Cal. 583; 2 Am. St. Rep. 829; 15 Pac. Rep. 287; 88 Cal. 468; 26 Pac. Rep. 3611; *Hilton v. Stewart*, 25 Utah, 161, sub nom. *In re Park's Estate*, 69 Pac. Rep. 671; *Wickersham v. Comerford*, 96 Cal. 433; 31 Pac. Rep. 358. Nor is the widow entitled, under such circumstances, to have a homestead set apart from her husband's separate property, even for a limited period: *Wickersham v. Comerford*, 96 Cal. 433, 439; 31 Pac. Rep. 358. So if a wife, supposing her husband to be dead, marries a second time, she cannot claim a family allowance from the estate of her former husband, so long as the second marriage has not been annulled by a competent tribunal, for, until such annulment, the second marriage is valid: *Estate of Harrington*, 140 Cal. 294, 295; 74 Pac. Rep. 136. Where the petition for the family allowance fails to state that a home-

stead set apart to the widow and children is insufficient for the support of the family, an order refusing to make a family allowance out of the estate of the decedent is not erroneous, where it appears that a homestead had been set apart to the widow and children: *Estate of Luther*, 67 Cal. 319; 7 Pac. Rep. 708. The court is also justified in refusing to ratify any family allowance made after the estate is ready for distribution. The widow, as executrix of her husband's estate, cannot properly delay the settlement of the estate in order that she may consume the whole of it by means of her allowance: *In re Dougherty's Estate*, 34 Mont. 336; 86 Pac. Rep. 38, 41. Where the fact of marriage is disputed, and the person claiming to have been the wife of the deceased has, as his widow, filed a petition asking for the appointment of an administrator, and the same has been decided in her favor, and an appeal has been taken therefrom to review and finally determine the very question of the marriage relation, the superior court, pending the appeal, has no jurisdiction to make an order allowing such person, so claiming to be the widow, anything for her maintenance pending the appeal; otherwise the proceeds of the estate might, in some instances, thereby become exhausted, and the contestant thus be deprived of the fruits of the litigation by a person having no right whatever to the same; and while, in some instances, this might result in hardship, in preventing a person lawfully entitled to the benefits of such a provision from having the same pending the appeal, yet this cannot, of itself, alter the rule of law in relation thereto: *State v. Lichtenberg*, 4 Wash. 231; 29 Pac. Rep. 999. Where a family allowance has been made to a widow and minor children, but the widow marries, the court may continue the allowance, if necessary for the benefit of the children; but when their mother ceases to be the widow of deceased, she cannot claim, as a perquisite for herself or for her new husband, a family allowance from the estate of her former spouse: *Estate of Still*, 117 Cal. 509; 49 Pac. Rep. 463, 465.

(14) **To children.** The family allowance is as much for the advantage of the children of the deceased as for the widow: *Moore v. Moore*, 60 Cal. 526, 530. It is not made "for the use of the family," but, by the terms of the statute, for its "maintenance" while the estate is in progress of settlement and its property is in the custody of the executor or administrator, and this includes the duty of keeping its members under the same roof with the common interest of a home, as well as the expense incurred for food and raiment or for education and health. Upon the death of the father, the maintenance of the family devolves upon the mother, and it is for the purpose of enabling her to discharge this duty that the court is authorized to appropriate a portion of the property of the estate. The allowance is not made merely for the purpose of enabling her to defray

the several expenses incurred for each member of the family, but that she may also provide a means whereby she and the minor children may be kept together and the family may be maintained as a whole. A provision, in the statute, that the court "must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances" implies that, before making the order, the court will ascertain the circumstances of the family, and of the estate out of which the allowance is to be made. This will involve an inquiry, among other matters, into their habits and mode of life during the lifetime of the decedent; the requirements of the several members of the family — depending upon their age and conditions — whether for education, physical support, or health, and also the condition and extent of the property belonging to the estate. The amount which, upon such consideration, the court determines will be reasonable is properly directed to be paid to the widow as the person charged with the maintenance of the family, and it then becomes a judgment in her favor for that amount. The minor children have no claim to any portion of the allowance thus made to her, nor is it held by her in trust for them. Certainly, the legislature did not intend that one half of the allowance should belong to her, out of which should be paid the cost of her maintenance, and that an equal part of the other half should belong to each child, out of which should be paid only the cost of supporting that child. In determining the amount to be paid, the court does not attempt to fix the amounts which will be consumed for each member of the family, but aggregates the needs of the family as a whole and makes an allowance which it considers would be reasonable for those needs. It is of universal experience that the same expense is not incurred for each child, and that there are many expenses which do not appertain to either child, but which are incurred for the family as a whole; and there are also many duties of the mother which are not susceptible of pecuniary measurements. The expenses incurred for the infant, which requires the mother's care, the child at school, or the youth preparing for the duties of manhood or womanhood in the years before majority are not the same; and the rent of the home, its furniture, the expense of reparation, wages of servants, cost of equipage, and numerous other items, are a charge upon the family as a whole, and are not to be apportioned among the individual members thereof. The amount of the allowance is fixed, with the view that it will be entirely consumed in maintaining the family, and if, in this respect, the court errs, whether by making the allowance too large or too small, it is an error in its judgment, which can be corrected only upon a further application, setting forth the grounds upon which the amount of the allowance should be modified. Until such change, if there be any portion which is not expended, it is the property of

the widow, and if the expenses are greater than the allowance, the loss must be borne by her. Upon these considerations, it must be held that the widow to whom the court directs a family allowance to be paid is not required to account to her children for the manner in which such allowance has been expended: *Bell v. Bell*, 2 Cal. App. 338, 340; 83 Pac. Rep. 814. But the allowance cannot be affected by any agreement or understanding between the widow and administrator which would have the effect of depriving the children of it, or of diverting it to any other use than that specified by the law: *Moore v. Moore*, 60 Cal. 526, 530. If a minor, being within sixteen days of the age of majority, makes an application to the court to have the personal property left by his parents set apart to him, and there is no showing in the application that such property is necessary for his support during such sixteen days, it is not error for the court to deny the application: *Stewin v. Thrift*, 30 Wash. 36; 70 Pac. Rep. 116, 118.

(15) **Order.** In general. Though there can be no family allowance subsequent to a widow's death, the amount allowed to her before death, and which was unpaid at the time of such death, is property of her estate, going to her heirs or personal representatives: *Estate of Lux*, 114 Cal. 73, 81; 45 Pac. Rep. 1023. And all property exempt from execution, set apart for the family, including the homestead selected, is exempt from execution: *Holmes v. Marshall*, 145 Cal. 777, 781; 104 Am. St. Rep. 86; 79 Pac. Rep. 534; 69 L. R. A. 67; 2 Am. & Eng. Ann. Cas. 88. A family allowance, made before exempt property and the homestead are set apart, is made subject to the rights of the designated beneficiaries to have a homestead and the exempt property set apart for their benefit, and is not a charge or lien upon the family home: *Estate of Still*, 117 Cal. 509, 513; 49 Pac. Rep. 463.

REFERENCES.

Right of estate of one, entitled by will or statute to an allowance for support and maintenance, to accumulations undrawn and unexpended at the time of her death: See note 9 L. R. A. (N. S.) 997, 998.

(16) **Order.** Duration, modification, cessation, and suspension. Upon the filing of the petition for letters, and when the court is without definite information concerning the value of the estate, which is afforded by the inventory and the appraisement, it may make an allowance for the widow and the children of decedent, which is in the nature of a preliminary or temporary allowance, not extending beyond the return of the inventory, after which time it becomes the duty of the court to make a further allowance, if the property set

apart to the family is insufficient for their support, and which allowance is to be of a more permanent character, and to continue during the administration of the estate: *Estate of Lux*, 100 Cal. 593, 599; 35 Pac. Rep. 341; *In re Dougherty's Estate*, 34 Mont. 336; 86 Pac. Rep. 38; *Estate of Welch*, 106 Cal. 427; 39 Pac. Rep. 805; unless the estate is insolvent, in which case it is not to continue longer than one year: *Estate of Lux*, 100 Cal. 593, 599; 35 Pac. Rep. 341; *Estate of Montgomery*, 60 Cal. 648; *Estate of Walkerley*, 77 Cal. 642; 20 Pac. Rep. 150. The order for family support, when made, may be subsequently modified by the court, if the condition of the estate or the relation of the family thereto should change; as, if, for instance, it should appear that the value of the estate was materially less than shown at the date of the order sought to be modified, or that its indebtedness is greater than was then supposed, or in the event of a partial distribution to the widow or children before the final distribution of the estate: *Estate of Lux*, 100 Cal. 593, 604; 35 Pac. Rep. 341; *Estate of Freud*, 131 Cal. 667, 674; 82 Am. St. Rep. 407; 63 Pac. Rep. 1080. An order of family allowance granted before the return of the inventory ceases upon such return: *Crew v. Pratt*, 119 Cal. 131, 137; 51 Pac. Rep. 44. The order of allowance to a widow, where there are no children, terminates at her second marriage, unless there is a further order of the court: *Estate of Hamilton*, 66 Cal. 576; 6 Pac. Rep. 493; but where there are children, the order may be continued for their benefit: *Estate of Still*, 117 Cal. 509, 514; 49 Pac. Rep. 463. If an order of family allowance has become final, by the lapse of time in which to appeal therefrom, the probate court or judge has no power, without motion or showing upon notice, to suspend the order: *Estate of Nolan*, 145 Cal. 559, 561; 79 Pac. Rep. 428. If a family allowance is granted to the widow during general administration, her right thereto is not suspended by reason of removal of the general administrator and the appointment of a special administrator. The right to such allowance continues during special administration: *Estate of Welch*, 106 Cal. 427, 432; 39 Pac. Rep. 805. But the widow, who is administratrix of the estate, and who has received a family allowance, cannot purposely delay the settlement of the estate that she may consume the whole of it by means of her allowance. The policy of the law is, that the affairs of estates shall be settled and the assets distributed as speedily as possible. The expression, "during the progress of the settlement of the estate," must be construed to mean during the time reasonably necessary for that purpose. If so, the order, though regarded as a judgment, fixing a lien upon the assets of the estate, must be presumed to have been satisfied, when the time shall have arrived at which the estate may be settled; else the administrator may delay action until the whole estate is consumed and nothing be left to those who are entitled to a distributive share in its assets: *In re Dougherty's Estate*, 34 Mont. 336; 86 Pac.

Rep. 38, 41. If a family allowance is made before the return of the inventory, it ceases to be operative upon such return: *Estate of Bell* (Cal.), 95 Pac. Rep. 372, 377.

(17) **Order. Validity.** An order of family allowance is not invalid for lack of a finding that the property exempt from execution, and already set apart for the support of the widow, was insufficient for that purpose. The order for additional allowance, in itself, is a declaration of the insufficiency of the amount originally set apart for the support of the family: *Estate of Welch*, 106 Cal. 427, 430; 39 Pac. Rep. 805. A temporary order for family allowance, made before the return of the inventory, ceases to be operative when that return is made, notwithstanding such order contains the words "until further order of this court." That phrase does not have the effect of prolonging the life of the order beyond the return of the inventory: *Estate of Bell*, 142 Cal. 97, 100; 75 Pac. Rep. 679. And it is unjust, after the widow has received five thousand seven hundred dollars, through the court of another state, to allow her five hundred dollars per month in this state, thirteen years after her husband's death, where the failure to close the estate many years prior to the order for such allowance was due solely to her neglect: *State v. Superior Court* (Wash.), 92 Pac. Rep. 942, 943. The survivor of the community of husband and wife, after the dissolution of the community by death, cannot create a charge against the community estate which would be superior to the claims of the creditors of the community, and also to the rights of the deceased spouse's heirs or devisees to a one-half interest in the community property. Hence if a husband marries again, after his wife's death, and then dies himself, an order of allowance to his second wife, making it a charge on the husband's interest in the community property, prior to that of community debts, cannot be sustained, because the interest of the deceased wife in the community property would then be subjected to the payment of the community debts to the extent of the depletion of the husband's interest therein: *In re Cannon's Estate*, 18 Wash. 101; 50 Pac. Rep. 1021, 1022.

(18) **Order. Finality, conclusiveness.** A family allowance, made under a valid order of court, becomes final, where no motion has been made to set it aside, and the time for an appeal therefrom has elapsed. It is then conclusive as to the status of the person in whose favor it was made, for all purposes connected with the order and payment of the money thereunder: *Estate of Nolan*, 145 Cal. 559, 561; 79 Pac. Rep. 428.

(19) **Paid without order of court.** In the matter of paying a family allowance, the executor or administrator is not required to wait for an order of court, but may make the necessary expenditures as

the exigencies occur, and the court will allow such sums as may be reasonable in the settlement. If an order is made for an allowance to the widow, it is a determination by the court that she is entitled to a family allowance for the period therein named, and the executors or administrators, having paid the same, are entitled to a credit in the statement of their accounts for the amount thus fixed by the court as a reasonable and proper sum to be paid to the surviving widow for that purpose; and it is error to refuse such credit: *Estate of Lux*, 100 Cal. 606, 608; 35 Pac. Rep. 345; *Estate of Lux*, 114 Cal. 89, 90; 45 Pac. Rep. 1028; *Dekum's Estate*, 28 Or. 97, sub nom. *Dekum v. Dekum*, 41 Pac. Rep. 159; *Estate of Fernandez*, 119 Cal. 579, 583; 51 Pac. Rep. 851. As the court has power to credit the executors or administrators in their final account with any reasonable sum of money paid out for the family allowance, the question of family allowance becomes adjudicated where no appeal is taken from an order of settlement, and no offset can be claimed to an annuity payable to the widow from the date of the death of the testator on account of payments after the return of the inventory: *Crew v. Pratt*, 119 Cal. 131, 137; 51 Pac. Rep. 44.

(20) Contest of allowance. Collateral attack. After an order for family allowance becomes final and conclusive, it is not subject to collateral attack: *Crew v. Pratt*, 119 Cal. 139; 51 Pac. Rep. 38; *Estate of Bell*, 131 Cal. 1, 4; 63 Pac. Rep. 81, 668; *Estate of Nolan*, 145 Cal. 559; 79 Pac. Rep. 428; *In re Dougherty's Estate*, 34 Mont. 336; 86 Pac. Rep. 38; and the order is not reviewable in equity: *Dougherty v. Bartlett*, 100 Cal. 496, 499; 35 Pac. Rep. 431. On the settlement of an administrator's accounts, a creditor of the estate cannot object to the allowance of a voucher filed by the widow of the deceased for payments alleged to have been made her as a family allowance, on the ground that it had never been received by her: *Estate of Fisher (Cal.)*, 42 Pac. Rep. 237, 238.

(21) Vacating allowance. Fraud. An order for a family allowance may be vacated by the probate court, and it will be presumed that, in setting aside orders approving the time of the allowance, the court duly considered the administrator's claim to protection for making payment under its previous orders; the court undoubtedly has a right to vacate its order of family allowance on the ground of fraud or mistake, and, in the absence of anything in the record to the contrary, it must be assumed, where such an order is set aside, that it was upon one or the other, or both, of these grounds that its jurisdiction was invoked. Although the widow might not have been in court when the vacating order was made, yet she waived any objection by reason of subsequent proceedings in the court from which it appears that she unsuccessfully appealed from the vacating

order, and upon final hearing asked the court to make a new award to her, and, when the estimate was returned by the appraisers, asked to have it approved by the court, which was done: *Clemes v. Fox*, 25 Col. 39; 53 Pac. Rep. 225, 228, 229. General equitable relief cannot be granted in the probate department of the superior court, for the reason that such relief is not within its probate jurisdiction. Sitting as a court of probate, the superior court exercises a special and limited statutory jurisdiction under statutory procedure, and although guided by the principles of equity in the exercise of that jurisdiction, it does not exercise general jurisdiction in equity, but is limited to matters in probate, and in the administration of the estate of decedents, to the objects of such administration. These objects are the temporary preservation and protection of the estate of the deceased, the satisfaction or payment of such debts and claims as are charges or liens upon it, and the distribution of the residue to those who are entitled thereto. Incidentally, the expenses incurred in the administration, and a temporary provision for the support of the family, including a homestead, where proper, are to be taken from the estate. This provision, however, is in reality a distribution of a portion of the estate to those who, by virtue of the statute, are entitled thereto. Under its probate jurisdiction the court cannot bring before it strangers to the estate for the purpose of adjusting their claims to property held by the executrix or administrator, or for the purpose of determining their rights to the proceeds of a sale derived under those for whose benefit the sale was ordered. Thus when it appears that the order for family allowance was made to reimburse the widow for moneys which she had already expended in the support of her family, and that she had obtained these moneys from the assignors of the plaintiff by mortgaging her interest in the estate for security for their repayment, and, without disclosing this fact, had, as executrix, obtained an order for the sale of the entire estate under which the purchaser would take the land discharged of such mortgage, there is presented the precise case in which a court of equity should interfere to control the enforcement of the judgment of another court by directing the application of the proceeds of that sale. The probate court lacks jurisdiction of such a matter, and jurisdiction in equity is therefore properly invoked and exercised: *Curtis v. Schell*, 129 Cal. 208, 219, 220; 79 Am. St. Rep. 107; 61 Pac. Rep. 951; *Savings Bank v. Schell*, 142 Cal. 505, 509; 76 Pac. Rep. 250.

(22) **Liens. Contracts to pay out.** A family allowance, made before exempt property and the homestead are set apart, does not constitute a charge or lien upon the family home: *Estate of Still*, 117 Cal. 509, 513; 49 Pac. Rep. 463. Where a lessor's lien possesses no superiority over that of any other person, it is subject to the

right of the widow and the minor children to support from the estate of the decedent: *In re Stone's Estate*, 14 Utah, 205; 46 Pac. Rep. 1101, 1102. If an executrix mortgages her interest in the property of the estate to obtain any additional income with which to support the family, and many years afterwards obtains an order for a family allowance, by concealing from the court the fact that the income and borrowed money had been sufficient for the support of the family, or that any money had been borrowed at all for that purpose, and by falsely representing to the court that the moneys received by her had been insufficient, and she obtains an *ex parte* order, in the matter of the estate, for a family allowance, reaching back many years, and for a large amount, and then files a petition for an order of sale of all the real property for the purpose of paying said allowance, it is clearly a scheme to deprive the mortgagee of his security, by selling the property at probate sale free of the mortgage, and, by means of the direction to pay the family allowance, to appropriate all the proceeds to her own use, and thus defraud the mortgagee of the amount due upon his mortgage. This the court will not allow, and it makes no difference whether the mortgages were executed by the widow herself on her individual interest in the estate, or whether they were made for the benefit of a son upon his interest. The legal effect of the transaction is the same: *Curtis v. Schell*, 129 Cal. 208; 79 Am. St. Rep. 107; 61 Pac. Rep. 951; *Savings Bank v. Schell*, 142 Cal. 505, 509; 76 Pac. Rep. 250.

(23) **Further allowance.** When the family allowance becomes exhausted, and the estate is solvent, the widow is entitled to such further allowance as is necessary for her maintenance during the progress of the settlement of the estate: *Estate of Roberts*, 67 Cal. 349, 350; 7 Pac. Rep. 733. So where the exempt property is set apart as insufficient for the support of the widow and minor children, the court may make such further allowance; and if the widow dies, an allowance may be made for the benefit of the minor children: *In re Murphy's Estate*, 30 Wash. 9; 70 Pac. Rep. 109. In making such further allowance, it must be presumed that the court will act with due regard to any previous order made for the widow's support and the subsequent condition of the estate: *Estate of Slade*, 122 Cal. 434, 438; 55 Pac. Rep. 158.

(24) **Motion for new trial.** A motion for a new trial is not the proper procedure after a family allowance has been granted. It is the duty of the court, *ex parte*, and without petition, to make such order, and, there being no provision for the framing of issues with respect to the matter of family allowance, proceedings for a new trial as to such a matter are not authorized: *Shipman v. Unangst*

(Cal.), 88 Pac. Rep. 1090; *Leach v. Pierce*, 93 Cal. 614, 619; 29 Pac. Rep. 235.

(25) Appeal. Review. An order granting an allowance to the widow of an intestate is appealable: *In re Dougherty's Estate*, 34 Mont. 336; 86 Pac. Rep. 38, 40. An appeal from an order denying a family allowance will not be reversed, where the petition for such allowance contains no statement that the proceeds of a homestead consisting of farming-lands were insufficient for the support of the family: *Estate of Luther*, 67 Cal. 319; 7 Pac. Rep. 708. An allowance to the widow is not reviewable after the time has elapsed for an appeal from the order. It then becomes final, and the power of the court over it is at an end. The court below cannot sit as an appellate court to review its own orders: *Estate of Stevens*, 83 Cal. 322, 326; 17 Am. St. Rep. 252; 23 Pac. Rep. 379. A wife separated from her husband is not a party "aggrieved" by the action of the court in refusing a family allowance to her, and has no right of appeal: *Estate of Noah*, 88 Cal. 468; 26 Pac. Rep. 361. If a special administrator has been directed, by order of the court, to pay arrearages of family allowance, accruing after the suspension of the general administrator, he may appeal from such order: *Estate of Welch*, 106 Cal. 427, 428, 429; 39 Pac. Rep. 805; and the presumption is, where a special administrator of the estate of the deceased has appealed from an order of the court directing him to pay to the widow of the deceased a designated sum of money as a family allowance, that the condition of the estate was such as to justify the order: *Estate of Carriger (Cal.)*, 41 Pac. Rep. 700, 701. An appeal from an order requiring an administrator to pay a family allowance stays proceedings upon the order appealed from, where an undertaking or deposit on appeal has been given or made: *Pennie v. Superior Court*, 89 Cal. 31, 32; 26 Pac. Rep. 617. An appeal from such an order operates as a supersedeas, and stays all further proceedings in the court below in the particular matter involved in the order appealed from, but the order or decree is "set at large," and the subject-matter removed from the jurisdiction of the lower court, until the appeal has been determined, and the matter remitted back from the appellate court: *Ruggles v. Superior Court*, 103 Cal. 125, 128; 37 Pac. Rep. 211. Upon an appeal from an order directing the payment of a family allowance, the appellate court will sustain the order, where the only ground alleged is the insufficiency of the evidence: *Estate of Nolan*, 145 Cal. 559, 561; 79 Pac. Rep. 428. Where the amount of the allowance is not so excessive as to constitute an abuse of discretion on the part of the court below, the appellate court will not disturb the order: *Estate of Bump (Cal.)*, 92 Pac. Rep. 643, 645. Where the showing is sufficient to justify an award to the widow for her allowance, the court will not reverse the

order, even though the estate is insolvent: *Clemes v. Fox*, 25 Cal. 39; 53 Pac. Rep. 225, 229. The appellate court will not interfere with the discretion of the lower court in such matters, if not exercised on erroneous principles, except in extreme cases: *Estate of Lufkin*, 131 Cal. 291, 293; 63 Pac. Rep. 469. Where there is no specific provision in the statute as to the contents of the record in such cases, or the mode of authentication, the provisions regulating bills of exceptions, statements, and appeals in ordinary actions must be applied, and, so far as may be, though the proceedings are conducted in a different way, and the records differ in their make-up, the analogies between them must govern. While there is no such thing, technically, as a judgment roll in probate proceedings, the successive determinations in the course of them, whenever the statute directly or by implication declares them final, must be regarded as final judgments, and the portions of the record upon which they are based must, on appeal, be regarded as the record for the particular determination: *In re Dougherty's Estate*, 34 Mont. 336; 86 Pac. Rep. 38, 40. The record must be held to consist of the papers found in the transcript, and, for the purpose of appeal, these papers must be held to constitute the judgment roll. Other matters, not forming part of the judgment roll in such cases, would have to be incorporated in bills of exceptions or statements, as the case might be, following the analogies of provisions regulating records on appeal from judgments in ordinary actions: *In re Dougherty's Estate*, 34 Mont. 336; 86 Pac. Rep. 38, 40; *Estate of Ryer*, 110 Cal. 556; 42 Pac. Rep. 1082. A proposed bill of exceptions, accompanied by general notice to the attorneys, by the general objectors, that the bill was intended to be used as a bill of exceptions in the matter of the petition by the widow for maintenance, filed by her in the matter of said estate, is one which the widow is entitled to use on the objectors' direct appeal from the order granting her a family allowance: *Leach v. Pierce*, 93 Cal. 614, 620; 29 Pac. Rep. 235. A creditor of an insolvent estate may appeal from an order of family allowance, though it may have been made without notice: *Estate of Fretwell (Cal.)*, 93 Pac. Rep. 283, 284. An appeal may be taken at any time within sixty days after the order is entered, but the time fixed in which to prepare and serve a bill of exceptions is ten days after notice of the entry of the judgment: *Leach v. Pierce*, 93 Cal. 614, 623; 29 Pac. Rep. 235. Where an application for a family allowance is made under an order which was never entered, a reversal by an appellate court of such order on a former appeal is *res judicata*: *Estate of Bell*, 35 Cal. Dec. 356, 363, 365 (April 2, 1908).

2. Assignment of estate less in value than fifteen hundred dollars.

(1) *In general.* When it appears, both from the petition for letters of administration and the return of the inventory and appraise-

ment, that the entire property of the estate is of less value than fifteen hundred dollars, the widow, if there are no children, is entitled to have the whole estate set apart to her without any further proceedings in the administration; and no notice to creditors is necessary, though an order to show cause is necessary, under the statute: *Estate of Atwood*, 127 Cal. 427, 430; 59 Pac. Rep. 770. And the widow is entitled thereto in case of an invalid second marriage: *Estate of Richards*, 133 Cal. 524, 528; 65 Pac. Rep. 1034. The court, however, in setting apart the whole estate to the widow and minor children, where it is of less value than fifteen hundred dollars, has no power to order any sale of the property of the deceased. The statute merely provides that the whole estate shall be set apart for the widow and children, subject only to the expenses of the last sickness, administration, etc. If there is to be any sale of the real property of the estate to pay such expenses, such sale must be conducted under the provisions of the statute relating to the sale of real property of a decedent, where alone the power to make and the method of such sale are to be found. The court has no jurisdiction to dispense with the regular proceedings required in the case of the sale of the real property of the decedent because of the fact that the estate is of less value than fifteen hundred dollars: *Wills v. Pauly*, 116 Cal. 575, 581; 48 Pac. Rep. 709. In such cases the expenses of administration, burial, and last sickness are to be paid before such estate is set apart to the widow, or to the widow and children: *In re Thorn's Estate*, 24 Utah, 209; 67 Pac. Rep. 22. In Utah, the widow does not become the absolute owner of such property, to the exclusion of the heirs and members of the family: *Rands v. Brain* (Utah), 14 Pac. Rep. 129, 130; 5 Utah, 272; 15 Pac. Rep. 1.

(2) **Notice to creditors, and to show cause.** The whole estate of a decedent, where it is less than fifteen hundred dollars in value, may be set apart to the widow, or to the widow and children, without notice to creditors: *Estate of Palomares*, 63 Cal. 402; *Estate of Atwood*, 127 Cal. 427; 59 Pac. Rep. 770. And notice of the order to appear and show cause why the whole of the estate should not be assigned to the widow, or to the widow and children, need not be given by publication, because the statute does not require it, and because the judge, on final hearing, if he deems the notice insufficient, may order such further notice as may seem to him proper: *Wills v. Booth* (Cal. App.), 91 Pac. Rep. 759, 760.

(3) **What property may be set apart.** It was clearly the intention of the legislature that estates under fifteen hundred dollars in value should go immediately to the family, without further administration, and the entire estate of the decedent is included. The fact that a part of the estate was separate property of the deceased, and that

before his death the widow had filed a homestead declaration thereon, he not joining therein, does not take the property out of the operation of the statute. The court, in making the order, is not setting aside a homestead nor dealing with the subject of homesteads: *Estate of Neff*, 139 Cal. 71, 72; 72 Pac. Rep. 632. The statute covers all property, where the estate does not exceed fifteen hundred dollars in value, whether the property be community or separate: *Estate of Leslie*, 118 Cal. 72, 73; 50 Pac. Rep. 29.

(4) **Apportionment, and rights of children.** Section 1469 of the Code of Civil Procedure of California does not expressly state to whom the estate shall be assigned, but simply that it shall be assigned for the use and support of the widow and minor children. The preceding section, however, which is in the same chapter, provides that "when property is set apart to the use of the family under the provision of this chapter, if the decedent left also a minor child or children, the one half of such property shall belong to the widow or surviving husband, and the remainder [shall go] to the child, or in equal shares to the children, if there be more than one." In the absence of special provision in said section 1469, the preceding section must control. The children, therefore, are entitled, as tenants in common, to an undivided one half of the property set apart to the widow and minor children, and they may recover the demanded premises in an action of ejectment: *McGuire v. Lynch*, 126 Cal. 576, 578; 59 Pac. Rep. 27.

(5) **Liens, outstanding titles, etc.** The setting apart of property for the support of the family, where the estate is less than fifteen hundred dollars in value, does not divest existing liens against the property: *Fairbanks v. Robinson*, 64 Cal. 250, 251. The order of the court sets apart only the title and interest of the deceased. It can do no more. It is not the purpose of the statute to have the court examine the title and set apart such property on condition that the title is perfect. It is evident that the court cannot affect the outstanding title in the hands of a third person: *Estate of Richards*, 133 Cal. 524, 528; 65 Pac. Rep. 1034. Where a lessor's lien is gone, his claim possesses no superiority to that of any other person, and is inferior to that of the widow and the minor children: *In re Stone's Estate*, 14 Utah, 205; 46 Pac. Rep. 1101, 1102. In the case of a valid mortgage lien, however, upon a probate homestead set apart for the use of the family, it was not intended that the creditor should lose his debt for not doing an impossible act by presenting his claim, because no notice to creditors can be given and no claims presented for allowance in such a case, and no presentation of the mortgage claim is necessary: *Browne v. Sweet*, 127 Cal. 332, 335; 59 Pac. Rep. 774. Where a deceased husband's estate is found, upon

the return of the inventory, to be of less value than fifteen hundred dollars, and the probate court thereafter duly and regularly makes an order and decree setting the entire estate aside for the use and support of the family of the deceased, in compliance with the statute, and the widow thereafter mortgages all her interest in and to such estate, the mortgage so executed covers whatever right, title, or interest she has in or to the estate by right of succession as an heir of her deceased husband, and the interest so granted and encumbered is commensurate only with her rights of succession, and a purchaser under foreclosure sale can acquire only such rights and privileges as she has by reason of being an heir to such estate: *Booth Mer. Co. v. Murphy (Ida.)*, 93 Pac. Rep. 777.

(6) **Appeal.** If a widow, who is also the administratrix of the estate, makes application to have the whole of the estate of the deceased set apart to her on the ground that it does not exceed in value fifteen hundred dollars, but the application is denied, and an appeal is taken by the widow, it will be dismissed, where she gave no bond on appeal. The order is against the widow, and in favor of the estate; and the widow, individually, is alone aggrieved, and she alone can appeal, but the appeal will not stand unless an undertaking on appeal was filed; and if the appeal was taken in her representative capacity, it must be dismissed, because she has no right to appeal in that capacity: *Estate of Wood*, 143 Cal. 522, 524; 77 Pac. Rep. 481. No notice of the application for a family allowance is required. The court may make the order on its own motion. But any person interested, whether he has had actual notice of the entry of the order or not, may appeal at any time within sixty days. Those who have had only constructive notice certainly should have a reasonable time within which to prepare and serve their bills of exceptions. What is a reasonable time is a question to be determined by the judge, upon all the facts and circumstances. As to those who have been parties to the contest, they are, following the analogies found in provisions of the code relating to civil actions, entitled to actual notice of the entry of the order; and the time within which to move for a new trial, when proceedings therefor are proper, or to prepare and serve a bill of exceptions to be used on appeal from the order, does not begin to run until such notice has been given: *Leach v. Pierce*, 93 Cal. 614, 621; 29 Pac. Rep. 235.

(7) **Death pending appeal. Abatement.** The power of the court to set apart the whole of an estate without administration, for the use and support of the widow and minor children, cannot be exercised, where there is no widow or minor children, and the estate is therefore subject to administration. Hence, where the court has denied the widow's application to have the whole estate set apart to

her, there being no minor child, and she dies pending her appeal from such order, she is the only person for whose use and support the estate could be set apart, and by her death the court loses jurisdiction to make such an order. Her death, pending the appeal from an order refusing to grant her application, has the same effect upon the power of the court as if she had died before the application had been heard. This right of the widow does not survive to any one, and the proceedings, therefore, abate by her death: *Estate of Bachelor*, 123 Cal. 466, 467; 56 Pac. Rep. 97. No action on the note of a decedent can be maintained against his administratrix, where the value of the estate left by him is less than fifteen hundred dollars: *Wills v. Booth* (Cal. App.), 91 Pac. Rep. 759, 760, 761.

CHAPTER II.

HOMESTEADS.

- § 411. Right of survivor to homestead.
- § 412. Selected and recorded homestead to be set off to person entitled. Subsisting liens to be paid by solvent estate.
- § 413. Carving homestead out of original, exceeding five thousand dollars in value. Report.
- § 414. Report of appraisers. Majority and minority, which may be confirmed.
- § 415. Day to be set for confirming or rejecting report of appraisers.
- § 416. Form. Order setting time for hearing report of appraisers and prescribing notice. Value exceeding five thousand dollars.
- § 417. Form. Notice of hearing on report of appraisers as to homestead.
- § 418. Form. Order setting apart homestead out of property worth more than five thousand dollars when selected.
- § 419. Costs, to whom chargeable. Persons succeeding to rights of homestead owners. Powers and rights of.
- § 420. Certified copies of certain orders to be recorded.

HOMESTEADS.

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§ 411. **Right of survivor to homestead.** If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, was selected from the community property, or from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in the survivor. If the homestead was selected from the separate property of either the husband or the wife, without his or her consent, it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the superior court to assign it for a limited period to the family of the decedent. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except as provided in the Civil Code. **Kerr's Cyc. Code Civ. Proc., § 1474.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1732.

Idaho. Code Civ. Proc. 1901, sec. 4126.

Montana. Code Civ. Proc., sec. 2590.

North Dakota. Rev. Codes 1905, § 8087.

Oklahoma. Rev. Stats. 1903, sec. 1610.

South Dakota. Probate Code 1904, § 156.

Wyoming. Rev. Stats. 1899, sec. 4741.

§ 412. **Selected and recorded homestead to be set off to person entitled. Subsisting liens to be paid by solvent estate.** If the homestead selected and recorded prior to the death of the decedent be returned in the inventory appraised at not exceeding five thousand dollars in value, or was previously appraised as provided in the Civil Code, and such appraised value did not exceed that sum, the superior court must, by order, set it off to the persons in whom title is vested by the preceding section. If there be subsisting liens or encumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate. If the funds of the estate be adequate to pay all claims against the estate, the claims so secured must be paid out of such funds. If the funds of the estate be not sufficient for that purpose, the claims so secured shall be paid proportionately with other claims allowed, and the liens or encumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment. **Kerr's Cyc. Code Civ. Proc., § 1475.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1733.

Idaho. Code Civ. Proc. 1901, sec. 4127.

Montana. Code Civ. Proc., sec. 2591.

North Dakota. Rev. Codes 1905, § 8088.

Wyoming. Rev. Stats. 1899, sec. 4742.

§ 413. **Carving homestead out of original, exceeding five thousand dollars in value. Report.** If the homestead, as selected and recorded, be returned in the inventory appraised at more than five thousand dollars, the appraisers must, before they make their return, ascertain and appraise the value of the homestead at the time the same was selected, and if such value exceeded five thousand dollars, or if the homestead was appraised as provided in the Civil Code, and such appraised value exceeded that sum, the appraisers must determine whether the premises can be divided without material injury, and if they find that they can be thus divided, they must admeasure and set apart to the parties entitled thereto such portion of the premises, including the

dwelling-house, as will amount in value to the sum of five thousand dollars, and make report thereof, giving the metes, bounds, and full description of the portion set apart as a homestead. If the appraisers find that the premises exceeded in value, at the time of their selection, the sum of five thousand dollars, and that they cannot be divided without material injury, they must report such finding, and thereafter the court may make an order for the sale of the premises and the distribution of the proceeds to the parties entitled thereto. **Kerr's Cyc. Code Civ. Proc.**, § 1476.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1734.

Idaho. Code Civ. Proc. 1901, sec. 4128.

Montana. Code Civ. Proc., sec. 2592.

North Dakota. Rev. Codes 1905, §§ 8088, 8090.

Wyoming. Rev. Stats. 1899, sec. 4743.

§ 414. **Report of appraisers. Majority and minority, which may be confirmed.** Any two of the appraisers concurring may discharge the duties imposed upon the three, and make the report. A dissenting report may be made by the third appraiser. The report must state fully the acts of the appraisers. Both reports may be heard and considered by the court in determining a confirmation or rejection of the majority report, but the minority report must in no case be confirmed. **Kerr's Cyc. Code Civ. Proc.**, § 1477.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1735.

Idaho.* Code Civ. Proc. 1901, sec. 4129.

Montana.* Code Civ. Proc., sec. 2593.

Wyoming. Rev. Stats. 1899, sec. 4744.

§ 415. **Day to be set for confirming or rejecting report of appraisers.** When the report of the appraisers is filed, the court must set a day for hearing any objections thereto, from any one interested in the estate. Notice of the hearing must be given for such time, and in such manner, as the court may direct. If the court be satisfied that the report is correct, it must be confirmed, otherwise rejected. In case the report is rejected, the court may appoint new appraisers

to examine and report upon the homestead, and similar proceedings may be had for the confirmation or rejection of their report, as upon the first report. **Kerr's Cyc. Code Civ. Proc.**, § 1478.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1736.

Idaho.* Code Civ. Proc. 1901, sec. 4130.

Montana.* Code Civ. Proc., sec. 2594.

North Dakota. Rev. Codes 1905, § 8090.

Wyoming.* Rev. Stats. 1899, sec. 4745.

§ 416. Form. Order setting time for hearing report of appraisers and prescribing notice. Value exceeding five thousand dollars.

[Title of court.]

[Title of estate.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

The appraisers appointed by the court to appraise the estate of said deceased having filed their return appraising the homestead selected and recorded in the lifetime of the deceased at more than five thousand dollars (\$5,000) at the time the same was selected, and setting apart a portion thereof as a homestead,² —

It is ordered, That _____, the _____ day of _____, 19____, be fixed as the day for hearing any objections thereto, and that the clerk give notice of said hearing by posting notices thereof not less than ten days³ prior to said date, in three public places in the county⁴ of _____, state of _____.

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. Or, making return that the premises cannot be divided without material injury. 3. Or as otherwise prescribed by statute. 4. Or, city and county.

§ 417. Form. Notice of hearing on report of appraisers as to homestead.

[Title of court.]

[Title of proceeding.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

Notice is hereby given, That the appraisers appointed to appraise the estate of the above-named deceased have filed herein their return and report appraising the homestead

selected and recorded during the lifetime of said decedent at more than five thousand dollars (\$5,000) at the time it was selected, and setting off a portion thereof as a homestead; and that the hearing of the same has been fixed by the court for _____,² the _____ day of _____, 19____, at _____ o'clock in the forenoon³ of said day, at the court-room of said court, at which time and place any person interested in the estate may appear and present his objections thereto.

Dated _____, 19____.

_____, Clerk.

By _____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Day of the week. 3. Or, afternoon.

§ 418. Form. Order setting apart homestead out of property worth more than five thousand dollars when selected.

[Title of court.]

[Title of estate.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

It appearing to the satisfaction of the court that due and legal notice has been given by the clerk, for the time and in the manner as directed by the court, of the report of the appraisers herein, appraising the value of the homestead of said decedent, at the time of its selection in his lifetime, at more than five thousand dollars (\$5,000), and admeasuring and setting apart a portion thereof as a homestead, and the widow of said deceased having filed her objections thereto, and the said hearing having been regularly postponed to this time, and the court having heard the said matter and confirmed said report in all things, —

It is therefore ordered, adjudged, and decreed, That said report be in all things confirmed, and that the land so admeasured be, and the same is hereby, set apart as a homestead for the use of _____, the said widow, and that the same was and is community property, and is hereby vested absolutely in the widow.²

Said portion so set apart is described as follows, to wit:
_____.³

_____, County Clerk.

Entered _____, 19____.⁴

By _____, Deputy.

Explanatory notes. 1. Give file number. 2. Or, that the same was separate property; that said deceased did not join in the selection

thereof; and that the same is set apart as a homestead for the period of ____ years only from the date hereof, for the use of the said widow, and ____ and ____, the minor children of said deceased. Compare *Weinreich v. Hensley*, 121 Cal. 647, 655; 54 Pac. Rep. 254. 3. Give description. 4. Orders and decrees need not be signed: See § 77, ante.

§ 419. **Costs, to whom chargeable. Persons succeeding to rights of homestead owners. Powers and rights of.** The costs of all proceedings in the superior court provided for in this chapter, must be paid by the estate as expenses of administration. Persons succeeding by purchase or otherwise to the interests, rights, and title of successors to homesteads, or to the right to have homesteads set apart to them, as in this chapter provided, have all the rights and benefits conferred by law on the persons whose interests and rights they acquire. **Kerr's Cyc. Code Civ. Proc., § 1485.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1737.

Idaho.* Code Civ. Proc. 1901, sec. 4131.

Montana. Code Civ. Proc., sec. 2595.

Wyoming.* Rev. Stats. 1899, sec. 4746.

§ 420. **Certified copies of certain orders to be recorded.** A certified copy of every final order made in pursuance of this article; by which a report is confirmed, property assigned, or sale confirmed, must be recorded in the office of the recorder of the county where the homestead property is situated. **Kerr's Cyc. Code Civ. Proc., § 1486.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1738.

Idaho.* Code Civ. Proc. 1901, sec. 4132.

Montana. Code Civ. Proc., sec. 2596.

Nevada. Comp. Laws, sec. 3040.

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I. ANTEMORTEM HOMESTEADS.

1. **In general.** The right of testamentary disposition is subordinate to the rights of the family. Thus, despite the fact that a farm has been specifically devised, one half to the widow and the other half to the children, it is competent for the probate court to set it aside as a homestead, for the right of a testator to devise is subordinate to the power of the probate court to sequester and set apart

the property for the shelter, care, and support of the family: *Estate of Huelsman*, 127 Cal. 275, 276; 59 Pac. Rep. 776. A homestead out of the separate property of a deceased husband can be set apart to the widow only for a limited time, and certainly not longer than during her life: *Hutchinson v. McNally*, 85 Cal. 619, 621; 24 Pac. Rep. 1071. An overruled opposition to the setting apart of a homestead does not estop the party objecting from establishing his title, in an action for that purpose: *Dickey v. Gibson*, 121 Cal. 276, 278; 53 Pac. Rep. 704.

REFERENCES.

Homestead in decedents' estates: See note 44 L. R. A. 402.

2. Definition of "homestead." The homestead, and the tests by which it is ascertained, are the same, whether the question arises between those claiming the homestead, or one of them and a vendee, a mortgagee, a creditor, or the heirs of the deceased husband or wife. There is not one homestead as against a creditor, and a different one when the survivor asserts his or her claim as against the heirs of the deceased: *Estate of Delaney*, 37 Cal. 176, 180. The word "homestead" signifies the place of the home; the residence of the family. It represents the dwelling-house at which the family resides, with the usual and customary appurtenances, including the outplaces of every kind necessary and convenient for the family use, and land used for the purposes thereof. It is in this sense that the word is used in the constitution, and also in the statute. In other words, it is the actual homestead to which they refer, and to which they purport to add certain legal incidents: *Keyes v. Cyrus*, 100 Cal. 322, 324; 38 Am. St. Rep. 296; 34 Pac. Rep. 722; *Estate of Garrity*, 108 Cal. 463, 468; 38 Pac. Rep. 628; 41 Pac. Rep. 485. The purpose of the homestead law is to secure a home to those clothed with a homestead right, — to each and all of them: *Moore v. Hoffman*, 125 Cal. 90, 92; 73 Am. St. Rep. 27; 57 Pac. Rep. 769.

3. Application of statute. The devolution of title to the homestead of one of the spouses is provided for in section 1265 of the Civil Code of California, and also in section 1474 of the Code of Civil Procedure of that state. The latter section was amended ten days later than the section of the Civil Code, and is to be regarded as the latest expression of the legislative will. By said section 1474 the legislature has declared that "if the homestead was selected from the separate property of either the husband or the wife, without his or her consent, it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the superior court to assign it for a limited period to the family of the decedent." The power thus to limit the estate of the heirs is not given by said section 1474, but is merely referred to as the source of the limitation

which may be placed upon the estate. The said section 1474 purports to deal merely with the descent of the property from which the homestead was selected, but the power of the court to assign the homestead, and upon whose exercise a limitation upon the estate of heirs is created, is given in section 1465 of the Code of Civil Procedure of that state, and the provisions of the section last named are to be read in connection with the provisions of section 1474: *Weinreich v. Hensley*, 121 Cal. 647, 653; 54 Pac. Rep. 254; *Estate of Fath*, 132 Cal. 609, 611; 64 Pac. Rep. 995. The power thus given to the court, by said section 1465, to set apart a homestead that has been selected from the separate estate of the decedent is the same as its power to set apart a homestead when none has been selected in the lifetime of the decedent, and must be exercised in the same manner and under the same limitations and conditions. The provision in section 1474 making the estate of the heirs subject to the exercise by the court of its power to assign the homestead to the family for a limited period does not confer upon the court the power to assign the homestead taken from the separate property of the decedent, unless by the conditions of section 1465 the separate estate may be so set apart. Section 1465 does not direct the court to set apart the homestead which had been selected by the survivor out of the separate property of the deceased spouse, but declares, in such case, that the court "must select," designate, and set apart a homestead, and limits the property out of which it is to be selected to the common property, if there be any. It is only in the case where there is no common property that it may select, designate, and set apart a homestead out of the separate estate of the decedent. It is very evident that if there be any common property, the homestead which may have been selected by the survivor from the separate property of the decedent, without his assent, would cease to be such upon his death; but the effect of his death upon the homestead selected from his separate estate, without his assent, is the same, whether there be common property or not: *Weinreich v. Hensley*, 121 Cal. 647, 654; 54 Pac. Rep. 252. Section 1468 of the Code of Civil Procedure of California, as amended in 1881, applies to probate homesteads selected and set apart by the court; and such amendment was intended to change the rule declared in *Mawson v. Mawson*, 50 Cal. 539, 543, and to take from the court the power to set apart a homestead selected from the separate property of the deceased, except for a limited period: *Estate of Schmidt*, 94 Cal. 334, 339; 29 Pac. Rep. 714. The provision in section 1468, declaring what shall be the ownership "when property is set apart to the use of the family in accordance with the provisions of this chapter" implies that, until it is so set apart, the property belongs to the estate of the decedent; and the subsequent provision in the same section, that "if the property set apart be a homestead selected from the separate property of the

deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased and subject to such order," clearly indicates that the court must make an order designating the limited period for which the homestead is set apart, and that until such order is made there is no homestead, and that the property selected as a homestead out of the separate estate of the deceased in his lifetime, without his assent, ceases upon his death to be a homestead, and vests in his heirs, free from any such limitation, unless it is afterwards selected and set apart as a homestead by an order of the court: *Weinreich v. Hensley*, 121 Cal. 647, 655; 54 Pac. Rep. 254.

4. Survivorship. Under the provisions of the codes of California, it is only a homestead selected from the community property during the existence of the community to which the law of title by survivorship applies: *Estate of Gilmore*, 81 Cal. 240, 243; 22 Pac. Rep. 655. If community property has been designated as a homestead, it becomes, upon the death of one of the spouses, the sole property of the survivor, who will be protected in the same manner as he was before: *Sanders v. Russell*, 86 Cal. 119, 120; 21 Am. St. Rep. 26; 24 Pac. Rep. 852. The homestead character of property is not affected by the death of the husband, but continues so long as it remains a homestead: *Estate of Fath*, 132 Cal. 609, 612; 64 Pac. Rep. 995. Where a homestead was the separate property of the husband, the wife has no right of survivorship in the property, but, on his death, it will be vested in his heirs, discharged of all claim or interest on her part by virtue of any previous declaration of homestead she may have made thereon: *Warner v. Warner*, 144 Cal. 615, 618; 78 Pac. Rep. 24.

REFERENCES.

As to proof of survivorship, see *Sanders v. Simcich*, 65 Cal. 50; 2 Pac. Rep. 741, 743.

5. Law at death controls. The law in force at the time of death controls on the subject of homesteads and the rights of survivors: *Rich v. Tubbs*, 41 Cal. 34, 36; *Estate of Headen*, 52 Cal. 294, 297; *Tyrrell v. Baldwin*, 78 Cal. 470, 473; 21 Pac. Rep. 116; *Gruwell v. Seybolt*, 82 Cal. 7; 22 Pac. Rep. 938; *In re Thorn's Estate*, 24 Utah, 209; 67 Pac. Rep. 22, 23. Thus if the act under which a homestead was created was amended before the death of either husband or wife, the right of survivorship is governed by the amended law, and not by the original one: *Tyrrell v. Baldwin*, 78 Cal. 470, 474; 21 Pac. Rep. 116. There can be no survivorship until a death has occurred; but the death of one of the spouses does not alter in any way the estate or title of the homestead: *Tyrrell v. Baldwin*, 78 Cal. 470, 473, 475; 21 Pac. Rep. 116. And as the descent of the homestead to the

surviving widow is governed by the law in force at the death of her husband, she becomes the owner in fee of the homestead property by virtue of her survivorship, and the title so acquired is not affected by the subsequent order of the court setting the property apart to her as a homestead. The effect of such order is to withdraw the property therein named from administration, but it does not qualify or affect the title that had vested in the widow at the instant of her husband's death: *Estate of Fath*, 132 Cal. 609, 612; 64 Pac. Rep. 995.

6. Right to homestead. "Family." Where a husband owns an undivided interest in land, as a tenant in common with others, and is living thereon with his family, his wife may claim a homestead therein to the extent of the husband's undivided interest and to the value of five thousand dollars: *Higgins v. Higgins*, 46 Cal. 259, 266; and although a widow has obtained a homestead, and she afterwards marries, she may claim another homestead out of the estate of her second deceased husband: *Higgins v. Higgins*, 46 Cal. 259, 265. Where property was the separate property of the wife, and at her death was the homestead of herself and her husband by virtue of a declaration made by her in due form, the husband, upon her death, acquires absolute title thereto. Upon the death of either spouse, the homestead selected from the community property, or from the separate property of the parties making the declaration, or joining therein, vests absolutely in the survivor. The survivor, in such case, takes his title by operation of law, and no order of court is necessary to perfect his title: *Fisher v. Bartholomew*, 4 Cal. App. 581; 88 Pac. Rep. 608, 609. And the title thus acquired cannot be affected by subsequent orders of the probate court. Hence an order of the probate court authorizing a sale of the premises operates only upon the title then remaining in the estate of the decedent, which is nothing: *Fisher v. Bartholomew*, 4 Cal. App. 581; 88 Pac. Rep. 608, 609. The statute of Oklahoma, which authorizes the survivor to continue to possess and to occupy the whole homestead until it is otherwise disposed of according to law, does not support the contention that any single survivor of the family may be entitled to the possession of the property as a homestead, unless such survivor is "the head of a family." To constitute a family, there must be a collection of persons living together. One person cannot constitute a family, nor the head of a family: *Betts v. Mills*, 8 Okl. 351; 58 Pac. Rep. 957.

REFERENCES.

What constitutes a "family," under the homestead and exemption laws: See note 4 L. R. A. (N. S.) 365-398.

7. Abandonment. Statute of limitations. Selection. A homestead may be abandoned by a deed in præsentî, vesting the title in the

grantee upon condition subsequent, and containing a reservation to the grantor; and a reconveyance will not revive the homestead: *Bank of Suisun v. Stark*, 106 Cal. 202, 207; 39 Pac. Rep. 531. If a widow does not know the law, that the homestead vested in her by the death of her husband, and, although she has able attorneys, she is not advised of her right to a probate homestead, and she relinquishes all rights in her husband's estate, but brings suit nearly nineteen years after his death to set aside such surrender of her homestead rights, the five-year statute of limitations applies to prevent her recovery. Such an action being one to settle and determine the question as to whether or not plaintiff is the owner of the homestead is one for the recovery of real estate: *Daniels v. Dean*, 2 Cal. App. 421; 84 Pac. Rep. 332, 334. Where a husband, the wife being dead, owned and occupied a tract of real estate as a homestead with his two minor children at the time of his death, and, immediately after his death, the said minor children were moved from said land, and a guardian was appointed for them, and the guardian, in his capacity as such, leased the land and collected the rents therefrom, but did not occupy the same, and where none of the said children had occupied the land as a residence after the death of their father, it was held that such removal of the minor heirs from the land did not constitute a waiver or abandonment of the homestead; and further, that personal "possession and occupancy" of the land, by either the minor heirs or their guardian, was not necessary; that "possession and occupancy" by a tenant of the guardian was sufficient to preserve the homestead character of the land for the minor heirs; and that said land could not be subjected to the payment of the debts of plaintiff, created prior to the death of the father: *Rockwood v. St. John's Estate*, 10 Okl. 476; 62 Pac. Rep. 277. A homestead selected by a wife from the separate property of her husband is not abandoned by a subsequent agreement between her and him for a division of the homestead between them, especially where it is not recorded by either of the parties. If a husband makes a filing upon public lands, before his marriage, the legal title acquired becomes his separate property; and a homestead filed thereon by the wife alone is not a "selection" from the "community property." If a wife files a declaration of homestead upon property at a time when all of the land in controversy is the separate property of her husband, the subsequent acquisition by her of the title to a part of the land as her separate property does not have the effect of changing the prior declaration into a selection by her of the homestead from her separate property. When the statute speaks of a selection of a homestead "from the separate property of the person selecting or joining in the selection of the same," it has reference to the status of the property as separate property at the time when the selection is made; and only in such case can there be properly imputed to the person making the selection an intention

to dedicate his or her property for homestead purposes, and thus to vest in the other spouse an estate therein which, upon the contingency of survivorship, will ripen into an absolute title to the land so dedicated. It would be subversive of the object and purpose of the law to hold that the wife's subsequent acquisition of the property from which she selected a homestead, when it belonged to her husband, could be made to relate back to give to her former act in selecting such homestead an intention and purpose which did not in fact then accompany it: *Estate of Lamb*, 95 Cal. 397, 406; 29 Am. St. Rep. 421; 30 Pac. Rep. 568.

8. Homestead vests how.

(1) **Homesteads selected from community property.** Where the homestead was selected from community property, it vests absolutely in the survivor at the death of either spouse: *Tyrrell v. Baldwin*, 78 Cal. 470, 476; 21 Pac. Rep. 116; *Bollinger v. Manning*, 79 Cal. 7, 11; 21 Pac. Rep. 375; *Sheehy v. Miles*, 93 Cal. 288; 28 Pac. Rep. 1046; *Vandall v. Teague*, 142 Cal. 471; 76 Pac. Rep. 35; *Saddlemire v. Stockton Sav. etc. Soc.*, 144 Cal. 650; 79 Pac. Rep. 381; *Hibernia Sav. & L. Soc. v. Hinz*, 4 Cal. App. 626; 88 Pac. Rep. 730; and an order of court made purporting to set aside the homestead property "for the use of the family" does not in any way change or affect the rights of the survivor, but merely excludes the property from administration: *Bollinger v. Manning*, 79 Cal. 7, 11; 21 Pac. Rep. 375. The probate court, in such a case, has no power to make a decree setting apart the property for the use of the family; and its effect, no matter how broad its language, is simply to take the property out of administration: *Sheehy v. Miles*, 93 Cal. 288, 295; 28 Pac. Rep. 1046. As the wife becomes the owner of a homestead upon community property immediately upon the death of her husband, the property retains its homestead character: *Hibernia Sav. & L. Soc. v. Hinz*, 4 Cal. App. 626; 88 Pac. Rep. 730, 731; and the probate court has no jurisdiction over it; hence its order setting apart the homestead to the widow has no other effect than to take the property out of administration. The order could affect only the interest of the estate in the property, which in such a case would be nothing: *Vandall v. Teague*, 142 Cal. 471, 474; 76 Pac. Rep. 35.

REFERENCES.

Amendment of 1880 to section 1474 of the Code of Civil Procedure of California made no change in the case of a homestead selected from community property: See next subdivision, *infra*.

(2) **Homesteads selected from separate property of persons selecting or joining in selection of same.** If the homestead selected by the husband or wife, or either of them, during their coverture, and recorded

while both were living, was selected from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in the survivor: *Estate of Croghan*, 92 Cal. 370, 371; 28 Pac. Rep. 570; *Estate of Fath*, 132 Cal. 609; 64 Pac. Rep. 995. Hence if the widow, upon the death of her husband, becomes, by virtue of her survivorship, the owner in fee of a homestead selected by the husband in his lifetime from his separate estate, the title thus acquired is not affected by a subsequent order of the court setting the property apart to her as a homestead. The effect of the order is simply to withdraw the property therein named from administration: *Estate of Fath*, 132 Cal. 609, 612; 64 Pac. Rep. 995. In such a case the death of the husband does not affect the homestead selected by him, but the homestead continues so long as it remains a homestead; and upon the death of the widow, leaving no minor children, there ceases to be any family for whose benefit the exemption exists and the homestead itself ceases to exist. It is subject to the widow's testamentary disposition, and in case she dies intestate, it descends to her heirs under the laws of succession: *Estate of Fath*, 132 Cal. 609, 612; 64 Pac. Rep. 995. The amendment of 1880 to section 1474 of the Code of Civil Procedure of California made no change in the case of a homestead selected from community property; but with reference to homesteads selected from separate property, it distinguished between those selected by or with the consent of the owner of the property, and those selected by one of the spouses without the consent of the other. Those of the former class were made to go to the survivor; of the latter, to the heirs of the person from whose property the selection had been made. Thus the only change made by said amendment was with relation to homesteads selected from separate property where the owner of the property made the selection or joined in it. But in the case of a homestead selected by the wife from the separate property of the husband without his consent, such property went to the heirs, by the provisions of said section 1474, before as well as after the amendment of 1880: *Estate of McGee*, 36 Cal. Dec. 155, 156 (Aug. 27, 1908).

(3) **Homesteads selected from separate property without owner's consent.** If the property was selected from the separate property of either the husband or wife without his or her consent, it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the probate court to assign it for a limited period to the family of the decedent: *Estate of Croghan*, 92 Cal. 370, 371; 28 Pac. Rep. 570; *Gruwell v. Seybolt*, 82 Cal. 7; 22 Pac. Rep. 938; *Estate of Schmidt*, 94 Cal. 334, 338; 29 Pac. Rep. 714; *Estate of Lamb*, 95 Cal. 397; 29 Am. St. Rep. 121; 30 Pac. Rep. 568; *Estate of Walkerly*, 108 Cal. 627, 654; 49 Am. St. Rep.

97; 41 Pac. Rep. 772; *Weinreich v. Hensley*, 121 Cal. 647, 654, 655; 54 Pac. Rep. 254. It will be noticed that, under the laws of California, where a homestead has been selected from the separate property of a husband during his lifetime, and without his consent, it goes, upon his death, to his "heirs or devisees," subject to the power of the court to assign the same for a limited period, under section 1265 of the Civil Code of that state, while, by section 1474 of the Code of Civil Procedure of said state, the same property vests in "the heirs," subject to the same power of limited assignment in the court. For comment upon this inharmoniousness, see *Estate of Walk-erly*, 108 Cal. 627, 654; 49 Am. St. Rep. 97; 41 Pac. Rep. 772; *Estate of Matheny*, 121 Cal. 267, 269; 53 Pac. Rep. 800.

(4) **Homestead declared by husband.** Where the husband made a valid declaration of homestead, the title thereto, upon his death, vests absolutely in his wife, and the children have no title or interest therein, whether the declaration was made upon community property, the separate property of the husband, or upon the separate property of the wife; because, if the land was the separate property of the wife, it was no part of the estate of the deceased husband, and the court sitting in probate had no jurisdiction over it, and could not deal with it as belonging to the estate: *Saddlemire v. Stockton Sav. etc. Soc.*, 144 Cal. 650, 653; 79 Pac. Rep. 381. When the homestead is selected from the separate property of the husband, who joins in its selection as a homestead, then, upon the death of the wife, it goes absolutely to the surviving husband. By the death of his first wife, the homestead property vests in him as fully and perfectly as though no homestead had ever been carved out of it; the title to the property is not affected by his second marriage; and he may alone mortgage the homestead without the second wife's signature: *Dickey v. Gibson*, 113 Cal. 26, 32; 54 Am. St. Rep. 321; 45 Pac. Rep. 15.

9. Setting apart a homestead. It is the duty of the court below, where a homestead has been selected, first to ascertain what was legally held as homestead property at the time of the death of the deceased, and then set it apart for the use of the widow: *Estate of Wixom*, 35 Cal. 320, 325. The court has a discretion to exercise in determining whether it will set aside a homestead from the separate property of the decedent, as well as the particular property which it will set aside, and also in determining the time during which it shall be held as a homestead. It is not required to set aside the property which was selected by the survivor, and is limited to selecting and designating property which is of no greater value than five thousand dollars. The court is not bound by the wishes of the applicant, but should exercise its own discretion and good judgment. The

right to have it assigned for a limited period is not absolute, but rests in the sound discretion of the court, to be exercised in view of all the facts appearing before it: *Weinreich v. Hensley*, 121 Cal. 647, 655; 54 Pac. Rep. 254; *Estate of Schmidt*, 94 Cal. 334; 29 Pac. Rep. 714; *Estate of Lamb*, 95 Cal. 397; 29 Am. St. Rep. 121; 30 Pac. Rep. 568. The right given to the probate court to set apart "to the family of the decedent," for a limited period, is not controlled or in any way affected by the wife's previous selection of a homestead: *Warner v. Warner*, 144 Cal. 615, 619; 78 Pac. Rep. 24; *Weinreich v. Hensley*, 121 Cal. 647, 653; 54 Pac. Rep. 254. Although she filed a declaration of homestead upon her husband's separate property, her subsequent acquisition of a part of such property as her separate property does not convert the prior declaration into a selection by her to a homestead of her separate property. Upon her death, the property so conveyed to her is to be treated as if the homestead had been selected without her consent, and as vesting in her heirs, subject to have it assigned for a limited period to the family of the deceased: *Estate of Lamb*, 95 Cal. 397, 407; 29 Am. St. Rep. 121; 30 Pac. Rep. 568. Where a homestead was declared by the wife upon her separate property, which was of such a kind that it could be impressed with the homestead characteristics, the title to it descends absolutely to the husband: *Estate of Young*, 123 Cal. 337, 347; 55 Pac. Rep. 1011; *Estate of Croghan*, 92 Cal. 370; 28 Pac. Rep. 570. The right of the survivor to retain a home for such a limited period as the court may direct does not depend on the fact that there are children or others who may share in its use. In such event the petitioner may himself be regarded as constituting the "family" of deceased. It is true that the word "family," in its ordinary signification, and as used in the statute concerning the descent of a homestead, refers to two or more persons, and includes those living under the same roof, as kindred or dependents, under one head; but this word, as used in the statute confirming probate homesteads, is not to be so restricted in its meaning as to exclude the only survivor of the family of which the deceased was a member. The object of the statute is to preserve the family home for the use and benefit of the survivor or survivors of those occupying it as such: *Estate of Lamb*, 95 Cal. 397, 407; 29 Am. St. Rep. 121; 30 Pac. Rep. 568.

10. Order. In general. In making an order setting aside a homestead to the widow for her lifetime, it is not proper for the court to decree to whom the fee in remainder shall vest upon her death. It should not undertake to adjudicate the question of heirship. When there is a contest between different persons claiming, in hostility to each other, to be heirs, that contest must be adjudicated in an appropriate action or proceeding in which the issue of heirship properly arises: *Estate of Firth*, 145 Cal. 236, 340; 78 Pac. Rep. 643. If the

entire estate set apart to the widow as a homestead was the separate property of the husband, and the order setting it aside did not limit the homestead to a life estate in the widow, but set it aside to her absolutely, the order of course is erroneous, but if the time to appeal from the order has expired, and no appeal was taken, title in fee, under the order, vests in the widow, for the order, though erroneous, was not void; and, in such a case, the court has no power to order the executors to discharge liens upon the property: *Estate of Huelsman*, 127 Cal. 275, 276, 277; 59 Pac. Rep. 776.

11. Order. Effect of. Title is not adjudicated by an order of the court setting apart premises as a homestead for the family, and one who opposes the order is not precluded from establishing his title in a proper action for that purpose: *Dickey v. Gibson*, 121 Cal. 276, 278; 53 Pac. Rep. 704. Even an order setting apart a probate homestead for the use of the family, including the widow and children, does not affect her absolute title, or confer any title upon the children by adjudication. The only effect of the order is to withdraw the premises therein named from administration: *Saddlemire v. Stockton Sav. etc. Soc.*, 144 Cal. 650, 653; 79 Pac. Rep. 381. So if a homestead selected by the husband, in his lifetime, from his separate estate vests absolutely in his surviving wife, an order setting apart the property to the widow as a homestead, pending the administration of her husband's estate, does not affect the widow's title by survivorship. Its only effect is to remove the homestead from administration of the husband's estate: *Estate of Fath*, 132 Cal. 609, 612; 64 Pac. Rep. 995. Where the survivor takes his title to a homestead by operation of law, no order of the court is necessary to protect his title: *Fisher v. Bartholomew*, 4 Cal. App. 581; 88 Pac. Rep. 608, 609. The effect of an order of a probate court setting apart, for a limited period, separate property of a decedent to the surviving spouse, which has already been devised to another person, and upon which no antemortem homestead has been filed, is to invalidate the devise, and such property should be distributed to the heirs at law of the decedent, subject to the homestead: *Estate of Matheny*, 121 Cal. 267, 268; 53 Pac. Rep. 800.

12. No money in lieu of. If the widow seeks to have set apart to her a homestead out of the separate property of her deceased husband, but there is no separate property, the court has no authority to award a sum of money as a substitute for a homestead. There is no provision of the codes which authorizes such an order, and, by strong implication, such an order is prohibited: *Estate of Noah*, 73 Cal. 590, 593; 2 Am. St. Rep. 834; 15 Pac. Rep. 290; *Estate of Isaacs*, 30 Cal. 105, 109.

13. Appraisement. Under section 1476 of Code of Civil Procedure of California, the homestead is treated as having vested at the time of its selection; but, under section 1465 of that code, it is created by the order of the court. The appraisement provided for in section 1476 applies to a selected homestead, and the value is to be fixed as of the time the homestead was selected. Section 1465 does not, in itself, require any appraisement; and so much of section 1476 as requires an appraisement cannot be applied in the case of a probate homestead, for the reason that it relates to a selected homestead and to an entirely different time: *Estate of Walkerly*, 81 Cal. 579, 583; 22 Pac. Rep. 888. The court provides for the appointment of appraisers in certain cases, where there is a question as to the value of the homestead; and the court is authorized to appoint appraisers, in the first instance, upon proof made of service upon the defendants of a copy of the petition and notice of the time and place of hearing, as provided in sections 1248 and 1249 of the Civil Code of California: *Harrier v. Bassford*, 145 Cal. 529; 78 Pac. Rep. 1038, 1040. If a vacancy is caused in a board of appraisers by the absence of one of the appraisers from the county, the court has authority to appoint another person without further notice; and either party has, of course, the right to move the court to vacate such appointment, or to set aside the report of appraisers, upon a reasonable showing that the appointee is unfit, incompetent, or disqualified: *Harrier v. Bassford*, 145 Cal. 529; 78 Pac. Rep. 1038, 1040. But a day for hearing and notice of the hearing must be given, under section 1478 of Code of Civil Procedure of that state; and if it be conceded that the court has the right to order a reappraisement of the homestead under that section, it must be admitted that, under the same section, the court should set a day for hearing any objections to the report made by the new appraisers, and cause notice thereof to be given. Hence it is error if the court not only does not set a day for hearing any objections to the report, but refuses to hear the objections of a creditor upon his direct application to be heard: *Estate of McCarthy*, 1 Cal. App. 467, 471; 82 Pac. Rep. 635. On an appeal from a judgment confirming the report of appraisers setting apart a homestead, the evidence may be reviewed, if the appeal was taken within sixty days: *Estate of Crowey*, 71 Cal. 300, 302; 12 Pac. Rep. 230.

14. Value. The value of an antemortem homestead is limited to five thousand dollars. The court has no power to select and designate property of a greater value than that amount: *Estate of Delaney*, 37 Cal. 176, 181; *Higgins v. Higgins*, 46 Cal. 259, 266; *Weinreich v. Hensley*, 121 Cal. 647, 655; 54 Pac. Rep. 254; *Estate of Herbert*, 122 Cal. 329, 331; 54 Pac. Rep. 1109; *People v. Gallanar*, 144 Cal. 656, 663; 79 Pac. Rep. 378. If the premises selected as a homestead from

community property do not exceed in value the sum of five thousand dollars at the time they were appraised in the probate proceedings, it is the imperative duty of the court to make the order setting them off as a homestead to the petitioner: *Estate of McCarthy*, 1 Cal. App. 467; 82 Pac. Rep. 635. The homestead character applies only to so much of the property as does not exceed five thousand dollars in value. If what is actually used as a homestead is of a greater value than five thousand dollars, the excess is not homestead under the statute, though so in fact. At its inception, the homestead is limited to five thousand dollars in value, and when the property is enhanced in value, so that it exceeds the statutory limit, the excess does not constitute a part of the statutory homestead. If the premises are worth five thousand dollars, every increase in value works a reduction in the area of the homestead; and where the statute does not contain any other provision for determining the area of the homestead, if the selected premises exceed five thousand dollars in value, it is the duty of the court, nevertheless, to ascertain the amount of land necessary to make up the value of the exemption, and set off that amount alone as the homestead: *Bank of Woodland v. Stephens*, 144 Cal. 659, 663; 79 Pac. Rep. 379; *Estate of Delaney*, 37 Cal. 176, 180; *Grogg v. Bostwick*, 33 Cal. 220, 228; 91 Am. Dec. 637. Where, upon the death of the homestead claimant, the inventory shows that the premises claimed exceeded five thousand dollars in value, the method of determining what part is homestead and what part is subject to the debts of the deceased is prescribed, in California, by sections 1476 et seq. of the Code of Civil Procedure: *Bank of Woodland v. Stephens*, 144 Cal. 659, 663; 79 Pac. Rep. 379. Said section 1476 applies to homesteads created by a declaration made and recorded, and it applies alone to such character of homesteads: *Estate of Herbert*, 122 Cal. 329, 331; 54 Pac. Rep. 1109. Sections 1465 and 1476 of the Code of Civil Procedure of California are to be applied in setting apart a homestead created by an insolvent debtor in case the value of the premises exceeds five thousand dollars; and in fixing the valuation of homestead premises, liens or encumbrances of any character are not an element entering into the question: *Estate of Herbert*, 122 Cal. 329, 331; 54 Pac. Rep. 1109. In case the homestead is of less value than five thousand dollars at the time of its selection, it goes absolutely to the survivor, although at the time of the death of the husband its value may exceed five thousand dollars: *Estate of Burdick*, 76 Cal. 639, 641; 18 Pac. Rep. 805; and in case the value of the estate of a deceased husband is less than fifteen hundred dollars, it is proper for the court to set it apart, without further administration, to the widow, although she claims a homestead upon the separate property of the husband, he not joining therein. Such a proceeding is under section 1469 of the Code of Civil Procedure of California, which deals specifically with the special

subjects of the estate less in value than fifteen hundred dollars: *Estate of Neff*, 139 Cal. 71, 72; 72 Pac. Rep. 632. There seems to be no impropriety, in the state of Nevada, in setting apart a homestead to the value of five thousand dollars out of property worth seven thousand five hundred dollars, without defining the boundary or extent necessary to reach that sum, or without ascertaining whether the premises can be divided. The necessity for this division or determination may never arise, and it is better that the trouble and expense incident to a division of the homestead be avoided until the time arrives, if ever, when the occupants of the homestead and the owner of the excess cannot agree, and then the tenant in common, who is dissatisfied, can proceed under the general statute allowing and regulating suits for partition: *In re Quinn's Estate*, 27 Nev. 156; 74 Pac. Rep. 5, 6. The homestead exemption of a childless surviving spouse is in the sum of five thousand dollars, and is not limited to one thousand dollars, as prescribed in section 1260 of the Civil Code of California, in a case where the debt sought to be enforced was contracted during the existence of the community and of the homestead, and where the homestead itself was declared during coverture upon community property: *Robinson v. Dougherty*, 118 Cal. 299, 300; 50 Pac. Rep. 649.

15. Division or sale. The appraisers must determine whether the premises can be divided without material injury, where they are worth more than five thousand dollars. If they can, they must proceed to admeasure and set apart a portion not to exceed in value five thousand dollars; otherwise provision is made for sale: *Estate of Herbert*, 122 Cal. 329, 331; 54 Pac. Rep. 1109; *Estate of Burdick*, 76 Cal. 639, 641; 18 Pac. Rep. 805. The statute is clear, that if a homestead was declared in the lifetime of the deceased, and if it is appraised at more than five thousand dollars, and cannot be divided, the whole may be sold, and five thousand dollars of the proceeds be set apart in lieu of the homestead claim: *Lord v. Lord*, 65 Cal. 84, 85; 3 Pac. Rep. 96.

16. Rights and title of survivor, heirs, successors, and children. Where one of the spouses takes title to a homestead by survivorship, such title is not affected by orders of the probate court respecting the homestead: *Saddlemire v. Stockton Sav. etc. Soc.*, 144 Cal. 650; 79 Pac. Rep. 381; *Estate of Fath*, 132 Cal. 609, 612; 64 Pac. Rep. 995. Section 1468 of the Code of Civil Procedure of California is a limitation upon the power of testamentary disposition, and operates to vest the title to the homestead in the heirs at law, and to withdraw it from disposition made by the testator under his will: *Estate of Matheny*, 121 Cal. 267, 269; 53 Pac. Rep. 800. The power of the court to set property apart as a probate homestead is paramount to

the power of the testator to devise his estate, and cannot be affected by a specific devise of the property: *Estate of Huelsman*, 127 Cal. 275, 277; 59 Pac. Rep. 776. A widow, who takes a homestead, cannot claim that a specific devise to her is exempt from the payment of debts of the estate: *Estate of Huelsman*, 127 Cal. 275; 59 Pac. Rep. 776. Where a widow becomes the owner in fee of homestead property by virtue of her survivorship, and she dies, leaving no minor child, there ceases to be any family for whose benefit the exemption exists, and the homestead itself ceases to exist. It is subject to her testamentary disposition, and in case she dies intestate, it descends to her heirs, under the laws of succession: *Estate of Fath*, 132 Cal. 609, 612; 64 Pac. Rep. 995. And, under the statute which provides for the protection of "persons succeeding, by purchase or otherwise, to the interests, rights, and title of successors to homesteads," those who acquire the title of a successor to a homestead hold the property under the same exemption as did the person to whose interest they have succeeded: *Estate of Fath*, 132 Cal. 609, 612; 64 Pac. Rep. 995. Section 1485 of the Code of Civil Procedure of California does not apply to probate homesteads: *Estate of Moore*, 57 Cal. 437, 443. If a probate homestead has been set apart out of the estate of a deceased person to his widow and minor children, one half of which was to go to the widow and the other half to the children, the title is in the widow and minor children during the latter's minority. When the children arrive at majority, their interest in the homestead ceases, and whatever property rights they thereafter have in the land covered by the homestead are in the nature of remaindermen or reversioners; but so long as the widow sees fit to continue in the family home, the grantee of one of the children cannot legally go into possession of the homestead as a tenant in common with the widow: *Moore v. Hoffman*, 125 Cal. 90, 92; 73 Am. St. Rep. 27; 57 Pac. Rep. 769. If the title of the homestead vests absolutely in the wife upon the death of her husband, and the homestead declared by the husband, whether it is upon community property or upon the separate property of the husband, or upon the separate property of the wife, the children have no interest or title therein; and no title is conferred on them by an order of the probate court setting the homestead apart for the use of the family, including the widow and children: *Saddlemire v. Stockton Sav. etc. Soc.*, 144 Cal. 650, 654; 79 Pac. Rep. 381. The tenure by which a homestead is held by the survivor of a community depends upon the nature of the title to the land from which the homestead is selected. If it is selected from community property in the lifetime of both spouses, it vests in the survivor in fee, and becomes his or her separate property. If it is selected from separate property, it goes, on the death of the person from whose property it was selected, to the heirs or devisees of such person, subject to the power of the court to assign it for a limited period to

the family of the decedent: Estate of Gilmore, 81 Cal. 240, 243; 22 Pac. Rep. 655.

REFERENCES.

Rights of children in decedent's homestead: See note 56 L. R. A. 33-39.

17. Exemption of homestead.

(1) **In general.** Where a wife, after the death of her husband, continues to reside upon the family homestead, although she is its sole occupant, it is exempt against her own creditors, as well as the creditors of her husband's estate, irrespective of the time the indebtedness was incurred, and without regard to which spouse held the legal title to the property during their married life: Weaver v. First Nat. Bank (Kan.), 94 Pac. Rep. 273. The use of merely formal phrases will not make a devise of a homestead subject to the payment of the testator's debts. To do so, the language employed must be unequivocal and imperative. A wife, upon the death of her husband, may elect to take title under his will to their homestead, which she continues to occupy, without subjecting it to the payment of his debts: Cross v. Benson, 68 Kan. 495; 75 Pac. Rep. 559.

(2) **Policy of the law.** The provisions of the Civil Code of California, by which the wife is authorized to select a home for herself and the family out of the separate property of the husband, that shall be exempt from the effect of misfortune or improvidence on his part, as well as from the importunity or rapacity of his creditors, have been enacted in pursuance of the public policy declared in the constitution, and, being remedial in their nature, are to receive a liberal construction: Warner v. Warner, 144 Cal. 615, 618; 78 Pac. Rep. 24; Sanders v. Russell, 86 Cal. 119; 21 Am. St. Rep. 26; 24 Pac. Rep. 852; Roth v. Insley, 86 Cal. 134; 24 Pac. Rep. 853. To the extent that these provisions are enacted in the interest of the wife, the policy in pursuance of which they are enacted, as well as the purposes of their enactment, is to be considered in the construction of any agreement by her in reference thereto. She is not to be held to have surrendered the rights conferred by these provisions, except by clear and expressive language: Warner v. Warner, 144 Cal. 615, 618; 78 Pac. Rep. 24. Having regard to the policy of the law, it seems plain that only the homestead, or the homestead estate, if it may be so called, is thus exempted from creditors' claims, and that the law evinces no such tenderness or regard for the heirs (except in the case of estates in value of less than fifteen hundred dollars) as would justify the conclusion that it means to prefer their claims to the claims of the creditors of the estate. In other words, the manifest policy of the law is to subject all property, excepting that exempt from execution, the homestead estate, and the property of estates

in value less than fifteen hundred dollars, to just claims of creditors: Estate of Tittel, 139 Cal. 149, 153; 72 Pac. Rep. 909.

(3) **Construction of codes.** In section 1474 of the Code of Civil Procedure of California, dealing with the case of the homestead selected from the separate property of its owner during his lifetime, the law is particular to declare that it shall not be subject to the payment of any debt or liability contracted by or existing against the husband or wife, or either of them, at the time of the death of such husband or wife, except as provided in the Civil Code of that state. Section 1265 of the Civil Code of said state, with like particularity, provides that, "upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it be held liable for the debts of the owner, except as provided in this title." In section 1468 of the Code of Civil Procedure of that state, there is no such provision, and the simple language is, that title vests in the heirs. This distinct difference is well founded in reason. The law has regard for the family as the basic unit of society, and for that reason protects the family home. In the case of the death of either spouse, in contemplation of the situation of minor and dependent children, it makes provision securing the surviving spouse and such children in the homestead. And where the estate is of small value, the law entirely cuts off the rights of the creditors, deeming it of paramount importance that the property of the deceased should be devoted to the maintenance and support of the family. Moreover, in the case of a homestead declared during the lifetime of the owner, all who may give credit to the family do so with knowledge that they can have no recourse to the homestead for their debts. But where a homestead was set apart to the widow out of the separate estate of her deceased husband during widowhood, the estate of his heirs is alienable at their pleasure, and alienable by operation of law, and is likewise subject to the just demands of creditors of the estate: Estate of Tittel, 139 Cal. 149, 153; 72 Pac. Rep. 909. Section 1468 of the Code of Civil Procedure of California, fixing the title of the property selected as a homestead for the use of the surviving husband or wife and the minor children, does not effect such a direct statutory distribution of the property as both to remove it from the administrative control of the court in probate, and at the same time from the reach of the creditors of the estate: Estate of Tittel, 139 Cal. 149, 150; 72 Pac. Rep. 909. But those who acquire the title of a successor to a homestead hold the property under the same exemption as did the person to whose interest they have succeeded: Estate of Fath, 132 Cal. 609, 612; 64 Pac. Rep. 995.

(4) "Family" of owner. Although, under the provisions of the Kansas constitution, "a homestead occupied as a residence by the family of the owner shall be exempt from forced sale under any process of law," a right to exemption cannot originate without the existence of a family,—of a household consisting of more than one person,—yet when the homestead character has once attached, it may persist for the benefit of a single individual, who is the sole surviving member of the family: *Weaver v. First Nat. Bank* (Kan.), 94 Pac. Rep. 273, overruling *Ellinger v. Thomas*, 64 Kan. 180; 67 Pac. Rep. 529. Under the terms of the constitution of Kansas, the area and appurtenances of the home are expressly limited; the beneficiary of the right is expressly limited; the manner of its enjoyment is expressly limited; the method of transferring the estate and the land it covers is expressly limited; the charges which may be made are expressly limited; and the character of process upon which it may be sold is expressly limited: but the time during which occupation by the family of the owner shall be a barrier against its appropriation for debts is not limited. There is no time appointed beyond which it shall not endure; and so long as family occupation as residence persists, no creditor may intrude upon the sanctity of the homestead demesne. Hence, if a husband and wife occupy a tract of land belonging to him as a homestead, she is the "family" of the owner, within the meaning of the constitution; and his death does not deprive her of the right to continue to be so designated, in order to maintain the homestead, to which she takes title, and which she continues to occupy free from forced sale under process of law for the payment of his debts; and, though the statute of descents and distribution may enlarge the right of an exemption of real estate from appropriation to the payment of debts, yet it cannot restrict the constitutional guaranty: *Cross v. Benson*, 68 Kan. 495; 75 Pac. Rep. 558, 561. In Oklahoma, he who claims a homestead as exempt on the ground that he is "the head of a family" must be able to show that there are others besides himself, who together form the family, and who are legally dependent upon him, and whom he is legally obliged to care for: *Betts v. Mills*, 8 Okl. 351; 58 Pac. Rep. 957. The owner of eighty acres of farming-land, occupied by himself and wife as their homestead, died; the widow continued to occupy it as a homestead; their children had all arrived at the age of majority and lived in homes of their own. It was held that the widow was "the family of the owner," and, as such, was entitled to hold the homestead exempt from the payment of the debts of her husband so long as she continued to occupy it: *Aultman, M. & Co. v. Price*, 68 Kan. 640; 75 Pac. Rep. 1019. Where a man died intestate, and his widow continued to reside on the farm as a homestead, but, in proceedings brought in the probate court by the creditors of the intestate's estate, it appeared that the children had attained their

majority and were living elsewhere; that the widow had previously conveyed to her daughter an undivided one-half interest in the farm, but in the deed conveying such interest had preserved to herself the possession, use, and profits of the land during her lifetime; and that she had not only not abandoned the homestead, but, on the contrary, was intending to make the farm her home as long as she lived, her support being derived from the rental thereof,—it was held that an order from the probate court directing the administrator to sell an undivided one-half interest in the farm for the payment of debts owing by deceased was erroneous: *Harclerode v. Green*, 8 Kan. App. 477; 54 Pac. Rep. 505. If, however, a man and his wife have a homestead, and both die, leaving no minor children, and none of their children ever resided upon the land, no conveyance of which was made while it was occupied as a homestead, such land, after the death of both husband and wife, is subject to sale for the payment of the debt of the husband, which he owed at the time of his death, and it is the duty of the executor or administrator of his estate to sell the land for the payment of his debts, where the husband left no real or personal property, other than the land so occupied as a homestead: *Stratton v. McCandliss*, 32 Cal. 512; 4 Pac. Rep. 1018, 1021.

(5) **Limit as to value.** In California, no limit is placed by the code on the amount of property that may be claimed as a homestead, except to confine it to the value of five thousand dollars, and, however great the area, no division can be had in court except for excess of that amount in value: *Payne v. Comings*, 146 Cal. 426, 429; 106 Am. St. Rep. 47; 80 Pac. Rep. 620. To the extent that an indivisible homestead exceeds five thousand dollars in value, it may be subjected to the payment of the debts of the deceased, but not until after all other available assets of the estate are exhausted: *Calmer v. Calmer* (N. D.), 106 N. W. Rep. 684.

18. Alienation of homestead. Where the statute provides that one half of the real estate of which the deceased dies seised shall "belong" to his widow, and the remainder to his child or children, and that the person succeeding to the title of "successors to homesteads" have all the rights of the persons whose interest they acquire, a wife, having minor children by a former, deceased husband, may convey to her second husband less than one half of the premises set apart to her and her children as a homestead from the estate of her deceased husband: *McHarry v. Stewart* (Cal.), 35 Pac. Rep. 141, 142, 143. So where the homestead was selected from the separate property of the husband, who joined in its selection as a homestead, title thereto vested in him at the death of his first wife, and, although he marries a second time, he alone may mortgage the homestead without his second wife's signature: *Dickey v. Gibson*, 113 Cal. 26, 31, 32;

54 Am. St. Rep. 321; 45 Pac. Rep. 15. And if the title to a homestead occupied by husband and wife is in the husband, he may devise the entire property to her by will: *Martindale v. Smith*, 31 Kan. 270; 1 Pac. Rep. 569, 572. In Utah, a husband may, by will, dispose of the homestead property in excess of the homestead limit. If the estate is insolvent, or below the homestead limit in value, the homestead right of the widow attaches; but if the estate is solvent and out of debt, the value of such part of the homestead as may be set apart to the widow should be deducted from her distributive share, unless it clearly appears from the will that the decedent designed the testamentary provision for the widow to be in addition to such share: *In re Little*, 22 Utah, 204; 61 Pac. Rep. 899, 901.

19. Presentation of claims.

(1) **In general. Purpose of law.** The evident purpose of the legislature in providing that if there be subsisting liens or encumbrances on the homestead, the claim secured thereby must be presented and allowed, the same as other claims against the estate, was undoubtedly to preserve the homestead estate, if possible: *Camp v. Grider*, 62 Cal. 20, 26. The general proposition that a mortgage upon the homestead cannot be enforced unless a claim therefor had been duly presented to the administrator is settled; but this rule applies exclusively to the property described in the mortgage which is impressed with the character of the homestead. The rule, in California, which requires a mortgage upon the homestead to be presented to the administrator as a claim is based upon the provisions of section 1475 of the Code of Civil Procedure of that state, and is limited to cases in which the homestead does not exceed five thousand dollars in value, or in which the mortgagee seeks to proceed in foreclosure of his mortgage against the property that is eventually set off as a homestead, where the premises described in the homestead declaration exceed five thousand dollars. It does not apply at all to a probate homestead: *Bank of Woodland v. Stephens*, 144 Cal. 659, 663, 664; 79 Pac. Rep. 379.

(2) **Necessity of presentment.** Before a suit can be commenced to foreclose a mortgage upon a homestead which was selected and recorded prior to the death of the decedent, it is necessary to present a claim upon the demand against the husband's estate to the executor or administrator of the estate for allowance. This is an exception to the general rule as to mortgages and other liens, and the reason for it is to preserve the homestead, if possible: *Wise v. Williams*, 88 Cal. 30, 33; 25 Pac. Rep. 1064; *McGahey v. Forrest*, 109 Cal. 63, 67; 41 Pac. Rep. 817. A mortgage of a homestead on community property must be presented before an action can be maintained thereon for its foreclosure: *Perkins v. Onyett*, 86 Cal. 348, 350; 24 Pac. Rep. 1024; *Bollinger v. Manning*, 79 Cal. 7, 11; 21 Pac. Rep. 375; *Sanders*

v. Russell, 86 Cal. 119; 21 Am. St. Rep. 26; 24 Pac. Rep. 852; Wise v. Williams, 88 Cal. 30; 25 Pac. Rep. 1064; Mechanics' B. & L. Assoc. v. King, 83 Cal. 440; 23 Pac. Rep. 376; Hibernia Sav. & L. Soc. v. Hinz, 4 Cal. App. 626; 88 Pac. Rep. 730, 731. And such presentation is not excused by the fact that the entire estate is homestead property: Bollinger v. Manning, 79 Cal. 7, 11; 21 Pac. Rep. 375. Where a homestead has been declared upon the property, it is necessary to present a claim against the husband's estate, notwithstanding a waiver in the complaint in an action of foreclosure of all recourse against the property of the estate other than that mortgaged: Wise v. Williams, 88 Cal. 30, 33; 25 Pac. Rep. 1064; Perkins v. Onyett, 86 Cal. 348; 24 Pac. Rep. 1024. A presentation of a mortgage note without a presentation of the mortgage is insufficient: Perkins v. Onyett, 86 Cal. 348, 350; 24 Pac. Rep. 1024. The mortgage of a homestead has no effect upon its character as a homestead, but the property thereby becomes subject to the lien of the mortgage, and during the mortgagor's lifetime is subject to foreclosure and sale in an action by the plaintiff therefor. But upon the mortgagor's death the provisions of section 1475 of the Code of Civil Procedure of California become operative, and require the plaintiff, as holder of the mortgage, to present his claim secured thereby for allowance, as other claims against the estate, and, after the presentation, the plaintiff has the right to have the claim paid out of the general funds of the estate, so far as these funds are available, and to enforce the lien of his mortgage against the homestead for any deficiency remaining after such payment. His failure to make such presentation deprives him of the right to enforce his mortgage for any part of the claim: Hibernia Sav. & L. Soc. v. Hinz, 4 Cal. App. 626; 88 Pac. Rep. 730, 731. Where the homestead was declared upon community property, and a judgment is recovered against the owner, it is the duty of the judgment creditors, upon the death of the judgment debtor, to present the judgment to the executor or administrator for allowance, in like manner as any other claim: Sanders v. Russell, 86 Cal. 119, 121; 21 Am. St. Rep. 26; 24 Pac. Rep. 852. If a mortgagee neglects to present his claim of mortgage upon a homestead given to secure a note executed by the husband and wife, he not only deprives himself of the right to foreclose the mortgage, but at the same time deprives himself of the right to an action upon the note. And he will not be permitted, without the consent of the mortgagor, to release the mortgage for the purpose of bringing an action upon the note: Hibernia Sav. & L. Soc. v. Thornton, 109 Cal. 427, 429; 50 Am. St. Rep. 52; 42 Pac. Rep. 447. If the mortgage covers a homestead upon the separate property of the wife, the mortgagee may foreclose without presenting a claim against the husband's estate, if he waives all claims against it: Bull v. Coe, 77 Cal. 54, 63; 11 Am. St. Rep. 235; 18 Pac. Rep. 808. If the homestead did not exist at the

time of the death of the deceased, but was set apart subsequently by the probate court, it is not necessary to present the mortgage claim if the mortgagee waives all recourse against the decedent's estate, other than the property mortgaged: *McGahey v. Forrest*, 109 Cal. 63, 68; 41 Pac. Rep. 817; *Schadt v. Heppe*, 45 Cal. 433. The rule that a mortgage can be foreclosed without the presentation of a claim against the estate applies to probate homesteads: *McGahey v. Forrest*, 109 Cal. 63; 41 Pac. Rep. 817; *Browne v. Sweet*, 127 Cal. 332; 59 Pac. Rep. 774; to a case where a homestead existed at the date of mortgage, but was abandoned before death: *Bank of Suisun v. Stark*, 106 Cal. 202; 39 Pac. Rep. 531; and to mortgages on land given at the time of its purchase: *Ryan v. Holliday*, 110 Cal. 335; 42 Pac. Rep. 891. And the settlement and distribution of the estate is no bar to the right to foreclose the mortgage against the distributees of the mortgaged lands, or the grantee of such distributees: *Dreyfuss v. Giles*, 79 Cal. 409; 21 Pac. Rep. 840; and it is immaterial that the action of foreclosure has not been commenced until after the time for the presentation of claims has expired: *Anglo-Nevada Assur. Corp. v. Nedeau*, 90 Cal. 393; 27 Pac. Rep. 302.

REFERENCES.

Concerning suits on mortgage claims against homesteads, see note § 481, post.

(3) **Statute of limitations.** If a mortgage on a homestead, and the note secured thereby, have been presented to the executor or administrator of the estate, and have been properly allowed, an action against the estate to foreclose the mortgage is not affected by the statute of limitations, pending proceedings for the settlement of the estate: *Wise v. Williams*, 72 Cal. 544, 548; 14 Pac. Rep. 204. If it does not appear what, if any, interest the wife had in the homestead property at the time the mortgage was made, and no claim is presented against her separate estate, the allowance of a claim against the estate of the husband stops the running of the statute of limitations, so far as the wife's rights, as successor of her husband, are concerned: *Wise v. Williams*, 88 Cal. 30, 35; 25 Pac. Rep. 1064. The mortgagee of a homestead must present his claim for allowance, or he can have no deficiency judgment against the estate, but must look only to the mortgaged property; and if he would charge a joint obligor or mortgagor, he must bring his action against him within four years from the maturity of the principal obligation: *Vandall v. Teague*, 142 Cal. 471, 476; 76 Pac. Rep. 35.

20. Foreclosure without presentment. The separate property of a survivor is not a part of the estate of the decedent; and if all demands against the estate are waived, it is not necessary or proper

to present a mortgage upon such separate property as a claim against the estate. Whatever may be the nature of the interest which the husband acquires of his wife's separate property by virtue of a homestead, it vests in her at his death. It is not a part of his estate. Hence if a mortgage covers a homestead upon the wife's separate property, and the creditor waives all claims against the husband's estate, it is not necessary for him to present a claim against such estate before bringing an action to foreclose his mortgage: *Bull v. Coe*, 77 Cal. 54, 62, 63; 11 Am. St. Rep. 235; 18 Pac. Rep. 808; overruling former opinion, 15 Pac. Rep. 123. It is not necessary to present a mortgage claim to the executor or administrator for allowance, before bringing suit thereon, if no claim is made against the assets of the estate for a deficiency, and recourse is waived as to any property of the estate of the mortgagor other than that described in the mortgage: *Schadt v. Heppe*, 45 Cal. 433, 437. The provisions of section 1475 of the Code of Civil Procedure of California do not apply to land which is eventually determined not to be a homestead; and a mortgagee of such lands is not required to present his claim to the executor or administrator as a condition precedent to his right to foreclose the mortgage on the excess: *Bank of Woodland v. Stephens*, 144 Cal. 659, 664; 79 Pac. Rep. 378. So the provisions of section 1475 have no application where a note and mortgage were executed by a husband alone upon community property, where the wife filed a declaration of the homestead upon the land described in the mortgage, but died before the commencement of the action to foreclose, and had not signed the note to the plaintiff, and there was no claim against her estate. The property described in the mortgage, being community property, vested, upon the wife's death, in the husband, as the survivor both of the community and of the homestead. In such a case it is not necessary that any claim should be presented against the wife's estate before the foreclosure of the mortgage: *Bay City etc. Assoc. v. Broad*, 136 Cal. 525, 527; 69 Pac. Rep. 225. Although a homestead is abandoned before the mortgagor's death, the fact that a homestead exists on the premises at the time the mortgage thereon is executed does not require a presentation of the claim against the estate of the deceased mortgagor. The mortgagee may foreclose without presentment of his claim, where his complaint in foreclosure expressly waives all recourse against any other property than that described in the mortgage: *Bank of Suisun v. Stark*, 106 Cal. 202, 204, 208; 39 Pac. Rep. 531. Property which has ceased to become a homestead is subject to the foreclosure of a mortgage thereon without the presentation of a claim to the executor or administrator: *Weinreich v. Hensley*, 121 Cal. 647, 656; 54 Pac. Rep. 254.

21. Liens and payment. The court has jurisdiction over the homestead for the purposes specified in the statute, and if the court,

from ignorance of the fact that there was a homestead, or by inadvertence or a mistake of law, makes an order not authorized by the statute, its proceedings, however erroneous, are not without jurisdiction, and are valid as against a collateral attack: *Ions v. Harbison*, 112 Cal. 260, 267; 44 Pac. Rep. 572. It is proper for the court to set apart a homestead out of or embracing the common property which is subject to a mortgage, and the widow is then in a position to effect a sale of the rest of the property, and the application of the proceeds to the payment of the mortgage, under section 1475 of the Code of Civil Procedure of California, or in case of foreclosure, to ask that the mortgaged property not set apart be first sold, and the proceeds applied, leaving the homestead liable for the remainder only: *Lord v. Lord*, 65 Cal. 84, 86; 3 Pac. Rep. 96. But that section, which makes provision for the extinguishment of liens and encumbrances on homesteads, is limited exclusively to homesteads declared during the lifetime of the spouses. The law has not seen fit to make the same provision as to probate homesteads: *Estate of Huelsman*, 127 Cal. 275, 277; 59 Pac. Rep. 776. The levy of an execution upon homestead property creates no lien, but simply a foundation for proceedings, under the statute, for the ascertainment of the value of the property covered by the declaration of homestead, and the procurement of an order for the partition or sale thereof, and the application of the excess to the satisfaction of the judgment: *Sanders v. Russell*, 86 Cal. 119, 120; 21 Am. St. Rep. 26; 24 Pac. Rep. 852. Valid liens existing on a homestead, created before the death of the head of a family, must be enforced in a court of equity: *Estate of Orr*, 29 Cal. 101, 104.

22. Determination of right. If the survivor, in whom a homestead is vested, afterwards mortgages it and dies, there is no presumption that no family is left surviving and that the homestead exemption has terminated. The burden of proof of those facts is upon the holder of a mortgage who asserts them: *Hibernia Sav. & L. Soc. v. Hinz*, 4 Cal. App. 626; 88 Pac. Rep. 730, 731. The death of the husband does not affect the homestead character of property selected by him, in his lifetime, from his separate estate as a homestead, but such homestead character continues so long as the property remains a homestead. It ceases, however, upon the death of his wife, leaving no minor child, for then there is no family for whose benefit the exemption exists; and if she dies intestate, the property passes to her heirs, under the laws of succession: *Estate of Fath*, 132 Cal. 609, 612; 64 Pac. Rep. 995. If the homestead was selected from the separate estate of a spouse, without the owner's consent, the property, upon the death of the owner, ceases to have the incidents of a homestead, and vests in his heirs, free from any such limitation, unless it is afterwards selected and set apart as a homestead by an order of the court: *Weinreich v. Hensley*, 121 Cal. 647, 655; 54 Pac. Rep. 254.

23. Partition of homestead. The estate in land set apart for a limited period out of the separate estate of a decedent as a homestead vests in those declared by the statute to be entitled to it, but subject to the assignment of such homestead by the court, and, at the expiration of the time limited for its existence, is subject to partition as though no homestead had been created: *McHarry v. Stewart* (Cal.), 35 Pac. Rep. 141, 142. So long as the homestead is occupied by the family of the deceased, and until the widow again marries, or the children arrive at the age of majority, no partition of the homestead can be made: *Hafer v. Hafer*, 33 Kan. 449; 6 Pac. Rep. 537, 547. But where a widow, the head of a family, occupies certain real estate as a homestead, and dies intestate, leaving heirs, some of whom are minor children, who continue to reside upon and to occupy said homestead as a residence, such residence is not exempt from partition, for the reason that all of the children of said widow have not arrived at the age of majority: *Martell v. Trumbly*, 9 Kan. App. 364; 58 Pac. Rep. 120.

II. PROBATE HOMESTEADS.

1. In general. Where no homestead has been selected and recorded during the lifetime of the decedent, it is the duty of the court to designate and set apart a homestead out of the community property, if any there be, and if not, then out of the separate property of the decedent: *Estate of Davis*, 69 Cal. 458; 10 Pac. Rep. 671; *Estate of Lahiff*, 86 Cal. 151, 153; 24 Pac. Rep. 850; and it may be done from any property suitable for the purpose: *Estate of Sharp*, 78 Cal. 483; 21 Pac. Rep. 182. If there are no minor children, then the homestead is for the surviving wife or husband alone: *Estate of Lahiff*, 86 Cal. 151, 153; 24 Pac. Rep. 850; but if taken from the separate property of the decedent, it can be for only a limited period: *Estate of Lahiff*, 86 Cal. 151, 153; 24 Pac. Rep. 850. The statute authorizing the court to set aside all property exempt from execution, including the homestead, authorizes the setting aside of the homestead in connection with and in addition to the personal property exempt from execution: *Estate of Busse*, 35 Cal. 310, 314, 315; and the insolvency of an estate does not prevent a court from setting apart a probate homestead: *Estate of Adams*, 128 Cal. 380; 57 Pac. Rep. 569. If a husband dies, and his widow, in ignorance of her right to a homestead, joins in a transfer of the property, and afterwards purchases it herself, this is not evidence of any abandonment of her homestead right, and she is entitled to have the property set aside to her as a homestead: *Smith v. Ferry*, 43 Wash. 460; 86 Pac. Rep. 658. A stranger is not entitled to enter into possession of homestead premises as a tenant in common and interfere with the occupancy and control by the homestead claimants, as this would be inconsistent with the very nature of a homestead, and violative of the very purpose for which homesteads are created; namely, to secure a home for those clothed with a homestead right,—to each and all of them:

Moore v. Hoffman, 125 Cal. 90, 92; 73 Am. St. Rep. 27; 57 Pac. Rep. 769. If a homestead is set apart to the widow out of her deceased husband's separate estate, the interest of his heirs in remainder is liable for debts against the estate, or charges against it, such as a family allowance made in favor of the widow. The statute was not designed to effect a statutory distribution of the estate so as to place it beyond the reach of creditors: *Estate of Tittel*, 139 Cal. 149, 150, 153; 72 Pac. Rep. 909.

2. Definition of homestead. Where the statute authorizing the court to set apart a probate homestead for the use of the widow and children does not define such homestead, resort must be had to the general law for such definition. The homestead represents the dwelling-house at which the family reside, with the usual and customary appurtenances, including out-buildings of every kind necessary or convenient for family use, and lands used for the purpose thereof. If situated in the country, it may include a garden or farm. If situated in a city or town, it may include one or more lots, or one or more blocks. In either case, it is unlimited by extent, and is not circumscribed by fences. It need not be in a compact body; on the contrary, it may be intersected by highways, streets, or alleys. In respect to quantity, by itself considered, it is unlimited, whether in town or country. In short, the only tests are use and value. Whatever is used — being necessary or convenient — as a place of residence for the family, as contradistinguished from a place of business, constitutes a homestead. If, however, it is also used as the place of business by the family, as frequently happens, it may not therefore cease to be a homestead, if it would be necessary or convenient for family use, independently of the business. The homestead, and the tests by which it is ascertained, are the same, whether the question arises between those claiming the homestead, or one of them and a vendee, a mortgagee, a creditor, or the heirs of the deceased husband or wife. There is not one homestead as against a creditor, and a different one when the survivor asserts his or her claims as against the heirs of the deceased: *Gregg v. Bostwick*, 33 Cal. 220, 227; 91 Am. Dec. 637; *Estate of Delaney*, 37 Cal. 176, 179; *Keyes v. Cyrus*, 100 Cal. 322, 324; 38 Am. St. Rep. 296; 34 Pac. Rep. 722; *Estate of Garrity*, 108 Cal. 463, 468; 38 Pac. Rep. 628; 41 Pac. Rep. 485; *Moore v. Hoffman*, 125 Cal. 90, 92; 73 Am. St. Rep. 27; 57 Pac. Rep. 769. A probate homestead differs from the case of a homestead created during the existence of the community by a compliance with the statute, the title to which vests in the survivor: *Estate of Boland*, 43 Cal. 640, 642.

3. Residence not essential. It is not essential to the validity of a homestead set apart to the surviving husband or wife, by order of the court, that the property be actually occupied at the time when the

order is made: *Estate of Noah*, 73 Cal. 590, 592; 2 Am. St. Rep. 834; 15 Pac. Rep. 290. Nor does the court make it requisite that the deceased should have resided on the property at the time of his death in order that the court may set apart a homestead for the use of the family, but authorizes the court to set apart any portion of the estate which is suitable for a homestead: *Estate of Pohlmann*, 2 Cal. App. 360; 84 Pac. Rep. 354, 355; *Estate of Bowman*, 69 Cal. 244.

4. Purpose and construction of statute. Mandatory nature of proceeding. The word "may," in public statutes, is often used for "must," or "shall," and is construed imperatively; and the statute which directs that the court "may," on its own motion, or on petition, "set apart" for the use of the family all property exempt from execution including the homestead is to be construed as "shall," and the court has no discretion to refuse the application. It was not intended to leave to the court's discretion the question whether or not the personal property exempt by law from execution, or the homestead selected under the provision of the general homestead law, should be set apart; and there is no more reason to suppose that it was intended he should exercise a discretion in reference to setting apart a probate homestead. The statute is mandatory in its nature: *Estate of Ballentine*, 45 Cal. 696, 699; *Estate of Wixom*, 35 Cal. 320, 323; *Estate of Davis*, 69 Cal. 458; 10 Pac. Rep. 671; *Kearney v. Kearney*, 72 Cal. 591; 15 Pac. Rep. 769; *Demartin v. Demartin*, 85 Cal. 71, 75; 24 Pac. Rep. 594; *Estate of Lahiff*, 86 Cal. 151, 153; 24 Pac. Rep. 850. Under the statute of Utah, the widow and minor child are entitled to a homestead of the value of two thousand two hundred and fifty dollars out of the real property of the estate, and to all of the exempt personal property of decedent: *In re Syndergaard's Estate (Utah)*, 88 Pac. Rep. 616, 617. It is only in cases where the court sets apart a homestead for a limited period that it can exercise discretion: See subd. 16, *infra*, "Limited Homestead." The fact that a widow, after the death of her husband, gives a quitclaim deed is no ground for refusing to set apart to her as a homestead, from the separate property of her deceased husband, a portion of the land conveyed by such deed: *Estate of Moore*, 57 Cal. 437, 443. Section 1485 of the Code of Civil Procedure of California does not apply to probate homesteads: *Estate of Moore*, 57 Cal. 437, 443; and section 1465 of the same code purports to deal merely with the descent of the property from which the homestead was selected; but the power of the court to assign the homestead, and upon whose exercise a limitation upon the estate of the heirs is created, is given in the section last named, and the provisions of the latter section are to be read in connection with the provisions of section 1474 of the same code: *Weinreich v. Hensley*, 121 Cal. 647, 653; 54 Pac. Rep. 254.

5. Right paramount to testamentary disposition. The right of the widow of a decedent, and of his minor children, to have a probate

homestead set apart to them out of the estate is paramount to that of testamentary disposition. Thus, although a farm had been specifically devised, one half to the widow and the other half to the children, it is competent for the probate court to set it aside as a homestead, for the right of a testator to devise is subordinate to the power in the probate court to sequester and set apart the property for the shelter, care, and support of the family: *Estate of Huelsman*, 127 Cal. 275; 59 Pac. Rep. 776. The power of testamentary disposition of property as conferred and defined by the statute is not paramount, but is subordinate to the authority conferred upon the probate court to appropriate the property for the support of the family of the testator, and for a homestead for the widow and minor child or children, as well as for the payment of the debts of the estate: *Sulzberger v. Sulzberger*, 50 Cal. 385, 387. The power or duty of the court to set aside a probate homestead is not limited by the fact that the decedent left a will by which he disposed of the property sought to be set aside: *In re Davis*, 69 Cal. 458, 460; 10 Pac. Rep. 671.

6. Application. Jurisdiction. It is not for a court of law, in an action of ejectment, to set apart premises as a homestead; that function appertains to a court sitting in probate in the matter of the estate of the deceased: *Richards v. Wetmore*, 66 Cal. 365, 366; 5 Pac. Rep. 620. When the surviving wife petitions to have the homestead set off to her, it ought to be shown what the homestead was at the time of the husband's death: *Estate of Delaney*, 37 Cal. 176, 182. The obvious purpose of the statute is to provide the family of the deceased with a home, where they may live and be protected as against creditors and heirs; and it is made the duty of the court to select and set apart for that home such part of the estate, consisting of a dwelling-house, and the land on which the same is situated, as, in view of the value of the estate and all the circumstances surrounding it, shall seem just and proper. The court is not bound by the wishes of the applicant, but should exercise its own discretion or good judgment; and unless that discretion is abused, its action will not be disturbed on appeal: *Estate of Schmidt*, 94 Cal. 334, 337; 29 Pac. Rep. 714. It is immaterial, however, whether the probate court acts on petition or on its own motion in setting apart a homestead to the widow, or widow and children, where no homestead had been selected and recorded during the decedent's lifetime: *Bullerdich v. Hermismeyer*, 32 Mont. 541; 81 Pac. Rep. 334. The guardian of a minor has authority to petition the court to set apart a homestead to such minor: *Estate of Pohlmann*, 2 Cal. App. 360; 84 Pac. Rep. 354, 356. The jurisdiction of a probate court to set aside a homestead to the surviving wife is not subject to the condition that she does not have any other property, or any other property suitable for a home. Such jurisdiction is excluded only when she has already a legal homestead, and a mere place fit to reside in is not a homestead, unless it has been impressed with that character by certain

acts required by law to be done for that purpose. The power and duty of the court to set apart the homestead is not, in any part of the statutory law, limited to a case where the widow has no other property; and if she has other property, it matters not how she obtained it, whether under her husband's will or otherwise. Her right to a probate homestead is an independent right, which she has in addition to any other right or property which she may have: *Estate of Firth*, 145 Cal. 236; 78 Pac. Rep. 643, 644. On an application of a surviving widow to have a probate homestead set apart to her, and where the only question involved is whether or not she should have the homestead, the adjudication should be limited to that question; and the court has no jurisdiction to undertake to adjudicate heirship. That is a question which should be determined in an appropriate action or proceeding in which the issue of heirship properly arises: *Estate of Firth*, 145 Cal. 236; 78 Pac. Rep. 643, 645. After the court has set apart community property as a homestead to the widow, it has no further jurisdiction over it for any purpose of distribution: *Estate of Gilmore*, 81 Cal. 240, 243; 22 Pac. Rep. 655. Application for a homestead may be made upon the return of the inventory, or at any subsequent time during the administration. The application does not come too late if made before the administration of the estate is closed: *Estate of Still*, 117 Cal. 509; 49 Pac. Rep. 463, 465. The power of the court to set aside a homestead is not defeated by the action of the executor in negotiating a sale which is unconfirmed, before the decree setting apart the homestead is made: *Estate of Lahiff*, 86 Cal. 151, 154; 24 Pac. Rep. 850.

7. How to be selected. If no homestead has been selected, designated, and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court must select, designate, and set apart, and cause to be recorded, the homestead, for the use of the surviving husband or wife and the minor children, out of the common property, or if there be no common property, then out of the separate property belonging to the decedent. The selection must be made from the common property, if there be any; it can be made from the separate property only in case there be no common property. The statute, in this regard, is clear and explicit, and admits of no question: *Lord v. Lord*, 65 Cal. 84, 86; 3 Pac. Rep. 96; *Estate of Lahiff*, 86 Cal. 151; 24 Pac. Rep. 850; *Estate of Schmidt*, 94 Cal. 334; 29 Pac. Rep. 714; *Weinreich v. Hensley*, 121 Cal. 647; 54 Pac. Rep. 254. It is to be observed in this connection, however, that if the homestead is selected out of the separate estate of the decedent it is "subject to the power of the superior court to assign it for a limited period to the family of the decedent." It can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order. This is so in California because the provision in section 1468 of the Code of Civil Procedure of that state, which pro-

vides that "if the property set apart be a homestead, selected from the separate property of the deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased subject to such order," has been held to apply to probate homesteads selected and set apart by the court: *Estate of Schmidt*, 94 Cal. 334; 29 Pac. Rep. 714; *Weinreich v. Hensley*, 121 Cal. 647; 54 Pac. Rep. 254; *Estate of Lahiff*, 86 Cal. 151; 24 Pac. Rep. 850; and see *infra*, subd. 16, "Limited Homestead." But it is only in cases where a homestead is set apart from the separate property of the deceased that it is required to be for a limited period: *Phelan v. Smith*, 100 Cal. 158, 170; 34 Pac. Rep. 667.

8. Procedure and practice. The code does not point out the steps to be pursued in setting apart a homestead, where none has been declared by the husband and wife, or one of them, during the lives of the parties, and in such cases the court may adopt any suitable method of procedure conformable to the spirit of the code: *Phelan v. Smith*, 100 Cal. 158, 169; 34 Pac. Rep. 667. In a proceeding to set apart a homestead to the widow and children of the decedent, title may be examined, but cannot be tried. That should be determined in some appropriate action brought for the purpose of settling the question. The question of the validity of adverse title claimed by contestants in the property sought to be set apart as a homestead is not proper to be litigated in such a proceeding: *Chalmers v. Stockton B. & L. Soc.*, 64 Cal. 77; 28 Pac. Rep. 59; *Estate of Burton*, 64 Cal. 428; 1 Pac. Rep. 702; *Estate of Groomes*, 94 Cal. 69, 72; 29 Pac. Rep. 487; *Estate of Kimberly*, 97 Cal. 281; 32 Pac. Rep. 234; *Dickey v. Gibson*, 121 Cal. 276; 53 Pac. Rep. 704. The court will not pass upon the validity of mortgages upon the homestead property: *Chalmers v. Stockton B. & L. Soc.*, 64 Cal. 77, 78; 28 Pac. Rep. 59. In the regular course of procedure, a homestead should be set apart at once upon the coming in of the inventory showing its existence, but, if not then done, it may be done at any subsequent time during administration. When thus set apart, it is properly withdrawn from administration, and the administrator has no further concern in it: *Estate of Still*, 117 Cal. 509; 49 Pac. Rep. 463, 465.

9. Appraisement. The statute of Washington does not seem to require appraisers, in a proceeding to set aside certain property of an intestate as a homestead to his widow, where there is no evidence that the property is worth more than seventeen hundred dollars: *Smith v. Ferry*, 43 Wash. 460; 86 Pac. Rep. 658, 659.

10. Property subject to. It is expressed in some of the older cases that no property could be set apart as a probate homestead which could not have been dedicated as such under the homestead act imme-

diately preceding the death of the deceased and during the continuance of the marriage of the spouses; and residence on the property was considered a prerequisite to the filing of a homestead thereon: Estate of Noah, 73 Cal. 590; 2 Am. St. Rep. 834; 15 Pac. Rep. 290; Estate of Ackerman, 80 Cal. 208; 13 Am. St. Rep. 116; 22 Pac. Rep. 141; Wickersham v. Comerford, 96 Cal. 433; 31 Pac. Rep. 358; Estate of Carriger, 107 Cal. 618; 40 Pac. Rep. 1032; In re McVay's Estate (Ida.), 93 Pac. Rep. 28, 31. But the expression, used in some of those cases, to the effect that a probate homestead can be set apart only on property which could have been dedicated under the homestead act, immediately preceding the death of the husband, must be construed to mean only that it must be property which in its character is homestead property,—that is, a dwelling-house, with the land on which it is situated, and which could have been occupied as a home,—and not that it must be land on which the husband actually resided at the time of his death. In the case of a probate homestead, the court creates the homestead, and it may be carved out of any property of the estate suitable for a homestead: Estate of Gallagher, 134 Cal. 96, 97; 66 Pac. Rep. 70; Estate of Lahiff, 86 Cal. 151; 24 Pac. Rep. 850. The code does not make it requisite that the deceased should have resided on the property at the time of his death, in order that the court may set apart a homestead for the use of the family, but authorizes the court to set apart any portion of the estate which is suitable for a homestead: Estate of Pohlmann, 2 Cal. App. 360, 362; 84 Pac. Rep. 354. If property is suitable and proper for a homestead, it may be set apart as a probate homestead, although it had previously been used exclusively for business purposes: Estate of Sharp, 78 Cal. 483, 485; 21 Pac. Rep. 182. It has been held that property consisting of a four-story brick building of the value of twenty-five thousand dollars, and which was erected and occupied exclusively for business purposes, could not be set apart as a probate homestead: Estate of Noah, 73 Cal. 590; 2 Am. St. Rep. 834; 15 Pac. Rep. 290. But if a building is the actual bona fide residence of a party, he may legally select it, and the land on which it is situated, as a homestead, even though, incidentally, a part thereof, no matter how large, may be used by him for other purposes than those of a family residence; and this is not in conflict with the equally well-settled doctrine, that the use of the property is an important element to be considered, and that where the building is occupied by the claimant primarily for other purposes than those of residence, the occupancy of a portion thereof by him and his family being for the purpose of conducting a business therein, and but incidental to the business, the property cannot be legally selected as a homestead. In no case has it been decided that where a portion of the building is dedicated to residence purposes, and is actually occupied by the claimant as the home of himself and his family, and such occupation is not merely incidental to the carrying

on of some business in other parts of the building, the building, and the land on which it is situated, cannot be legally selected as a homestead: *Estate of Levy*, 141 Cal. 646, 650; 99 Am. St. Rep. 92; 75 Pac. Rep. 301. It may be true that where two or more buildings suitable for dwelling-house purposes, belonging to the claimant, are situated upon the same parcel of land, and the claimant resides in one, he can legally select but one as a homestead. But cases of this kind are distinguishable from the case of a single building. Thus where an entire building is composed of three flats, one of the floors being actually occupied as the family home, the occupation being solely for the purpose of such a home, and not merely incidental to some other purpose, and the place so occupied is an integral part of the land on which the building stands, the fact that the building contains two other stories, so constructed that they are more adapted for renting purposes, being built with separate street entrances, cannot impair the right of the claimant to select as a homestead the building and all of the land on which it stands. While the floors of such a building may constitute separate dwelling-places, there is but one building incapable of division, and the form of the construction of the building is immaterial: *Estate of Levy*, 141 Cal. 646, 651; 99 Am. St. Rep. 92; 75 Pac. Rep. 301.

11. Property not subject to. A widow died testate, and left surviving her several children, none of whom were minors. By her will, the property was divided among her children, and the home place, on which she had resided many years, was given to a son, who did not reside therein, and who did not claim the same as a homestead. For some time before her death a married daughter, and also a granddaughter, lived with her, and after her death they continued to occupy the home place, claiming a homestead right therein. The language of the will, giving the property to the son, imported a complete transfer of ownership to him; but in another clause she recommended him to keep the home, so that if any of her children should become homeless it might be a refuge for them. On the claim of a homestead, it was held that the complete title to the land passed to the son, and that the daughter and granddaughter had no interest in the land to which the homestead right could attach: *Hartman v. Armstrong*, 59 Kan. 696; 54 Pac. Rep. 1046. Partnership property cannot be set apart by the probate court as a homestead to the widow of the deceased member of the firm: *Kingsley v. Kingsley*, 39 Cal. 665, 667. Nor can property held by the decedent as a tenant in common be set aside as a probate homestead: *Estate of Carriger*, 107 Cal. 618, 621; 40 Pac. Rep. 1032. Lands held in joint tenancy are not subject to a probate homestead: *Cameto v. Dupuy*, 47 Cal. 79, 80. Nor can such a homestead be set apart out of farming-land upon which there is no dwelling, and which had not been lawfully claimed as a homestead, and upon which no one

resided at the time of the husband's death, such premises not being suitable for a homestead. The fact that the deceased and his widow had, many years before the application for a homestead, resided on the lands involved, in a dwelling-house which stood thereon; that such dwelling-house and contents had been destroyed by fire; and that both husband and wife had resided elsewhere,—does not affect the legal question presented, where no other dwelling-house was ever built on the land, and where it was not in any way, after the fire, occupied as a home: *Estate of Gallagher*, 134 Cal. 96, 98; 66 Pac. Rep. 70. A probate homestead cannot be taken from tracts of land widely separated. If separate parcels of land are selected as a homestead, and such selection may perhaps be made, they must, at least, be so near together that they can be occupied and used for the purposes of a homestead; and in this respect there is no difference between a homestead set apart by the court, and one selected under the homestead law: *Estate of Armstrong*, 80 Cal. 71, 74; 22 Pac. Rep. 79. A homestead cannot be created out of land held by the applicant as a tenant in common with others; but where a widow has no title as tenant in common in community property, which, during the administration of the estate, is subject to a probate homestead, her infant son is entitled, upon application, to have a homestead therein set apart to him: *Estate of Still*, 117 Cal. 509, 516; 49 Pac. Rep. 463, 465.

12. **Widow's right.** In general. The power and duty of the court to set apart a probate homestead is not limited to a case where the widow has no other property. Her right to a probate homestead is an independent right, which she has in addition to any other right or property which she may have: *Estate of Firth*, 145 Cal. 236; 78 Pac. Rep. 643, 644. Although a widow marries after she has had a probate homestead set apart to her out of the estate of her deceased husband, she may claim a homestead out of the estate of her second husband: *Higgins v. Higgins*, 46 Cal. 259, 265. A widow to whom a probate homestead has been set aside may maintain an action to quiet title thereto: *McKinnie v. Shaffer*, 74 Cal. 614; 16 Pac. Rep. 509; or ejectment against the administrator of her deceased husband: *Moore v. Moore* (Cal.), 34 Pac. Rep. 90. The widow of a deceased partner is not entitled to a homestead out of the partnership property: *Kingsley v. Kingsley*, 39 Cal. 665, 667. If a widow marries before an order of the probate court setting apart to her a probate homestead, she loses, by her marriage, the right to such homestead: *Estate of Boland*, 43 Cal. 640. If a wife, supposing her husband to be dead, marries a second time, she cannot claim a probate homestead in the estate of her former husband, as his widow, until the second marriage has been annulled by a competent tribunal. The second marriage is valid until so annulled: *Estate of Harrington*, 140 Cal. 244; 98 Am. St. Rep. 51; 73 Pac. Rep. 1000. And a widow, who has never resided in the state, is

not entitled to a probate homestead, where the statute provides that all of the property exempt from execution, including the homestead, of a decedent, who leaves a widow residing in the state, shall be set apart for her use. "It is not questioned," said the court, "that the widow, in some cases, may be entitled to the homestead, although she was absent at the time of her husband's death, and although she may never have been upon the premises claimed, or within the borders of the state; but it is not so where she voluntarily ceased to be a member of her husband's family, and, by her own preference, made her home elsewhere." "The petitioner," said the court, "was never a member of the family or household of the deceased in this state, and this was, as a matter of fact, never her home or residence. Upon the contrary, she persistently, and in terms, refused to reside here or to make this her home": *Ullman v. Abbott*, 10 Wyo. 97; 67 Pac. Rep. 467, 470. After an order of sale of real estate to pay the expenses of the last sickness, etc., is made, the court cannot properly set apart the same real estate to the widow as a homestead, where the expenses were a proper charge against the estate, and could only be realized and paid from the proceeds of the sale of the property; and, under the circumstances, no error is made in refusing to set aside the homestead to the widow: *In re Thorn's Estate*, 24 Utah, 209; 67 Pac. Rep. 22.

13. Widow's right. How not affected. A widow is entitled to a probate homestead, although there are no minor children: *Estate of Armstrong*, 80 Cal. 71; 22 Pac. Rep. 79. She is also entitled to one, though she has other property: *Estate of Firth*, 145 Cal. 236; 78 Pac. Rep. 643. Although a widow grants all of her individual estate in a tract of land, which was community property, the grantee takes the property subject to have the land set apart as a homestead for the widow and minor children, and he cannot defeat the homestead right by asserting his right to take as a tenant in common. The right to have a probate homestead carved out of the estate is inherent, not in her alone, but in the children as well, and she can no more foreclose their right thereto, than she can their rights as heirs to the estate. To say that the widow may convey her right to such a homestead, and that the grantee takes as a tenant in common with the children, is, in effect, to say there shall be no homestead. The law consecrates the homestead to a specific purpose, and that purpose can only be accomplished by making it a home for the family: *Phelan v. Smith*, 100 Cal. 158, 165, 166; 34 Pac. Rep. 667. The widow and minor children do not lose their right to a probate homestead when, as administratrix, the mother procured an order of sale of the property, which was never sold under such order: *Estate of Still*, 117 Cal. 509, 514; 49 Pac. Rep. 463. The fact that the wife was separated from her husband before his death, but not permanently, where such separation was caused by his cruel and inhuman treatment, does not prevent

her from maintaining an application for a probate homestead out of the property of her deceased husband: *In re McVay's Estate* (Ida.), 93 Pac. Rep. 28, 31. And an agreement between husband and wife to live separate and apart, with an allowance to the wife, does not bar her right to a probate homestead from the estate of her deceased husband: *Eproson v. Wheat*, 53 Cal. 715. In this case, however, the agreement did not divide any property, but merely provided for separation, and that the husband should pay one hundred dollars per annum to the wife during his lifetime; the wife relinquished no right to property; and the setting apart to her of the homestead, after his death, is not in contravention of any expressed or implied term of the agreement. But it is different where both husband and wife enter into a valid agreement, which is binding upon the parties, and the wife thereby absolutely relinquishes her right to select as a homestead, during the husband's life, any part of the property allotted under such agreement to him as his separate estate, and the court has no authority to set apart to her any part of it, after his death, as a probate homestead: *Wickersham v. Comerford*, 96 Cal. 433, 439; 31 Pac. Rep. 358. A devise to the widow does not affect her right to a probate homestead: *Estate of Firth*, 145 Cal. 236, 238; 78 Pac. Rep. 643. A bequest by a husband to his wife, of money, in lieu of the homestead, does not bar her right to a probate homestead, where she has not accepted the bequest: *Eproson v. Wheat*, 53 Cal. 715, 719. The obtaining of a general judgment lien does not cut off the widow's right to select the land of a deceased husband as a probate homestead at any time before a sale thereof: *McMillan v. Mau*, 1 Wash. 26; 23 Pac. Rep. 441. For other cases concerning this topic, see subdivision 6, ante; and subdivision 25, post.

14. Widow's right. Limitations on. A widow's right to a probate homestead cannot be conveyed or waived by her, at least in such a way as to defeat the interests of the minor children: *Phelan v. Smith*, 100 Cal. 158; 34 Pac. Rep. 667. But a valid agreement between a husband and wife for a separation and division of the community property, whereby she relinquishes all right and claim to any part of the share allotted to the husband, deprives her of the right thereafter to select a homestead out of the husband's separate estate, either during his life or after his death: *Wickersham v. Comerford*, 96 Cal. 433, 439; 31 Pac. Rep. 358. And acquiescence for a long period as to certain property selected and set apart as a probate homestead is an estoppel from claiming other property, although there were liens afterward discovered on the lot first set aside: *Holden v. Pinney*, 6 Cal. 234, 236.

15. Limited homestead.

(1) **In general.** These words are used to designate a probate homestead set apart for "a limited period" to the surviving husband or

wife. The code of California provides that if no homestead is selected, designated, and recorded, the court must select, designate, and set apart, and cause to be recorded, a homestead for the use of the husband or wife, out of the common property, and if there be no common property, then out of the real estate belonging to the decedent. And there is another provision of said code, that if the probate homestead be selected out of the probate property of the deceased, it must be only for a limited period, and it may be done from any property suitable for the purpose. Section 1468 of the California Code of Civil Procedure, which provides that "if the property set apart be a homestead selected from the separate property of the deceased, the court can set it apart only for a limited period, to be designated in the order, and the title vests in the heirs of the deceased subject to such order," has been held to apply to probate homesteads selected and set apart by the court. The court has a discretion in selecting such a homestead from the separate property of the deceased, but it has no power to set it apart, except for a limited period: *Estate of Schmidt*, 94 Cal. 334, 340; 29 Pac. Rep. 714; *Estate of Lahiff*, 86 Cal. 151; 24 Pac. Rep. 850; *Estate of Firth*, 145 Cal. 236; 78 Pac. Rep. 643; *Lord v. Lord*, 65 Cal. 84, 87; 3 Pac. Rep. 96; *Neary v. Godfrey*, 102 Cal. 338, 341; 36 Pac. Rep. 655; *Estate of Burrows*, 136 Cal. 113, 115; 68 Pac. Rep. 488; *Warner v. Warner*, 144 Cal. 615, 618; 78 Pac. Rep. 24. The right of a survivor to have a probate homestead set apart to him or her out of the separate estate of the decedent for a limited period is not absolute, but rests in the sound discretion of the court, to be exercised in view of all the facts appearing before it: *Estate of Lamb*, 95 Cal. 397, 408; 29 Am. St. Rep. 121; 30 Pac. Rep. 568. The right given to the probate court, by the statute, to set apart a homestead "to the family of the decedent" for a limited period, is not controlled, nor in any way affected, by the wife's previous selection of a homestead out of her husband's separate estate without his assent: *Weinreich v. Hensley*, 121 Cal. 647, 653; 54 Pac. Rep. 254. The power given to the court to set apart a homestead that has been selected from the separate estate of the decedent is the same as its power to set aside a homestead when none has been selected in the lifetime of the decedent, and must be exercised in the same manner and under the same limitations and conditions. It is only in the case where there is no common property that the court may select, designate, and set apart a homestead out of the separate estate of the decedent: *Weinreich v. Hensley*, 121 Cal. 647, 654; 54 Pac. Rep. 254. The court has a discretion to exercise in determining whether it will set aside a homestead from the separate property of the decedent, as well as the particular property which it will set aside, and also in determining the time during which it shall be held as a homestead. Section 1468 of the California Code of Civil Procedure clearly indicates that the court must make an order designating the limited period for which the homestead is set apart, and until

such order is made there is no homestead: *Weinreich v. Hensley*, 121 Cal. 647, 655; 54 Pac. Rep. 254. The widow's right to a probate homestead is an independent right, which she has in addition to any other right or property which she may have, and the power of the court to set aside a homestead to her on separate property of the husband which has been devised to others is well established: *Estate of Huelsman*, 137 Cal. 275; 59 Pac. Rep. 776; *Estate of Firth*, 145 Cal. 236, 239; 78 Pac. Rep. 643; *Sulzberger v. Sulzberger*, 50 Cal. 385. Our law is liberal to a wife with respect to community property, — that is, property acquired after marriage, by the assumed joint efforts of both spouses, — yet, with regard to the husband's separate property, she has scarcely any right at all. He may devise it all to strangers, and leave her penniless. The old estate of dower is taken away. The right to have a homestead for a limited period given her by the probate court is about the only interest which she can assert in a deceased husband's property: *Estate of Firth*, 145 Cal. 236, 239; 78 Pac. Rep. 643. It is true that by section 1468 of the Code of Civil Procedure of California it is declared, as a general rule of property, that where a probate homestead is selected for a limited period from the separate property of the deceased "the title vests in the heirs of the deceased subject to such order"; but the question as to whom the remainder goes is not before the court on a simple petition for a homestead, and it is error, on such a petition, for the court to determine where the title of the property shall vest upon the termination of the homestead. The adjudication should be confined to the question as to whether the wife should have the homestead: *Estate of Firth*, 145 Cal. 236, 240; 78 Pac. Rep. 643. The limited period for which a probate homestead may be set apart to the widow out of the separate property of her husband certainly does not extend longer than during her life: *Hutchinson v. McNally*, 85 Cal. 619, 621; 24 Pac. Rep. 1071. Where the wife alone makes a declaration of homestead on separate property of the husband, it does not affect the title of the heirs to the property; but it vests in them subject to the right of the court to set the same aside for a limited period to the surviving wife and children: *Gruwell v. Seybolt*, 82 Cal. 7, 9; 22 Pac. Rep. 938. The court will not refuse to set apart a probate homestead to a widow from the separate property of her deceased husband, though a part of the property was conveyed by her after his death, by a quitclaim deed: *Estate of Moore*, 57 Cal. 437, 442.

(2) *Dissenting opinions.* Though a homestead was set aside to a surviving widow, and the order so setting it aside did not limit it to a life estate in the widow, but set it aside to her absolutely, this, though erroneous, is not void, where the time to appeal from the order had expired and no appeal had been taken, and the order, though erroneous, vests the title in fee in the widow: *Estate of Huelsman*, 127 Cal. 275, 276; 59 Pac. Rep. 776. While the cases of *Estate of Huelsman*, 127

Cal. 275, 276; 59 Pac. Rep. 776; Estate of Moore, 96 Cal. 522, 531; 31 Pac. Rep. 584; and Fealey v. Fealey, 104 Cal. 354, 360; 38 Pac. Rep. 49, support the proposition stated, in effect, that a title in fee may arise out of a voidable order, yet where an appeal is not taken, and the time for appeal has expired, it cannot be said that the case of Hanley v. Hanley, 114 Cal. 690, 693; 46 Pac. Rep. 736, supports such proposition, although it is cited upon the point in the case of Estate of Huelsman, 127 Cal. 275, 276; 59 Pac. Rep. 776. Justice Garoutte, in his specially concurring opinion in the last-named case, dissents from the decision on this point, and holds, as would seem to be the reasonable position, that such an order would be void, at least as to any interest beyond a life estate. He says further: "The statute is the measure of the court's power in such a case, and the statute says the property may be set aside for a 'limited period,' and this court has declared that such limited period may not exceed a term for life." Hence an order that purports to set aside separate property as a homestead in fee is void upon its face, to the extent, at least, of anything beyond a life estate: Estate of Huelsman, 127 Cal. 275, 278; 59 Pac. Rep. 776. The same exception to the ruling opinion in Estate of Moore, was taken in the concurring opinion of Justice Paterson, who held that where it is conceded that the property out of which the estate was carved was separate property of the deceased, the court had no power to set aside a homestead in fee; and that, the fact being admitted, and shown by the record, no appeal from the order was necessary: Estate of Moore, 96 Cal. 522, 532; 31 Pac. Rep. 584.

16. Surviving husband's right. A surviving husband may have set apart to him a probate homestead out of the separate property of the estate of his deceased wife in a proper case. But if, after a homestead has absolutely vested in the surviving husband, he sells it, he is not afterwards entitled to have another homestead set apart to him out of the separate property of his deceased wife: Estate of Ackerman, 80 Cal. 208, 210; 13 Am. St. Rep. 116; 22 Pac. Rep. 141. And while he could not have selected a homestead out of his wife's separate property without her consent when living, yet this does not affect the power of the court to set it apart to him, as such, for a limited period after her death; and the power of the court, in this regard, is not defeated by the action of the executor in negotiating a sale which is unconfirmed before the decree is made setting apart the homestead: Estate of Lahiff, 86 Cal. 151, 154; 24 Pac. Rep. 850. In such a case the homestead may be taken from any property suitable for the purpose, and if there is no minor child, it is for the surviving husband alone: Estate of Lahiff, 86 Cal. 151, 153; 24 Pac. Rep. 850. The surviving husband, upon the administration of the estate of his deceased wife, is entitled to have a probate homestead out of the community property set apart to him absolutely, where it was declared upon

community property, though he had conveyed it to a third person, who subsequently conveyed it to the wife, because the deed of the homestead premises made by the husband alone did not convey any title to the grantee, unless it appeared that it was in trust for the wife, and the grantee's deed to the wife conveyed nothing, even if the husband consented to or directed it: *Estate of Geary*, 146 Cal. 105, 110; 79 Pac. Rep. 855. But the surviving husband's right to have a homestead set off to him for a limited period out of the property of his deceased wife, as "the family of the decedent," is not an absolute right, but rests in the sound discretion of the court, to be exercised in view of all the facts appearing before it. The right of the surviving husband, in such a case, does not depend upon the fact that there are children or others who may share the use of the homestead: *Estate of Lamb*, 95 Cal. 397, 408; 29 Am. St. Rep. 121; 30 Pac. Rep. 568.

17. **Minor children's right.** The court has power to set apart a probate homestead for minor children who have no living parent, though they are temporarily absent from the state at the hearing of a petition to set apart such homestead for them: *Estate of Pohlmann*, 2 Cal. App. 360; 84 Pac. Rep. 354; *Estate of Still*, 117 Cal. 509; 49 Pac. Rep. 463; *Estate of Davis*, 69 Cal. 458; 10 Pac. Rep. 671. Premises which are suitable for a homestead may be set apart to them as a probate homestead, although the deceased never resided thereon: *Estate of Pohlmann*, 2 Cal. App. 360; 84 Pac. Rep. 354. Their guardian, or any friend of the minors, may petition for such homestead, because the court has authority to set it apart, either on petition or on its own motion: *Estate of Pohlmann*, 2 Cal. App. 360; 84 Pac. Rep. 354. Those who are not children in fact or by adoption are not entitled to have a homestead set apart to them out of the estate of a decedent: *Estate of Romero*, 75 Cal. 379, 381; 17 Pac. Rep. 434. A minor child loses its right to a probate homestead if application therefor is not made during the minority of the child: *Estate of Heywood*, 149 Cal. 129; 84 Pac. Rep. 834. A probate homestead set apart by the court from community property for the use of the surviving wife and minor children, belongs one half to the widow and the remainder, in equal shares, to the children; and the shares of the minors, the moment the probate homestead is set apart for the use of the widow and the minor children out of the community property, at once becomes their property, and their several interests therein become part of their respective estates, to be cared for by their several guardians, and during their minority the children's interests may be sold by their guardians, under proper proceedings for the sale thereof had in the matter of their estates: *Estate of Hamilton*, 120 Cal. 421, 428; 52 Pac. Rep. 708. The widow may mortgage her interest in a probate homestead, but such mortgage is subject to the rights of the children: *Hoppe v. Hoppe*, 104 Cal. 94, 101; 37 Pac. Rep. 894. If a widow dies, leaving a minor child, no arrears of a

family allowance due to the widow, or any claim in her favor against the estate, either as administratrix or otherwise, can preclude the setting apart of a probate homestead to such child, after the death of the widow, where no prior order had been made setting apart the homestead: *Estate of Still*, 117 Cal. 509, 513; 49 Pac. Rep. 463. The right of an infant applicant to a homestead out of the estate is independent of, and is not abridged by, the general debts of the estate, or the claims of the administratrix, however just; but neither the widow nor the other children can, individually or collectively, waive the right of an infant child to a homestead: *Estate of Still*, 117 Cal. 509; 49 Pac. Rep. 463, 465. The right to have a probate homestead carved out of the estate is in the nature of a charge upon the estate, from which the widow, under her right of succession, could no more discharge it, than she could free the estate from its liability for the debts of her deceased husband. The homestead is, in a proper case, a charge upon the estate of the deceased, created by the law, and is one of the burdens upon the community property, subject to which the surviving wife takes her interest therein equally with the other limitations prescribed by the Civil Code. Pending the administration of a decedent's estate, a minor child is entitled to his right of homestead, although other minors, by reaching their majority, without an application for a homestead having been made by them, or on their behalf, have lost their rights: *Estate of Still*, 117 Cal. 509; 49 Pac. Rep. 463, 465.

18. No money in lieu of homestead. There is no authority for the probate court to set apart money to the widow in lieu of a homestead, where there is no property belonging to the estate of the deceased husband out of which a homestead can be set apart to her: *Estate of Isaacs*, 30 Cal. 105, 113; *Estate of Noah*, 73 Cal. 590, 594; 2 Am. St. Rep. 834; 15 Pac. Rep. 290.

19. Order. Notice. Validity. An order setting apart a probate homestead out of community property, ex parte, and without notice, is valid: *Kearney v. Kearney*, 72 Cal. 591, 595; 15 Pac. Rep. 769; *Gaylord v. Place*, 98 Cal. 472, 480; 33 Pac. Rep. 484. The proceeding is in rem, and all parties interested are bound by it, without personal notice: *Hanley v. Hanley*, 114 Cal. 690, 694; 46 Pac. Rep. 736; *Kearney v. Kearney*, 72 Cal. 591, 593; 15 Pac. Rep. 769. Nor can heirs or devisees claim that they are deprived of their property without due process of law, because the court, having jurisdiction of the estate of the deceased before distribution, has determined, without notice, to set apart some or all of the estate absolutely to the widow, and that no appeal is allowed from the order. They take the estate subject to that very contingency, and they are not deprived of it in the sense intended by the constitutional inhibition when that contingency occurs: *Otto v. Long*, 144 Cal. 144, 148; 77 Pac. Rep. 885. A failure to file or to enter

the order setting apart a probate homestead to the widow, until after she had executed a mortgage thereon, which was foreclosed against her, did not affect the validity of her title, or of the mortgage: *Otto v. Long*, 144 Cal. 144, 146; 77 Pac. Rep. 885. Should it be conceded that the court erred in setting apart absolutely to a widow a homestead out of the separate property of her deceased husband, still it is only an error committed in the exercise of its jurisdiction, and the order is not void. Hence, if no appeal has ever been taken from the order, it is in force; and this being so, the court errs in distributing, as part of the estate, the land so set apart as a homestead. By force of the decree setting it aside, the title to the homestead is, as against the heirs of the deceased, in the parties named in that decree: *Estate of Moore*, 96 Cal. 522, 531; 32 Pac. Rep. 584. The term "family" is synonymous with and represents the surviving wife or husband and children, if any. Hence when the court, in its decree setting apart a probate homestead for the widow and children, uses the phrase, for the "use of the family" of the deceased, the term "family" expresses the meaning and is used in the sense of the statute, and is therefore fully explicit enough to describe the widow and children: *Phelan v. Smith*, 100 Cal. 159, 170; 34 Pac. Rep. 667. The provision in the statute for recording in the recorder's office a homestead out of the decedent's exempt property, for the use of the widow, is manifestly no more than a direction for the preservation of an additional record, to impart notice to third persons, and recording is not essential to the validity of a probate homestead: *Otto v. Long*, 144 Cal. 144; 77 Pac. Rep. 885, 886. In view of the very grave questions which have been raised in regard to the validity of homesteads set apart without notice, it has been suggested in California that probate judges adopt, as a suitable mode of proceeding, the mode found in sections 1474-1486 of the Code of Civil Procedure of that state, so far as applicable; that is, the admeasurement and appraisal of the homestead, the report, the setting of the day for hearing, and the notice as there prescribed: *Kearney v. Kearney*, 72 Cal. 591, 597; 15 Pac. Rep. 769.

20. Order. Effect of. The order setting apart a probate homestead to the widow relieves the property from administration, as it does not then constitute assets of the estate of the deceased, and excludes it from distribution; but it does not affect the title of the homestead: *Estate of Gilmore*, 81 Cal. 240, 243; 22 Pac. Rep. 655; *Dickey v. Gibson*, 121 Cal. 276, 278; 53 Pac. Rep. 704; *Estate of Still*, 117 Cal. 509, 513; 49 Pac. Rep. 463; *Saddlemire v. Stockton Sav. etc. Soc.*, 144 Cal. 650, 654; 79 Pac. Rep. 381; *Herrold v. Reen*, 58 Cal. 443; *Rich v. Tubbs*, 41 Cal. 34; *Schadt v. Heppe*, 45 Cal. 433; *Estate of Boland*, 43 Cal. 640, 642; *Estate of Hamilton*, 120 Cal. 421, 426; 52 Pac. Rep. 708. As the homestead, when set apart, ceases to be a part of the assets of the estate, neither the probate court nor the executor or administrator has

any further control over it after it has been so assigned: *Estate of Orr*, 29 Cal. 101, 104; *Schadt v. Heppe*, 45 Cal. 433, 437; *Estate of Burns*, 54 Cal. 223, 228. The title of the widow, acquired by survivorship, is not affected by a subsequent order of the court setting the property apart to her as a homestead: *Saddlemire v. Stockton Sav. etc. Soc.*, 144 Cal. 650, 653; 79 Pac. Rep. 381. The effect of the homestead order is to remove the premises set apart from the disposition of the will, and to vest title thereto, subject to the order, in the heirs of the deceased, as distinguished from the devisees: *Estate of Levy*, 141 Cal. 646, 648; 99 Am. St. Rep. 92; 75 Pac. Rep. 301. It is error for the probate court to set apart absolutely to the widow and minor children a probate homestead out of the estate of her deceased husband for the "use of the family," though he does not designate that it is for a "limited period." It is only where a homestead is set apart from the separate property of the deceased that it is required to be for a "limited period": *Phelan v. Smith*, 100 Cal. 158, 170; 34 Pac. Rep. 667. The widow, or widow and minor child or children, as the case may be, take the homestead subject to all valid liens existing against it at the time of the death of the husband, and free from all other claims: *Estate of Orr*, 29 Cal. 101, 104. The adjudication of claims against a probate homestead is for another forum than the probate court. Hence a decree of the probate court setting apart a probate homestead subject to the liens of mortgages existing against it is unauthorized: *Chalmers v. Stockton B. & L. Soc.*, 64 Cal. 77, 78; 28 Pac. Rep. 59. The statute requiring the court to set aside a probate homestead does not provide that it shall be set aside clear and free from all encumbrances; nor does it declare that the order setting apart the homestead shall destroy or in any manner impair any lien upon the property. It follows that the setting apart of a homestead does not destroy or impair the lien of a valid mortgage executed by the testator: *Estate of McCalley*, 50 Cal. 544, 546. Where the property exempt from execution is set apart to the widow and minor children, it is no longer under the control or supervision of the court: *Bell v. Bell*, 2 Cal. App. 338; 83 Pac. Rep. 814.

21. Order. Finality and conclusiveness. An order setting apart a homestead for the use of the survivor, or of the survivor and minor children, is appealable; but where the time for an appeal has elapsed, the order becomes final and conclusive upon all matters determined, or which might have been determined, upon the hearing of the matter. Such a judgment is founded in proceedings, not against persons as such, but against or upon the thing or subject-matter itself, whose status or condition is to be determined, and the judgment, when rendered, is a solemn declaration of the status of the thing, and ipso facto renders it what it declares it to be: *Kearney v. Kearney*, 72 Cal. 591; 15 Pac. Rep. 769; *Gruwell v. Seybolt*, 82 Cal. 7, 10; 22 Pac. Rep. 938; *Fealey v. Fealey*, 104 Cal. 354; 43 Am. St. Rep. 111;

38 Pac. Rep. 49; *Hanley v. Hanley*, 114 Cal. 690, 694; 46 Pac. Rep. 736. Thus if the question whether the property set apart to the widow as a homestead was or was not community property, is put in issue in the homestead proceedings, that question is concluded by the judgment: *Fealey v. Fealey*, 104 Cal. 354, 358, 359; 43 Am. St. Rep. 111; 38 Pac. Rep. 49. The proceeding being in rem, all persons interested are bound by it, without personal notice: *Hanley v. Hanley*, 114 Cal. 690, 694; 47 Pac. Rep. 736. And a decision, in a probate homestead proceeding, finding and declaring that the applicant is not the widow, is, where such issue of fact is vital to the controversy, and has been tried and determined against the widow, a final determination of fact, which is forever binding in every court between the parties to that litigation and their privies, and becomes the law of the case: *Estate of Harrington*, 147 Cal. 124; 81 Pac. Rep. 546.

22. Power to encumber or alienate. The right to a probate homestead is not the subject of sale. It is merely a right to have the court, as a part of the administration of the estate of a decedent, set apart property, and not until such action can it be said that any estate has become vested, either at law or in equity. The right to have a homestead set apart is therefore not estate, either at law or in equity. The estate of homestead is one of a peculiar nature. It is a provision, by the humanity of the law, for a residence for the owner and his family: *Estate of Moore*, 57 Cal. 437, 444; *Estate of Burton*, 63 Cal. 36, 38. The homestead is set apart "for the use of the family," and "belongs" to the widow and minor children; and is to remain as a homestead, without any power in either of the parties interested to destroy its quality as a homestead until after all of the children have arrived at majority. The homestead is a place of abode for the family, and no act of any member of the family can in any way prejudice the rights of the others to occupy it. It must remain intact until the youngest child has reached majority. Hence it is not competent for either of the other co-tenants to have a partition until that period has been reached: *Hoppe v. Hoppe*, 104 Cal. 94, 100; 37 Pac. Rep. 894. To hold that the widow, or any fewer than all of the parties in interest, can, by a conveyance, defeat the object of the law, would be a fraud upon the rights of those not joining in such conveyance: *Phelan v. Smith*, 100 Cal. 158, 166; 34 Pac. Rep. 667. But the widow, and the children upon attaining majority, may dispose of their respective interests in the homestead, and when all the children have reached majority, the mother and children may have a partition, or may sell the property freed from its homestead character: *Estate of Hamilton*, 120 Cal. 421, 428; 52 Pac. Rep. 708. And where the widow has the right to convey a homestead awarded to her by the probate court, her grantee

is vested with the fee, and the right to the use of water appurtenant thereto: *Bullerdick v. Hermesmeyer*, 32 Mont. 541; 81 Pac. Rep. 334, 337. A widow who has no interest in her deceased husband's estate whatever, except to have a probate homestead admeasured to her, and her right as a legatee under his will, is not estopped from claiming a probate homestead out of the land of her deceased husband notwithstanding she had made an agreement assigning her right to receive a legacy from the estate, and making such assignment more secure by conveying her right as heir in case the legacy should fail by the revocation of the will. The will not being revoked, there was not a conveyance by her of any interest in the estate, if her right to a probate homestead out of the estate was not a subject of conveyance: *Estate of Vance*, 100 Cal. 425, 428; 34 Pac. Rep. 1087.

23. Mortgage lien. Presentation of claims. If the widow takes a probate homestead, it is subject to a valid mortgage thereon, and the mortgagee, as before the death of the husband, may subject the land to the satisfaction of the mortgage debt, but his remedy is not in the probate court: *Estate of Orr*, 29 Cal. 101, 104. The probate court has no power to make a decree declaring that the homestead, as set apart, shall be subject to the liens of mortgages thereon: *Chalmers v. Stockton B. & L. Soc.*, 64 Cal. 77, 78; 28 Pac. Rep. 59. The court has no power to order the executors or administrators to discharge the lien of a mortgage upon a probate homestead, the title to which is vested in fee in the widow, if no claim for the debt has been presented against the estate. The mortgagee's recourse, in such a case, is limited to the mortgaged property: *Estate of Huelsman*, 127 Cal. 275, 277; 59 Pac. Rep. 776. The statute does make a provision for the extinguishment of liens and encumbrances upon a homestead which is selected and recorded prior to the death of one of the spouses, but that statute deals with homesteads declared during the lifetime of the spouses, and the law has not seen fit to make the same provision with respect to probate homesteads: *Estate of Huelsman*, 127 Cal. 275, 277; 59 Pac. Rep. 776. This case, however, holding that there is no provision for paying off liens on a probate homestead, which liens existed at the death of deceased, does not hold that the administrator cannot pay off liens on a probate homestead, which they, of their own volition, and contrary to the spirit and intent of the law, have placed there. If the court authorizes a mortgage upon an estate, including the probate homestead set apart therefrom for the minor children, when it would not have done so if the facts had been called to its attention, and the estate is solvent, land not included in the homestead should first be sold and the proceeds applied to the satisfaction of the mortgage debt, and if the proceeds are sufficient to pay off the mortgage, the homestead claimant is entitled to have the premises free from the encumbrance:

Estate of Shively, 145 Cal. 400, 403; 78 Pac. Rep. 869. It is the duty of the court, before the property of an estate is mortgaged, to set apart a homestead from the unencumbered real estate, regardless of the creditors of the estate; but if the court authorizes a portion of the property of a decedent's estate to be mortgaged before setting apart a probate homestead out of that portion thereof, and the proceeds of such mortgage are used in paying debts and expenses of administration, the administrators have the right to apply all of the proceeds of a sale of the mortgaged premises toward payment of the mortgage on the probate homestead. The estate being solvent, the administrators cannot be allowed to deprive the minor children of a homestead because the court authorized a mortgage upon it when it would not have done so if the facts had been called to its attention: Estate of Shively, 145 Cal. 400, 402, 403; 78 Pac. Rep. 869. The rule in California which requires a mortgage upon the homestead to be presented to the administrator as a claim is based upon the provisions of section 1475 of the Code of Civil Procedure of that state, but such rule does not apply at all to a probate homestead: Bank of Woodland v. Stephens, 144 Cal. 659, 663, 664; 79 Pac. Rep. 379. If the mortgage is upon a probate homestead set apart by the court for the use of the family, no presentation of the mortgage claim is required: Browne v. Sweet, 127 Cal. 332, 335; 59 Pac. Rep. 774; McGahey v. Forrest, 109 Cal. 63, 68; 41 Pac. Rep. 817; Schadt v. Heppe, 45 Cal. 433. Homesteads set apart by order of the court during the pendency of probate proceedings, which had no existence prior to the death of the decedent, are not included in section 1475 of the Code of Civil Procedure of California, but are left to the control of section 1500 of the same code, and a prior lien thereon may be enforced without the necessity of presenting the claim secured thereby to the executor or administrator, provided the holder is willing to expressly waive, in his complaint, and does waive, all recourse to any other property of the estate: McGahey v. Forrest, 109 Cal. 63, 69; 41 Pac. Rep. 817.

REFERENCES.

A mortgage placed upon property after it has been set aside as a probate homestead need not be presented against the estate. The claim, in such a case, is not against the estate: See 19, subd. (2), supra.

24. Value. It is settled that there is no specified limitation of value in the case of a probate homestead, the rule being, that the court may set apart such property as, regardless of its value, in view of the value and condition of the estate, may seem just and proper, and this is so, whether such homestead has been selected for a limited period or not: Estate of Levy, 141 Cal. 646, 652; 99 Am. St. Rep. 92; 75 Pac. Rep. 301; Estate of Adams, 128 Cal. 380; 57 Pac. Rep. 569; 60 Pac. Rep. 965; Estate of Walkerly, 81 Cal. 579; 22 Pac. Rep.

888; Estate of Smith, 99 Cal. 449; 34 Pac. Rep. 77; Estate of Schmidt, 94 Cal. 334, 337; 29 Pac. Rep. 714. But it has been held that where an estate is solvent the court must take into account the rights of creditors; and as the legislature has fixed the sum of five thousand dollars as the limit in value which the debtor may claim for his homestead against the demand of his creditors, "a wise exercise of judicial discretion would limit the homestead to be so set apart to this amount in value in the case of an insolvent estate, where a homestead of this value can be divided from the remainder of the estate, or where the property sought to be set apart is capable of such admeasurement": Estate of Adams, 128 Cal. 380, 384; 57 Pac. Rep. 569; 60 Pac. Rep. 965. While the rights of creditors are not to be disregarded in setting apart a homestead, they "are subordinate to the right of the family to a home": Estate of Adams, 128 Cal. 380, 383; 57 Pac. Rep. 569; 60 Pac. Rep. 965; and if, in order to set apart such a home, it is necessary to take the entire estate of the deceased, the creditors' rights must yield: *Keyes v. Cyrus*, 100 Cal. 322, 326; 38 Am. St. Rep. 296; 34 Pac. Rep. 722. Heirs, devisees, and legatees occupy, at best, a no more advantageous position than creditors: *Sulzberger v. Sulzberger*, 50 Cal. 385; Estate of Davis, 69 Cal. 458; 10 Pac. Rep. 671; Estate of Lahiff, 86 Cal. 151; 24 Pac. Rep. 850. While they have rights which should be considered, the family is first entitled to a home, if there is property capable of being set apart as such; and where the only premises suitable for homestead purposes are indivisible, and no homestead can be given to the family, unless the whole of such premises is given, the fact that such premises are valued at seventeen thousand five hundred dollars, and constitute in value nearly one half of the estate, does not impair the homestead right, in the absence of a statutory limitation as to value: Estate of Levy, 141 Cal. 646, 652; 99 Am. St. Rep. 92; 75 Pac. Rep. 301. If the only property suitable for homestead purposes is incapable of division, and if it is necessary to set aside the whole of such property, the court may properly set it apart for the most limited period, — the period of administration of the estate, — and may further provide that the family allowance theretofore granted shall cease and determine. The rights of all others interested in the estate will thus be preserved, so far as practicable: Estate of Levy, 141 Cal. 646, 653; 99 Am. St. Rep. 92; 75 Pac. Rep. 301. Although the code provides a machinery by which creditors may have the homestead declared sold, and the proceeds in excess of five thousand dollars applied to the payment of debts, this does not affect the "creation" of a homestead upon land in excess of five thousand dollars, upon a contest between the widow and the heirs at law of the decedent. Such provision has nothing to do with the "creation" of a homestead, even when it is established by the parties under the Civil Code; and there are no existing provisions of the code which restrain the court from select-

ing premises as a homestead because they exceed in value five thousand dollars. There were such provisions in sections 1480-1484 of the Code of Civil Procedure of California; but those sections were repealed in 1874: *Estate of Smith*, 99 Cal. 449; 34 Pac. Rep. 77. When a homestead estate is decreed by the county court in a homestead which exceeds five thousand dollars in value, and is indivisible, the decree should show the amount of the excess in value, and the fact that the property is indivisible: *Calmer v. Calmer* (N. D.), 106 N. W. Rep. 684. In the state of Washington, a widow cannot claim for herself and her minor children any permanent homestead in premises which were the separate property of the deceased husband at the time of his death. The realty vests in the heirs at law of the decedent, subject to the lawful rights and claims of creditors and all parties interested in the regular course of administration. The law does not prevail in that state, that, no matter how valuable the homestead of the decedent may be, it must go to his widow or children, to the exclusion of the rights of his creditors, as this would have the effect of enlarging the homestead rights of the widow and children by reason of the death of the husband: *Lloyd v. Lloyd*, 34 Wash. 84; 74 Pac. Rep. 1061.

25. **Waiver, loss, and determination of right.** The acceptance, by a widow, of letters testamentary, and the fact that she was, by the will, constituted one of the residuary legatees, does not tend to show that she waived her right to a homestead as prescribed by the statute: *Sulzberger v. Sulzberger*, 50 Cal. 385, 388; *Estate of Firth*, 145 Cal. 236, 239; 78 Pac. Rep. 643. Nor does she waive her right to a probate homestead by qualifying as executrix under the will: *Estate of Firth*, 145 Cal. 236, 239; 78 Pac. Rep. 643. The homestead, when set apart, is for the benefit of the widow and children, and the widow cannot individually, by any act of her own, waive the rights of the children: *Phelan v. Smith*, 100 Cal. 158, 165; 34 Pac. Rep. 667. When minors have reached their majority without an application for a homestead having been made for or on their behalf, their rights are lost; but neither the widow, nor the other children, can, individually or collectively, waive the right of a child who has not attained majority to a probate homestead: *Estate of Still*, 117 Cal. 509; 49 Pac. Rep. 463, 465. If a surviving husband, who has had a homestead set apart to him, afterwards sells the same, he is not entitled to another homestead out of the separate property of his deceased wife: *Estate of Ackerman*, 80 Cal. 208; 13 Am. St. Rep. 116; 22 Pac. Rep. 141. So if a widow, who is entitled to a homestead, marries before an order of the court setting it apart to her, she loses, by such marriage, her right to the homestead: *Estate of Boland*, 43 Cal. 640, 642; *Estate of Still*, 117 Cal. 509; 49 Pac. Rep. 463. The homestead is set apart "for the use of the family," and "belongs" to

the widow and minor children; and is to remain as a homestead, without any power in either of the parties interested to destroy its quality as a homestead, until after all of the children have arrived at majority. The homestead is the place of abode for the family, and no act of any member of the family can in any way prejudice the rights of the others to occupy it. It must remain intact until the youngest child has reached its majority. Hence it is not competent for either of the other co-tenants to have a partition until that period has been reached: *Hoppe v. Hoppe*, 104 Cal. 94, 100; 37 Pac. Rep. 894; *Estate of Hamilton*, 120 Cal. 421, 427; 52 Pac. Rep. 708. When the children arrive at majority, their interest in the homestead, as a homestead, ceases, for they no longer constitute a part of the family, and whatever rights they thereafter have in the land covered by the homestead are in the nature of those of remaindermen or reversioners: *Moore v. Hoffman*, 125 Cal. 90, 93; 73 Am. St. Rep. 27; 57 Pac. Rep. 769. The widow and minor children do not lose their right to a homestead by the widow's act, as administratrix, in procuring an order of sale of the property, which property was never sold under such order: *Estate of Still*, 117 Cal. 509; 49 Pac. Rep. 463, 465. It is a governing principle that the homestead right continues in favor of any one of the family for whom it was created, as long as he or she asserts it, and remains in a position to assert it; and this principle applies, either where the rights of the minor children are being asserted as against the act of the widow, or where the rights of the widow are being asserted as against the acts of the children. When the children arrive at majority, their interest in the homestead, as a homestead, ceases, and the widow, being the only homestead claimant left, could, of course, dispose of her interest in the land, because there would then be no other homestead claimant to contest her right to do so. But the grantee of a child cannot disturb the widow's possession until her homestead right has been extinguished, either by her own act or by operation of law, and it cannot be extinguished by the act of any one of the children, either before or after their majority: *Moore v. Hoffman*, 125 Cal. 90, 93; 73 Am. St. Rep. 27; 57 Pac. Rep. 769.

26. Vesting of title. If no homestead was selected, designated, or recorded in the lifetime of the husband, a decree setting apart a homestead for the use of the family of the decedent vests the title to the homestead in the widow and minor children: *Hoppe v. Hoppe*, 104 Cal. 94, 100; 37 Pac. Rep. 894; *Fealey v. Fealey*, 104 Cal. 354, 360; 43 Am. St. Rep. 111; 38 Pac. Rep. 49; *Estate of Gilmore*, 81 Cal. 240, 243; 22 Pac. Rep. 655; but upon the death of a spouse, the community property upon which a homestead exists vests absolutely in the survivor: *Sheehy v. Miles*, 93 Cal. 288, 295; 28 Pac. Rep. 1046; *Dickey v. Gibson*, 113 Cal. 26, 30; 54 Am. St. Rep. 321; 45 Pac. Rep. 15;

Vandall v. Teague, 142 Cal. 471, 474; 76 Pac. Rep. 35; *Saddlemire v. Stockton Sav. etc. Soc.*, 144 Cal. 650, 653; 79 Pac. Rep. 381; and the probate court has no power to make a decree setting apart the property for the "use of the family"; and the effect of such a decree, if made, no matter how broad its language, is, simply, to take the property out of administration: *Sheehy v. Miles*, 93 Cal. 288, 295; 28 Pac. Rep. 1046. If the homestead, however, was selected while the husband and wife were both alive, out of the separate property of either, it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the court to assign it for a limited period to the family of the decedent: *Mawson v. Mawson*, 50 Cal. 539, 543; *Gruwell v. Seybolt*, 82 Cal. 7; 22 Pac. Rep. 938; *Estate of Moore*, 96 Cal. 522; 32 Pac. Rep. 584; *Hardwick v. Black*, 128 Cal. 672; 61 Pac. Rep. 381; *Estate of Fath*, 132 Cal. 609; 64 Pac. Rep. 995. If a probate homestead is set apart to the widow out of community property, and there are no minor children, the title thereto vests absolutely in her: *Otto v. Long*, 144 Cal. 144, 146; 77 Pac. Rep. 885. If the homestead is set apart by the probate court out of the separate estate of the deceased husband, it belongs to the widow and minor children, if there are any: *Estate of Schmidt*, 94 Cal. 334, 338; 29 Pac. Rep. 714; but if there is no minor child or children, one half vests in the widow and the other half in the child, or in the children in equal proportion: *Hardwick v. Black*, 128 Cal. 672, 674; 61 Pac. Rep. 381, approving *Mawson v. Mawson*, 50 Cal. 539, 542, a case which the court said had not only stood unquestioned for twenty-five years, but had been frequently alluded to in subsequent decisions of the supreme court,—sometimes with approval, and never otherwise. Under a statute prescribing that the homestead may be set apart for a limited period, the period cannot be greater than for life, and a decree setting aside a homestead for a specified term of years is on condition that the party live so long, and upon death before the expiration of such period, the homestead vests in the party from whose property it was taken: *Neary v. Godfrey*, 102 Cal. 338, 341; 36 Pac. Rep. 655.

27. Vacating order. Collateral attack. Before making an order setting apart a probate homestead, it is necessary for the court to determine that the facts exist which authorize it to do so, and this determination, when made, cannot be inquired into collaterally: *Otto v. Long*, 144 Cal. 144, 147; 77 Pac. Rep. 885; *Saddlemire v. Stockton Sav. etc. Soc.*, 144 Cal. 650, 655; 79 Pac. Rep. 381. But if an application is made within six months, to have an order setting apart a homestead vacated on the ground of "inadvertence, surprise, or excusable neglect," such application, upon a proper showing, will be granted: *Levy v. Superior Court*, 139 Cal. 590, 591; 73 Pac. Rep. 417; *Cahill v. Superior Court*, 145 Cal. 42, 43; 78 Pac. Rep. 467. A creditor

of an estate, whose claim against it has not been allowed, is entitled to bring an action in equity to set aside and annul an order setting apart a homestead to the widow of the deceased, upon the ground that it was procured by fraud; and where the complaint charges a wilful suppression of a material truth, and a suggestion of a falsehood by defendant, with intent to deceive and mislead the court, to the prejudice of the creditors of the estate, and avers that such suggestion had the intended effect, to the injury of plaintiff, who was one of such creditors, it charges a fraud: *Wickersham v. Comerford*, 96 Cal. 433, 435, 439; 31 Pac. Rep. 358. But a judgment or decree of a court of competent jurisdiction can be set aside in an independent equitable proceeding for fraud only where the fraud alleged was extrinsic or collateral to the matter which was tried and determined by such court. Wilful and false representations made to the court, in testimony, that the premises involved were community property, and that a declaration of homestead had been filed on the premises while the widow and her husband were actually residing thereon, is not a fraud "extrinsic or collateral" to the matter tried and determined by the court. A decree obtained by perjured testimony is not such fraud: *Hanley v. Hanley*, 114 Cal. 690, 693; 46 Pac. Rep. 736; *Fealey v. Fealey*, 104 Cal. 354; 43 Am. St. Rep. 111; 38 Pac. Rep. 49; *Gruwell v. Seybolt*, 82 Cal. 7, 10; 22 Pac. Rep. 938. And where the heirs had notice of the application for a homestead, and the estate has been fully administered, their complaint, in an action to set aside the decree, which fails to show any fraud or device which would prevent proof of the character of the property from which the homestead was selected, does not show a cause of action: *Gruwell v. Seybolt*, 82 Cal. 7, 10; 22 Pac. Rep. 938.

28. Exemption of homestead. The homestead is exempt from execution or forced sale, whether selected and recorded by the voluntary act of the parties or by an order of the probate court: *Keyes v. Cyrus*, 100 Cal. 322, 327; 38 Am. St. Rep. 296; 34 Pac. Rep. 722; *Estate of Hamilton*, 120 Cal. 421, 429; 52 Pac. Rep. 708; *Tyrrell v. Baldwin*, 78 Cal. 470, 475; 21 Pac. Rep. 116. Where statutes exist exempting a limited estate for the use of the widow and minor children, and from levy and forced sale under legal process for debts against the decedent, it cannot be said that the legislature intended that the expenses of the last sickness, funeral charges, and expense of administration should not be a proper charge against such exempted property: *In re Thorn's Estate*, 24 Utah, 209; 67 Pac. Rep. 22.

29. Appeal. The order setting apart a probate homestead is appealable, but the right to have it reviewed for error is lost by a failure to appeal therefrom: *Gruwell v. Seybolt*, 82 Cal. 7, 10; 22 Pac. Rep. 938. But, while such order is appealable, yet it cannot be reviewed

on appeal from a subsequent order: *Estate of Burns*, 54 Cal. 223, 228. The code requires such appeal to be taken within sixty days: *Estate of Burns*, 54 Cal. 223, 228; *Estate of Burton*, 64 Cal. 428; 1 Pac. Rep. 702. And an appeal from a decree denying a widow's application to have a homestead set aside to her out of her deceased husband's estate must be taken within the same time after the decree or judgment is entered: *Estate of Harland*, 64 Cal. 379; 1 Pac. Rep. 159. Both the executor under the will and the devisees and legatees under the will are "parties aggrieved," within the meaning of those words as used in the law relative to the right of appeal. They are therefore entitled to appeal from an order setting apart from the property of the estate of a decedent a homestead for the use of the surviving wife for and during the period of administration of the estate and until its final distribution: *Estate of Levy*, 141 Cal. 646, 647; 99 Am. St. Rep. 92; 75 Pac. Rep. 301. The devisees in such a case are specially aggrieved by the order, for the reason that, under the settled law in this state, the effect of the homestead order is to remove the premises set apart from the disposition of the will, and to vest title thereto, subject to the order in the "heirs" of the deceased as distinguished from the devisees: *Estate of Levy*, 141 Cal. 646, 647; 99 Am. St. Rep. 92; 75 Pac. Rep. 301. If the petition for the setting aside of a probate homestead to the widow is denied, findings should be made, if requested: *Estate of Burton*, 63 Cal. 36, 37; but not upon immaterial issues: *Estate of Adams*, 128 Cal. 380, 388; 57 Pac. Rep. 569; 60 Pac. Rep. 965. The correctness of the order setting apart a probate homestead out of the separate estate of the decedent is to be determined upon a consideration of the character of the estate at the time of making the application or of the hearing thereon. No benefit that the estate may have derived from the care and provision of the executrix, or any extravagance in the management of the estate, or the amount previously allowed for the support of the family, is an element to be considered in determining the right to have a homestead set apart: *Estate of Adams*, 128 Cal. 380, 384; 57 Pac. Rep. 569; 60 Pac. Rep. 965. An objection not made in proceedings to set apart a homestead cannot be heard for the first time on appeal: *Estate of Pohlmann*, 2 Cal. App. 360; 84 Pac. Rep. 354, 355. In the absence of a statement on appeal from an order setting aside a homestead to the widow and minor children, only errors appearing on the face of the order are properly before the appellate court for determination: *In re Quinn's Estate*, 27 Nev. 156; 74 Pac. Rep. 5. The action of the trial court will not be disturbed on appeal in such cases, unless abuse of discretion is shown: *Estate of Schmidt*, 94 Cal. 334; 29 Pac. Rep. 714; *Estate of Firth*, 145 Cal. 236; 78 Pac. Rep. 643.

CHAPTER III.

ALIENATION OF HOMESTEADS OF INSANE PERSONS.

- § 421. Petition for sale or mortgage of.
- § 422. Form. Petition for leave to convey or mortgage homestead of insane spouse.
- § 423. Notice of application for order.
- § 424. When order may be made, and its effect.
- § 425. Form. Order permitting spouse of insane person to sell or mortgage homestead.
- § 426. Form. Grant of homestead by spouse of insane person.
- § 427. Form. Mortgage of homestead by spouse of insane person.

HOMESTEADS OF INSANE PERSONS.

In general.

§ 421. **Petition for sale or mortgage of.** In case of a homestead, if either the husband or wife becomes hopelessly insane, the husband or wife not insane may petition the superior court of the county in which such homestead is situated for an order permitting the husband or wife, not insane, to sell and convey, or mortgage, such homestead to raise moneys to satisfy a lien or charge thereon, or to provide for the support and care either of the sane or insane spouse, or of their minor children. Such petition must be subscribed and sworn to by the applicant, setting forth the name and age of the insane husband or wife; the number, age, and sex of the children, if any, of such insane husband or wife; a description of the premises constituting the homestead; the value of the same; the county in which it is situated; and such facts, in addition to that of the insanity of the husband or wife, relating to the circumstances and necessities of the applicant and his or her family, as he or she may rely upon in support of the petition. **Kerr's Cyc. Civ. Code, § 1269a.**

Note. A sale of a homestead in accordance with the provisions of this chapter does not deprive the insane spouse of a vested right to property without his consent and without due process of law: *Rider v. Regan*, 114 Cal. 667, 671; 46 Pac. Rep. 820.

§ 422. Form. Petition for leave to convey or mortgage homestead of insane spouse.

[Title of court.]

[Title of proceeding.] { No. ____¹ Dept. No. ____
[Title of form.] }

To the Honorable the ____ Court of the County of ____.²

The petition of ____ respectfully shows:

That he is the husband of ____,³ who has become and is hopelessly insane;

That petitioner and his said insane wife⁴ are the owners of a homestead interest in the land hereinafter described; that said land was selected, declared, and recorded as a homestead from the community property of said spouses⁵ by declaration of homestead recorded in the office of the county recorder of the county of ____⁶ on or about the ____ day of ____, 19__, in volume ____ of declarations of homesteads, at page ____ thereof;

That the name of the insane wife⁷ of petitioner is ____, and her age is ____ years;

That the children of said insane spouse are, in number, age, and sex, as follows: ____;

That the land constituting said homestead is situated in the county⁸ of ____, state of ____, and is described as follows: ____;

That the value of said premises is ____;⁹

That your petitioner hereby asks for an order authorizing and permitting him to sell and convey¹⁰ the above-described premises for the reason that his said wife is hopelessly insane, as above stated, and, in addition thereto, ____.¹¹

Wherefore petitioner prays that an order be made permitting him to sell and convey¹² the above-described land, and for such other order as may be meet.

____, Attorney for Petitioner. ____ , Petitioner.

Subscribed and sworn to by the petitioner, before me, this ____ day of ____, 19__.

____, Notary Public, etc.¹³

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Or, wife of, giving name of insane spouse. 4. Or, husband. 5. Or,

from the separate property of the spouse recording the homestead, etc. 6. Or, city and county. 7. Or, husband. 8. Or, city and county. 9. Give value. 10. Or, mortgage. 11. Give any additional facts relating to the necessities or circumstances of the applicant or family, or the condition of the property, or other reasons for the order. 12. Or, mortgage. 13. Or other officer taking the oath. **Kerr's Cal. Cyc. Civ. Code**, § 1269b, prescribes the time and manner of giving notice in this proceeding, but does not direct who shall give the notice, nor make any suggestion as to its form.

§ 423. Notice of application for order. Notice of the application for such order must be given by publication of the same, in a newspaper published in the county in which such homestead is situated, if there is a newspaper published therein, once each week for three successive weeks, prior to the hearing of such application, and a copy of such notice must also be personally served upon the nearest male relative of such insane husband or wife, resident in this state, at least three weeks prior to such application; and in case there is no such male relative known to the applicant, a copy of such notice must be so served upon the public administrator of the county in which such homestead is situated; and in such case it is the duty of such public administrator to appear and represent the interests of such insane person. For all such services rendered by the public administrator he must be allowed a reasonable fee, to be fixed by the court, and the same must be taxed as costs against the person making application for the order herein provided for. **Kerr's Cyc. Civ. Code**, § 1269b.

§ 424. When order may be made, and its effect. If it appears to the court that such husband or wife is hopelessly insane, the court may make an order permitting the husband or wife, not insane, to sell and convey, or mortgage, such homestead, and thereafter any sale, conveyance, or mortgage made in pursuance of such order is as valid and effectual as if the property affected thereby was the absolute property of the person making such sale, conveyance, or mortgage. If a sale is ordered it must be reported to and confirmed by

the court. Such husband or wife must, before executing any mortgage or conveyance, give a bond, to be approved by the judge of the court, in double the amount of the mortgage, or double the value of the property to be sold, conditioned to account for the proceeds of the mortgage or sale and to apply such proceeds only as the court may direct. **Kerr's Cyc. Civ. Code**, § 1269c.

§ 425. Form. Order permitting spouse of insane person to sell or mortgage homestead.

[Title of court.]

[Title of proceeding.]

{ No. ____¹ Dept. No. ____
[Title of form.]

The petition of ____ for leave to convey² the homestead of said petitioner and his³ insane spouse coming on regularly for hearing, after due notice thereof given as required by law, and it appearing to the court from the evidence adduced that said ____⁴ the spouse of said petitioner, is hopelessly insane, and that good cause exists for the making hereof, —

It is hereby ordered, That said petitioner, ____, be, and he is hereby, permitted and authorized to sell and convey⁵ the homestead property of said spouses, described in the petition herein, which had been selected and recorded as a homestead by instrument recorded about the ____ day of ____, 19__, in volume ____ of homesteads, at page ____, in the office of the county recorder of the county of ____,⁶ and which is described as follows, to wit: ____.⁷

Dated ____, 19__. ____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2. Or, mortgage. 3. Or, her. 4. Name of insane spouse. 5. Or, mortgage. 6. Or, city and county. 7. Give description. If a sale is ordered, it must be reported to and confirmed by the court, for which proceedings see **Kerr's Cal. Cyc. Code Civ. Proc.**, §§ 1552, 1554, and 1575; and, before executing either mortgage or conveyance, the party executing the same must give bond, to be approved by the judge, in double the amount of the mortgage or double the value of the property, conditioned to account for, and to apply, the proceeds only as the court may direct; but no party is designated in whose favor the bond must be drawn.

§ 426. Form. Grant of homestead by spouse of insane person.

This grant, Made this ____ day of ____, 19__, between ____, husband ¹ of ____, the grantor, and ____, the grantee herein, witnesseth:

That, whereas the said ____, wife ² of said grantor, is hopelessly insane, and the real estate herein described has been selected and recorded as a homestead; and whereas, after proceedings duly had in said matter, an order was duly made and entered in and by the ____ court of the county ³ of ____, on or about the ____ day of ____, 19__, permitting said grantor to sell and convey said real estate, under and in pursuance of which order said grantor has sold said real estate to said grantee, —

Now, therefore, in consideration of the premises, and of the sum of ____ dollars, receipt of which is hereby acknowledged, said grantor hereby grants to said grantee all that certain lot and parcel of land situate in the county ⁴ of ____, state of ____, and described as follows: ____.⁵

In witness whereof, The said grantor hereunto sets his hand and seal the day and year first above written.

____ [Seal]

Signed, sealed, and delivered in presence of ____.

Explanatory notes. 1. Or, wife. 2. Or, husband. 3, 4. Or, city and county. 5. Give description.

§ 427. Form. Mortgage of homestead by spouse of insane person.

This mortgage, Made this ____ day of ____, 19__, between ____, husband ¹ of ____, mortgagor, and ____, mortgagee, herein, witnesseth:

That, whereas the said ____, wife ² of said mortgagor, is hopelessly insane, and the real estate hereinafter described has been selected and recorded as a homestead; and whereas, after proceedings duly had in said matter, an order was duly made and entered in and by the ____ court of the county ³ of ____, on or about the ____ day of ____, 19__, permitting said mortgagor to mortgage said real estate, —

Now, therefore, in pursuance of the aforesaid order, said mortgagor mortgages to the mortgagee all that certain real estate situate in the county⁴ of —, state of —, and described as follows: —,⁵ as security for the payment to said mortgagee of a certain promissory note in the words and figures following: —.⁶

In witness whereof, Said mortgagor has hereunto set his hand and seal the day and year first above written.

— [Seal]

Signed, sealed, and delivered in presence of —.

Explanatory notes. 1. Or, wife. 2. Or, husband. 3, 4. Or, city and county. 5. Give description of land. 6. Give copy of promissory note. Insert any other covenants desired, as to insurance, etc.

HOMESTEADS OF INSANE PERSONS.

In general.

A sale of the homestead, by order of court, where one of the spouses has become insane, and where the petition for such sale failed to allege the value of the homestead to be sold, is void: *Jones v. Fallvella*, 126 Cal. 24; 58 Pac. Rep. 311, 312. The effect of the insanity of one of the spouses is not to deprive him or her of homestead benefits, or to give to the other spouse any greater interest therein or authority to encumber it than is expressly provided by law: *Security etc. Co. v. Kauffman*, 108 Cal. 214, 220; 41 Pac. Rep. 467. The joining of the guardian of an insane spouse, under an order of the probate court, with the sane spouse, in a mortgage on the homestead, is not such joint consent as is contemplated by the constitutional provision relating to encumbering or conveying the homestead. Such a mortgage is void: *Locke v. Redmond*, 59 Kan. 773; 52 Pac. Rep. 97; 6 Kan. App. 76; 49 Pac. Rep. 670. The mere fact that a wife is involuntarily absent from premises which she had, with her husband, occupied as a homestead with their minor children, as where she has been committed to an asylum for the insane, does not wrest from her her homestead rights for herself and family: *Curry v. Wilson* (Wash.), 87 Pac. Rep. 1065, 1067.

REFERENCES.

As to alienation of homesteads of insane persons, see *Henning's General Laws*, p. 514. Abandonment of homestead by insane spouse: See note 3 L. R. A. (N. S.) 515.

CHAPTER IV.

DOWER.

- § 428. When dower may be assigned by county court.
- § 429. Warrant for assignment of dower.
- § 430. Oath of commissioners and return of proceedings.
- § 431. Form. Petition for admeasurement of dower.
- § 432. Form. Order for notice of hearing on petition for dower.
- § 433. Form. Order appointing guardian for minors.
- § 434. Form. Notice of hearing on petition for dower.
- § 435. Form. Order for admeasurement of dower.
- § 436. Form. Warrant to commissioners to admeasure dower.
- § 437. Form. Oath of commissioners to admeasure dower.
- § 438. Form. Return of commissioners to admeasure dower.
- § 439. Form. Order confirming report of commissioners to admeasure dower.

DOWER AND CURTESY.

- | | |
|----------------------------------|-----------------------------|
| 1. Dower. In general. | (2) In Utah. |
| 2. Dower. Power to modify right. | (3) In Montana. |
| 3. Dower. Law governing. | (4) In Oregon. |
| 4. Dower. Rights of dowress. | (5) In Hawaii. |
| (1) In Kansas. | 5. Curtesy. Relinquishment. |

§ 428. When dower may be assigned by county court. When a widow is entitled to dower in the lands of which her husband died seised, and her right to dower is not disputed by the heirs or devisees, or any person claiming under them or either of them, it may be assigned to her in whatever counties the lands may lie, by the county court of the county in which the estate of the husband is settled, upon application of the widow or any other person interested in the lands; notice of which application shall be given to such heirs, devisees, or other persons, in such manner as the county court shall direct. Bellinger and Cotton's Ann. Codes and Stats., § 5522.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 37, p. 363.

Montana. Code Civ. Proc., secs. 3070-3075.

New Mexico. Comp. Laws 1897, sec. 2051.

§ 429. **Warrant for assignment of dower.** For the purpose of assigning such dower, the county court shall direct a warrant to issue to three discreet and disinterested persons, authorizing and requiring them to set off the dower by metes and bounds, when it can be done without injury to the whole estate. Bellinger and Cotton's Ann. Codes and Stats., § 5523.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 38, p. 363.

Montana. Code Civ. Proc., sec. 3076.

New Mexico. Comp. Laws 1897, sec. 2051.

§ 430. **Oath of commissioners and return of proceedings.** The commissioners shall be sworn by a judge of any court of record or a justice of the peace faithfully to discharge their duties, and shall, as soon as may be, set off the dower according to the command of such warrant, and make return of their doings, with an account of their charges and expenses, in writing, to the county court; and the same being accepted and recorded, and an attested copy thereof filed in the office of the county clerk of the county where the lands are situated, the dower shall remain fixed and certain, unless such confirmation be set aside or reversed; costs on appeal, and one half of the costs of such proceedings, shall be paid by the widow, and the other half by the adverse party. Bellinger and Cotton's Ann. Codes and Stats., § 5524.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 39, p. 363.

Montana. Code Civ. Proc., sec. 3077.

New Mexico. Comp. Laws 1897, sec. 2051.

§ 431. **Form. Petition for admeasurement of dower.**

[Title of court.]

[Title of proceeding.]	{ No. ____ ¹ Dept. No. ____
	{ [Title of form.]

To the Honorable the ____ Court of the County of ____.

The petition of ____ respectfully shows:

That she is the widow ² of —, deceased, who died on or about the — day of —, 19—, and the administration of whose estate is now pending herein;

That at the time of the death of said deceased, and during his marriage with petitioner, he was seised of an estate in fee of the following described real estate: —; ³

That the dower of your petitioner in said land has not been assigned to her, and she is now entitled thereto.

Wherefore petitioner prays that her dower in the above described real estate may be admeasured and assigned to her, and that such other order may be made as may be meet.

Dated —, 19—.

—, Petitioner.

—, Attorney for Petitioner.

Explanatory notes. 1. Give file number. 2. The application may be made by any other person interested in the land, in which case the nature of the interest of the petitioner, as heir or devisee, etc., should be stated, in addition to the dower interest, and the petition otherwise changed to correspond thereto. 3. Give description. Under the Montana statute, "every widow claiming dower may file her complaint in the district court of the proper county, against the parties aforesaid" (heirs, or other person in possession having the next estate of freehold or inheritance), "stating their names, if known, setting forth the nature of her claim, and particularly specifying the lands, tenements, and hereditaments in which she claims dower, and praying that the same may be allowed to her, whereupon the clerk must issue a summons, and the pleadings and proceedings must be as in other cases": See Mont. Code Civ. Proc., § 3072.

§ 432. Form. Order for notice of hearing on petition for dower.

[Title of court.]

[Title of proceeding.]

{ No. —. ¹ Dept. No. —
[Title of form.]

The petition of —, widow of —, deceased, having been filed herein, praying for the admeasurement and assignment of dower to her in certain real estate of said deceased, —

It is ordered, That said petition be, and it is hereby, set for hearing before this court on —, ² the — day of —, 19—, at — o'clock, — m., at the court-room of

said court; that notice of said hearing be given by the clerk of this court, by ^s posting notices thereof in three public places in this county, at least ten days prior to said day of hearing. _____, Judge of the _____ Court.

Dated _____, 19____.

Explanatory notes. 1. Give file number. 2. Give day of the week. 3. Or, mailing notice, postage prepaid, to each of the heirs (and devisees) of said deceased residing in this state, addressed to each at his residence; or, publishing notice in _____, a newspaper published in this county.

§ 433. Form. Order appointing guardian for minors.

[Title of court.]

[Title of proceeding.] { No. _____¹ Dept. No. _____
[Title of form.] }

_____, the widow of _____, deceased, having filed herein her petition for the assignment of dower to her out of certain real estate belonging to the estate of said deceased, and it appearing to the court that _____ and _____ are heirs ² of said deceased, and are minors without general guardian,—

It is ordered, That _____ be, and he is hereby, appointed guardian for the above-named minors, solely to appear for and take care of their interests in the premises.³

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. Or, and devisees; or, parties interested in said estate, or claiming an interest in said land. 3. The statute of Montana provides that "the right of dower of an insane married woman may be sold by her guardian, and the title to the real estate transferred to the purchaser, under the direction of the court or judge, in the same manner and with like effect as the property of any insane person may be sold and transferred": Mont. Code Civ. Proc., § 2974.

§ 434. Form. Notice of hearing on petition for dower.

[Title of court.]

[Title of proceeding.] { No. _____¹ Dept. No. _____
[Title of form.] }

Notice is hereby given, That _____, widow of _____, deceased, has filed in the above court her petition for the admeasurement and assignment of dower to her in certain

real estate hereinafter described, belonging to the estate of said deceased; and that the hearing on said petition has been set by this court for _____,² the _____ day of _____, 19____, at _____ o'clock, — m., at the court-room of this court, at which time and place all heirs,³ and all persons claiming under them, or any of them, are required to appear and show cause, if any they have, why said petition should not be granted.

The real estate mentioned in said petition, and sought to be affected by this proceeding, is described as follows:
_____,⁴ _____, Clerk.

Dated _____, 19____.

Explanatory notes. 1. Give file number. 2. Give day of week.
3. Devisees, if any. 4. Give description.

§ 435. Form. Order for admeasurement of dower.

[Title of court.]

[Title of proceeding.]	{	No. _____ ¹	Dept. No. _____
		[Title of form.]	

The petition of _____, widow of _____, deceased, praying that dower be admeasured and assigned to her, coming on regularly to be heard this _____ day of _____, 19____; and it appearing to the court that due notice of the hearing of said petition has been given to the heirs² of said deceased, and to all persons claiming under them, or any of them, as required by law and the order of this court; that said petitioner is the widow of said deceased; that during the marriage of said deceased with his said wife he was seised in fee of the lands hereinafter described; and that petitioner is entitled to dower therein, —

It is ordered, That said petition of said widow, _____, for the admeasurement of dower be, and it is hereby, granted; and that a warrant be issued by the clerk of this court to _____, _____, and _____, three discreet and disinterested persons, authorizing and requiring them to set off said dower by metes and bounds, if the same can be done without injury to the whole estate; and to make return of their doings to this court, with an account of their charges and expenses as required by law.

The real estate from which said dower is to be set off is described as follows: ____.³

Dated _____, 19____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. And devisees, if any. 3. Give description.

§ 436. Form. Warrant to commissioners to admeasure dower.

[Title of court.]

[Title of proceeding.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

The People of the State of _____,

To _____, _____, and _____, Greeting.

Whereas, on the _____ day of _____, 19____, an order was duly made in and by the above-named court, in the above-entitled proceeding, directing the clerk of said court to issue to you a warrant, authorizing and requiring you, as commissioners, to allot and set off to _____, as widow of _____, deceased, her dower in the real estate of said deceased in said order described, as follows: _____,² —

Now, therefore, you are, by this warrant, authorized and required to admeasure and set off, by metes and bounds, if it can be done without injury to the whole estate, to said _____, widow of said _____, deceased, her dower in the premises above described, with all reasonable speed, and thereafter make written return to the court of your doings in that behalf, with an account of your charges and expenses incurred therein.

By order of the _____ court, this _____ day of _____, 19____.

[Seal]

_____, Clerk.

By _____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Describe the land.

§ 437. Form. Oath of commissioners to admeasure dower.

[Title of court.]

[Title of proceeding.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

State of _____,
County of _____, } ss.

_____, _____, and _____, being duly sworn, each for himself, on oath, says that he will faithfully discharge the duties of

commissioner to admeasure and set off to —, widow of —, deceased, her dower out of the real estate of said deceased, in accordance with the requirements of the warrant herein issued to him.

_____ } Commissioners.

Subscribed and sworn to before me this ____ day of _____, 19____, Judge of the ____ Court.²

Explanatory notes. 1. Give file number. 2. Or, Justice of the Peace. For form of oath of commissioners in Montana, see Mont. Code Civ. Proc., § 3076.

§ 438. Form. Return of commissioners to admeasure dower.

[Title of court.]

[Title of proceeding.]

{ No. ____¹ Dept. No. ____
[Title of form.]

The undersigned, commissioners heretofore appointed to admeasure and set off to —, widow of —, deceased, her dower in the real estate of said deceased, respectfully report:

That, after receiving the warrant hereto annexed, they took the oath required by law, which is also attached hereto, and thereafter performed the duties required of them as follows:

That they viewed the land described in said warrant, and, being of the opinion that the dower interest of said widow therein could be set off to her without injury to the whole estate, and finding that a survey was necessary therefor, they employed —, a competent surveyor, and his assistants, and have with their aid admeasured, and the undersigned, as such commissioners, have set off, allotted, and assigned to said —, widow as aforesaid, as and for her dower interest in said real estate, the following described portion thereof: —; ²

That the following is an account of the charges and expenses of said commissioners, incurred by them in the performance of said duties:

Compensation of commissioners, — days each, at
 \$ — per day.....\$ —
 Compensation of surveyor and — assistants, —
 days, at \$ — per day.....
 Total \$ —
 All of which is respectfully submitted.

— }
 — } Commissioners.
 — }

Explanatory notes. 1. Give file number. 2. Give description of land set off.

§ 439. Form. Order confirming report of commissioners to admeasure dower.

[Title of court.]

[Title of proceeding.]

{ No. —.¹ Dept. No. —
 { [Title of form.]

The commissioners heretofore appointed to admeasure and set off to —, widow of said —, deceased, her dower in the real estate of said deceased, having filed their report herein, and said report coming on regularly for hearing and action by the court,² and it appearing that all requirements of law have been complied with herein, and that said report of the commissioners is fair and just, and should be accepted and confirmed by the court, —

It is ordered, That said report of the commissioners, and the admeasurement and assignment of dower to said —, widow of said deceased, therein contained, be, and the same are hereby, accepted and confirmed by the court.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. If any opposition be made, insert, "and — having appeared in opposition thereto, and the court having heard the allegations and proofs of the parties."

DOWER AND CURTESY.

- | | |
|----------------------------------|----------------------------|
| 1. Dower. In general. | (2) In Utah. |
| 2. Dower. Power to modify right. | (3) In Montana. |
| 3. Dower. Law governing. | (4) In Oregon. |
| 4. Dower. Rights of dowress. | (5) In Hawaii. |
| (1) In Kansas. | 5 Curtesy. Relinquishment. |

1. **Dower. In general.** The right of dower in Utah was abolished in 1872, and remained so abolished until re-established by the Edmunds-Tucker act, in March, 1887; and thereafter dower could only be waived or vested as in said act provided: *Norton v. Tufts*, 19 Utah, 470; 57 Pac. Rep. 409. In Montana, a court sitting in probate has no jurisdiction of any matter touching the admeasurement of dower. The jurisdiction upon this subject is conferred upon the court as a court of general jurisdiction, and must be invoked by an independent action. If the court, when exercising its probate jurisdiction, has no power with reference to dower, no order which it may make touching the distribution of property during the course of administration can, of itself, affect the right of dower in any lands to which the right has attached, or any election which the widow has with reference to it. She may bring her action to have her dower allotted to her, notwithstanding the order of distribution makes no mention of her right: *In re Dahlman's Estate*, 28 Mont. 379; 72 Pac. Rep. 750, 751. A circuit judge at chambers has jurisdiction, in the territory of Hawaii, to admeasure dower; but he has no such jurisdiction if the right of dower is denied, even in a case instituted by the widow herself: *Ahin v. Opele*, 17 Haw. 525, 527.

2. **Dower. Power to modify right.** Dower is a subject that is entirely within the control of the legislative power until it becomes vested by the death of the husband, and, until vested, the legislature may modify, abrogate, increase, or diminish it at pleasure, at least so far as it affects the wife. The common law respecting dower remained in force all of the time while Utah was a territory, and continued in force after it became a state, except as modified by statutory enactment. The common law as to dower, in Utah, continued in force from 1887 to January 1, 1898: *Hilton v. Thatcher*, 31 Utah, 360; 88 Pac. Rep. 20, 21, 22, 23, 24.

REFERENCES.

Power of legislature to destroy dower: See note 19 L. R. A. 256.

3. **Dower. Law governing.** The right of dower is governed by the law in force at the time of the death of the husband, while the measure of the right is determined by the law in force at the time of the husband's conveyance, where the wife has not relinquished her right: *Hilton v. Thatcher*, 31 Utah, 360; 88 Pac. Rep. 20, 22. The widow

takes dower under the statute in force at the time of the death of her husband, and not under that of the date of the entry of a confession of judgment. The assignment of dower, under a statute like that of Oregon, must be made according to the statute in force at the time of the death of the husband, except as against the existing rights of third persons in the lands of the husband, acquired by deed or mortgage, in which the wife did not join, by sheriff's sale during the life of the husband, or by executory contract, in which cases the assignment must be under the law in force at the time of such conveyance, sale, or contract, if, by the later statute, the dower estate is enlarged to the prejudice of such purchaser; the reason for the exemption being that such purchaser has a vested right by reason of his purchase, and the legislature cannot enact a law that will impair the obligation of his contract: *Davidson v. Richardson* (Or.), 89 Pac. Rep. 742, 743. This rule applies to judgment liens obtained prior to the enactment enlarging the dower estate. A judgment lien is not a vested right or interest of a creditor in the land until levy and sale. It is only an incident in the remedy for the collection of the debt, purely a creation of statute, and not of the contract, and consequently is subject to the control of the legislature to modify it by increasing or diminishing, or to abolish it altogether, without violating the creditor's constitutional guaranty that the obligation of his contract shall not be impaired: *Davidson v. Richardson* (Or.), 89 Pac. Rep. 742, 743.

REFERENCES.

Estimating value of dower right: See note 5 L. R. A. 521. Assignment of dower: See notes 39 Am. St. Rep. 25-39; 79 Am. Dec. 600-604.

4. Dower. Rights of dowress.

(1) **In Kansas.** In Kansas, a widow is not entitled to a dower interest in lands conveyed by her husband, when she, at the time of the conveyance, was a non-resident of the state: *Buffington v. Grosvenor*, 46 Kan. 730; 27 Pac. Rep. 137, 140. In 1879, a dowress sold and released her right of dower in her deceased husband's land in the state of Illinois to the then owner of the fee; and it was held that, the state having no statute relating thereto, the common-law rule applied, and that the consideration received for such release became the absolute property of the dowress, and did not remain a share of the decedent's estate, of which he had only a life use: *Williams v. Merriam*, 72 Kan. 312; 83 Pac. Rep. 976.

(2) **In Utah.** That portion of a statute abolishing the estate of dower and curtesy does not cut off the widow's right to an interest in the lands of the husband, alienated by him without his wife's consent prior to the passage of such law, although his death did not occur until many years subsequently to its enactment. The measure of her right in such alienated lands is to be determined by the law

in force at the time they were alienated: *Hilton v. Thatcher*, 31 Utah, 360; 88 Pac. Rep. 20, 22, 24, 25. The estates of dower and curtesy, as such, were abrogated by statute in Utah in 1898, but the right itself was continued in force as an enlarged estate or interest: *In re Park's Estate (Utah)*, 87 Pac. Rep. 900, 902. Prior to 1898, the widow, upon the death of her husband, was entitled to a one-third part of all lands of which he was seised during the marriage, and the extent of such interest was a life estate; but, under a statute enacted at that time, she was, upon the death of her husband, entitled to one third in value of the lands so owned by him, or in which he had an equitable estate, the same to be set apart to her in fee-simple. This was an enlargement of the widow's interest becoming effective January 1, 1898. Prior to that time her interest terminated, as at common law, at her death. Hence where lands were alienated by the husband before January 1, 1898, and while the widow was entitled to a life estate only, she is not entitled to take the value of her interest in the husband's lands out of his estate, as authorized by the act adopted on said date. No doubt this might be consented to by all who have an interest in the estate, but it cannot be accorded as a matter of legal right: *In re Park's Estate (Utah)*, 87 Pac. Rep. 900, 902, 903. The dower rights of a wife cannot be affected by an attempted sale by her husband without her consent, where the purchaser knows that the vendor is a married man. The purchaser buys with full knowledge of both the interest fixed by law and of his vendor's legal status. He knows that he cannot obtain the interest of a wife without her consent; that such interest is contingent only during the life of her husband; and that, upon his death, it immediately vests in her as a fee-simple estate: *Free v. Little (Utah)*, 88 Pac. Rep. 407, 411. The act of Congress endows the widow, in Utah, with a one-third part of all lands whereof the husband was seised; consequently the widow should have a dower interest, a life estate, to the extent of one third of all the real estate whereof the husband died seised, and she is further entitled to her rights under the law of succession: *Knudsen v. Hannberg*, 8 Utah, 203; 30 Pac. Rep. 749, 752. The homestead right does not attach in favor of the widow or children, unless the estate is insolvent and in debt, or is below the homestead allowance in value, and if it is not, it goes to the heirs at once, under the law of succession, subject to the widow's right of dower: *Knudsen v. Hannberg*, 8 Utah, 203; 30 Pac. Rep. 749, 752. A marital separation by mutual agreement, even if followed by adultery, was not sufficient to disendow the wife, under 13 Edward I, until the husband, by offering to take her back, had withdrawn from the contract of separation, and the wife had thereupon refused such offer: *Norton v. Tufts*, 19 Utah, 470; 57 Pac. Rep. 409. A widow may, by mere silence, estop herself in pais from claiming dower in her husband's estate. But where a concealment by silence is relied upon for estoppel, the parties against whom estoppel is

claimed must have knowledge of the facts and of the action about to be taken: *Norton v. Tufts*, 19 Utah, 470; 57 Pac. Rep. 409.

(3) **In Montana.** The Montana statute recognizes the common-law right of dower. At the same time, it extends this right to estates to which it did not attach at the common law, and enlarges the wife's right by the election granted to her under such statute. By this provision she has the absolute right to take in fee, in lieu of the common-law dower, one half of all the real estate, subject to the payment of debts lawfully due from the estate. This estate falls to her, not as heir, or by will of her husband, but by virtue of her marital right, and without regard to the law relating to the rights of heirs, or to any will made by the husband. After the wife's right has become fixed by the death of the husband, she can assert it, despite the rights of creditors, heirs, or any other person whomsoever. It is true that when the fee to her portion in lands has vested in her under the right of succession, the dower right in such property is *pro tanto* merged in the fee; but this in no wise affects her right to dower in the residue of the estate. This descends to the heirs, subject to her rights, and, though she falls within the class of those who, under the statute, are denominated "heirs," this does not affect her rights conferred by other statutes which have no connection whatever with the law of succession. Hence if the husband dies intestate, leaving surviving him his widow, and one or both of his parents, but without children or grandchildren, the widow, although she has participated in the distribution of her husband's estate as an heir, is entitled to one half of said estate, after the payment of debts, under the statute relating to succession, in addition to her right of dower, or election in lieu thereof. The two rights, though conferred by statute, rest upon different principles, and exist independently of each other; and the right of election given the widow, under the circumstances contemplated by statute, has no connection with the right to take as heir one half of the residue of the estate, real and personal, after the claims of creditors are satisfied: *Dahlman v. Dahlman*, 28 Mont. 373; 72 Pac. Rep. 748, 749, 750. The express provision of the Montana statute is, that the widow shall be endowed of the third part of all lands wherein her husband was seised of an estate of inheritance at any time during the marriage, including equitable and all other estates in lands of whatever description. This provision is without restriction or limitation. It attaches to all lands falling within the description, unless the wife shall have relinquished her right in legal form. This may be done only by her deed executed and duly acknowledged in conformity with the law, or by the acceptance by her of a devise or bequest under the will of her husband, or by a jointure settled upon her, with her assent, by her husband before the marriage: *Dahlman v. Dahlman*, 28 Mont. 373; 72 Pac. Rep. 748, 749. Under a statute which provides that every devise of land, or any estate therein, by will,

shall bar the widow's dower in land, etc., a widow, by accepting the provisions made for her by the will of her deceased husband, is estopped and barred from claiming dower in any real estate of which her husband died seised, as well as the lands aliened by him alone in his lifetime: *Spalding v. Hershfield*, 15 Mont. 253; 39 Pac. Rep. 88, 89, 90.

(4) **In Oregon.** The administrator is entitled to the possession of all the property of the deceased, both real and personal, for the purposes of administration; but the county court has power to protect the widow's dower interest in moneys in the hands of such administrator: *Butler v. Smith*, 20 Or. 126; 25 Pac. Rep. 381. Proceedings for the sale of real property of a deceased husband to pay his debts affect his widow's rights of dower: *Arnold v. Smith*, 43 Or. 595; 73 Pac. Rep. 336, 337. A widow's absolute right to dower in the lands of which her husband had been seised, although resting in action, is liable in equity for her debts, but the creditors should have the dower actually assigned before it is sold under execution, as the uncertainty existing before assignment would inevitably cause diminution of price which would not occur if the dower was assigned before the sale took place: *Baer v. Ballingall*, 37 Or. 416; 61 Pac. Rep. 852, 853. A wife's inchoate right of dower attaches to the surplus moneys realized from a sale of the husband's lands upon a decree of foreclosure, and her interest in the funds will be protected against the deceased husband's creditors; but her right cannot be litigated in an action to recover the funds in a case to which she is not a party: *Butler v. Smith*, 20 Or. 126; 25 Pac. Rep. 381.

(5) **In Hawaii.** A widow is not entitled to her dower out of her husband's personal estate until after payment of expenses of administration: *Notley v. Brown*, 16 Haw. 575, 577.

REFERENCES.

Widow's right to dower in real estate of deceased partner: See note 27 L. R. A. 340-354. Dower in homestead; relative rights of wife and children: See note 56 L. R. A. 67-69. Is a widow's dower right in property allotted to her as a homestead extinguished, or merely in abeyance? See note 10 L. R. A. (N. S.) 1206, 1207.

5. **Curtesy. Relinquishment.** When a husband or wife owns property in his or her own right, any inchoate right the other may have therein, such as tenant by the curtesy or by dower, cannot be the subject of a valid contract between them. Hence a husband and his wife cannot enter into a valid contract or agreement at the time a will executed by the wife is made, for the relinquishment or surrender of his curtesy interest in her property, and clothe her with power and authority to dispose of her property by will free from his curtesy interest: *McCrary v. Biggers*, 46 Or. 465; 81 Pac. Rep. 356, 357.

PART VII.

CLAIMS AGAINST ESTATE.

CHAPTER I.

CLAIMS AGAINST ESTATE.

- § 440. Notice to creditors. Additional notice.
- § 441. Form. Order for publication of notice to creditors.
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- § 466. Claims in action pending at time of decease.
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- § 469. Execution not to issue after death. If one is levied, the property may be sold.
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- § 473. Form. Referee's report as to correctness of creditor's claim.
- § 474. Trial by referee, how confirmed, and its effect.
- § 475. Liability of executor, etc., for costs.
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- § 477. Executor neglecting to give notice to creditors, to be removed.
- § 478. Form. Order of removal for neglecting to give notice to creditors.
- § 479. Executor to return statement of claims.
- § 480. Payment of interest-bearing claims.
- § 481. Manner of closing estates when claims are unpaid and claimant cannot be found.

CLAIMS AGAINST ESTATE.

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| 1. Notice to creditors. | (10) What claims need not be presented. |
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| (5) Publication. | (15) Effect of death. |
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 - (8) Pleadings. Allegation as to presentation of claim.
 - (9) Pleadings. Amendment of complaint.
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 - (11) Pleadings. Variance.
 - (12) Parties. Administrator, only, is necessary when.
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 - (4) Recovery. Costs.
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- 8. Enforcement of claims against estates.
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 - (9) Judgment. Interest.
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- 12. Foreclosure of mortgages. Limitation of actions.
 - (1) In general.
- 13. Foreclosure of mortgages. Death of mortgagor.
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 - (2) Enforcement without presentation.
 - (3) Express waiver in complaint.
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- 14. Mortgages on homesteads.
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| (4) Limitation of actions. | (4) Deeds of trust. |
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| | (2) Right of appeal. Jurisdiction. |

§ 440. **Notice to creditors. Additional notice.** Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper of the county, if there be one, if not, then in such newspaper as may be designated by the court, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice. Such notice must be published as often as the judge or court shall direct, but not less than once a week for four weeks.

[**Additional notice.**] The court or judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice, his successor must give notice only for the unexpired time allowed for such presentation. **Kerr's Cyc. Code Civ. Proc., § 1490.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 820, p. 314.
Arizona.* Rev. Stats. 1901, par. 1739.
Colorado. 3 Mills's Ann. Stats., sec. 4780.
Idaho. Code Civ. Proc. 1901, sec. 4133.
Montana.* Code Civ. Proc., sec. 2600.
Nevada. Comp. Laws, sec. 2892.
New Mexico. Comp. Laws 1897, sec. 2004.
North Dakota. Rev. Codes 1905, § 8097.
Oklahoma.* Rev. Stats. 1903, sec. 1616.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1153.
South Dakota.* Probate Code 1904, § 167.
Utah. Rev. Stats. 1898, secs. 3848, 3849.
Washington. Pierce's Code, § 2531.
Wyoming. Rev. Stats. 1899, sec. 4747.

§ 441. Form. Order for publication of notice to creditors.

[Title of court.]

[Title of estate.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

It is ordered that notice to creditors of said decedent, pursuant to ____,² be published once a week for four weeks in the ____, a newspaper of said county.³

Dated ____, 19____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2. Refer to the statute providing for notice to creditors. 3. Or, city and county.

§ 442. Form. Notice to creditors.

[Title of court.]

[Title of estate.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

Notice is hereby given by the undersigned, administrator² of the estate of ____, deceased, to the creditors of and all persons having claims against the said deceased, to exhibit such claims, with the necessary vouchers, within ____³ months after the first publication of this notice to the said administrator,⁴ at the office of ____,⁵ which said office the undersigned selects as his place of business in all matters connected with said estate of ____, deceased.

____, Administrator⁶ of the Estate of ____, Deceased.

____, Attorney for said Administrator.⁷

Dated and first published at ____,⁸ on this ____ day of ____, 19____, Attorney for Said Administrator.⁹

Explanatory notes. 1. Give file number. 2. Or, administrator with the will annexed; or, executor of the last will and testament, etc. 3. Number of months prescribed by statute, depending on the value of the estate. 4. Or, executor. 5. State where. 6, 7. Or as the case may be. 8. State where. 9. Or, executor.

§ 443. What time must be expressed in the notice. The time expressed in the notice must be ten months after its first publication, when the estate exceeds in value the sum

of ten thousand dollars, and four months when it does not.
Kerr's Cyc. Code Civ. Proc., § 1491.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 820, p. 314.
- Arizona.** Rev. Stats. 1901, par. 1740.
- Idaho.** Code Civ. Proc. 1901, sec. 4134.
- Montana.** Code Civ. Proc., sec. 2601.
- Nevada.** Comp. Laws, sec. 2892.
- New Mexico.** Comp. Laws 1897, sec. 2004.
- North Dakota.** Rev. Codes 1905, § 8097.
- Oklahoma.** Rev. Stats. 1903, sec. 1617.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1158.
- South Dakota.** Probate Code 1904, § 168.
- Utah.** Rev. Stats. 1898, sec. 3849.
- Wyoming.** Rev. Stats. 1899, sec. 4747.

§ 444. **Copy and proof of notice to be filed, and order made.** After the notice is given, as required by the preceding section, a copy thereof, with the affidavit of due publication, or of publication and posting, must be filed, and upon such affidavit or other testimony to the satisfaction of the court, an order or decree showing that due notice to creditors has been given, and directing that such order or decree be entered in the minutes and recorded, must be made by the court. **Kerr's Cyc. Code Civ. Proc.**, § 1492.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 821, p. 314.
- Arizona.*** Rev. Stats. 1901, par. 1741.
- Idaho.*** Code Civ. Proc. 1901, sec. 4135.
- Montana.*** Code Civ. Proc., sec. 2602.
- Nevada.** Comp. Laws, sec. 2892.
- New Mexico.** Comp. Laws 1897, sec. 2004.
- North Dakota.** Rev. Codes 1905, § 8098.
- Oklahoma.** Rev. Stats. 1903, sec. 1618.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1159.
- South Dakota.** Probate Code 1904, § 169.
- Utah.** Rev. Stats. 1898, sec. 3850.
- Washington.** Pierce's Code, § 2532.
- Wyoming.** Rev. Stats. 1899, sec. 4748.

§ 445. Form. Affidavit of publication of notice to creditors.

[Title of court.]

[Title of estate.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

State of _____,
County ² of _____, } ss.

_____, of said county ³ and state, having been first duly sworn, deposes and says:

That he is, and at all times embraced in the publication herein mentioned was, the principal clerk of the printers and publishers ⁴ of _____, a newspaper ⁵ printed and published daily (Sundays excepted) ⁶ in said county; ⁷

That deponent, as such clerk, ⁸ during all times mentioned in this affidavit, has had, and still has, charge of all the advertisements in said newspaper; and

That a notice to creditors, of which the annexed is a true printed copy, was published in the above-named newspaper on the following dates, to wit, _____, ⁹ being for a period of once a week for four (4) ¹⁰ weeks; and further deponent saith not.

Subscribed and sworn to before me this _____ day of _____, 19____.

_____, Notary Public in and for the County ¹¹ of _____,
State of _____.

Explanatory notes. 1. Give file number. 2, 3. Or, City and County. 4. Or, printer or foreman. 5. "Of general circulation," if the statute requires it. 6. "Sundays excepted," if such is the case. 7. Or, city and county. 8. Or, printer or foreman. 9. Give date of each publication. 10. "Successive" weeks, if such is the fact. 11. Or, city and county.

§ 446. Form. Order fixing time of hearing on application for decree establishing notice to creditors.

[Title of court.]

[Title of estate.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

In the above-entitled matter, application having been made to this court for a decree establishing due notice to creditors in said estate, —

It is hereby ordered, That said application be heard at _____ o'clock in the forenoon² of _____,³ the _____ day of _____, 19____, at the court-room of Department No. 4 of said court, in the court-house at _____,⁴ and that the clerk of the court give notice thereof by posting notices in three of the most public places in said county⁵ for not less than five⁶ days before said day of hearing.

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. Or, afternoon. 3. Day of week. 4. Name the location. 5. Or, city and county. 6. Or other time fixed by law or rules of court.

§ 447. Form. Affidavit of posting notice of time of hearing of application for decree establishing notice to creditors.

[Title of court.]

[Title of estate.] { No. _____¹ Dept. No. _____
[Title of form.]

_____, being duly sworn, says: That on the _____ day of _____, 19____, he posted correct and true copies of the annexed notice in three of the most public places in said county,² to wit, one of said copies at the place at which the court is held,³ one at _____,⁴ and one at _____,⁵ in said county.⁶

Subscribed and sworn to before me this _____ day of _____, 19____. _____, Deputy County Clerk.

Explanatory notes. 1. Give file number. 2. Or, city and county. 3. Designating it. 4. City hall. 5. United States post-office in the town or city of _____, in said county, designating its location. 6. Or, city and county.

§ 448. Form. Decree establishing notice to creditors.

[Title of court.]

[Title of estate.] { No. _____¹ Dept. No. _____
[Title of form.]

It appearing to the satisfaction of the court, upon application of the administrator² of the said estate, that due and legal notice to the creditors thereof has been given, and that notice of the time and place of such application has been given as directed by the court,³ —

It is decreed, That the value of the estate of said deceased is less than ten thousand dollars (\$10,000); * that due notice to creditors to present their claims has been given herein in all respects as required by law; and that more than four * months have elapsed since the first publication of notice to creditors.

Dated —, 19—, —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Or, by a copy, and affidavit of due publication of notice to creditors of said deceased, presented and filed in this court, showing the publication of notice ordered by the judge of this court. 4. Or, more than ten thousand dollars (\$10,000). 5. Or, ten; or as the case may be. This decree should not be made and entered until after the time allowed for the presentation of claims has elapsed.

§ 449. Time within which claims must be presented. All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever; provided, however, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court, or a judge thereof, that the claimant had no notice as provided in this chapter, by reason of being out of the state, it may be presented at any time before a decree of distribution is entered. **Kerr's Cyc. Code Civ. Proc., § 1493.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 821, p. 314.
- Arizona.** Rev. Stats. 1901, par. 1742.
- Colorado.** 3 Mills's Ann. Stats., secs. 4781, 4782, 4789.
- Idaho.*** Code Civ. Proc. 1901, sec. 4136.
- Kansas.** Gen. Stats. 1905, § 2955.
- Montana.** Code Civ. Proc., sec. 2603.
- Nevada.** Comp. Laws, sec. 2893.
- New Mexico.** Comp. Laws 1897, sec. 2062.
- North Dakota.** Rev. Codes 1905, § 8099.
- Oklahoma.** Rev. Stats. 1903, sec. 1619.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1493.
- South Dakota.** Probate Code 1904, § 170.
- Utah.** Rev. Stats. 1898, sec. 3851.
- Washington.** Pierce's Code, § 2533.
- Wyoming.*** Rev. Stats. 1899, sec. 4749.

Probate — 43

§ 450. Form. Claim of creditor against estate.

[Title of court.]

[Title of estate.]

{	No. ____ ¹	Dept. No. ____
	[Title of form.]	

The undersigned, a creditor of _____, deceased, presents his claim against the estate of said deceased, with the necessary vouchers for approval as follows, to wit: -

Estate of _____, Deceased. To _____, Dr.²

Explanatory notes. 1. Give file number. 2. Give items of claim, including dates, subject-matter, and amounts, with total; and description of note or mortgage, etc., with place and book of record. This and the next two forms should be attached to or printed on the same blank.

§ 451. Form. Affidavit to creditor's claim.

[Title of court.]

[Title of estate.]

{	No. ____	Dept. No. ____
	[Title of form.]	

State of _____,
County¹ of _____, } ss.

_____, whose foregoing claim is herewith presented to the administrator² of the estate of said deceased, being sworn, says: That the amount thereof, to wit, the sum of _____ dollars (\$_____), is justly due to said claimant; that no payments have been made thereon which are not credited; and that there are no offsets to the same, to the knowledge of affiant.

Subscribed and sworn to before me this _____ day of _____, 19____. _____, Notary Public, etc.³

Explanatory notes. 1. Or, City and County. 2. Or, executor. 3. Or other officer taking the oath. This form should be attached to the Creditor's Claim, or be printed thereon.

§ 452. Form. Indorsements on back of creditor's claim.¹

The within claim, presented by _____, a creditor of the estate of said deceased, is allowed and approved for \$_____, this _____ day of _____, 19____.

_____, Administrator of said Estate.

Allowed and approved for \$_____, this _____ day of _____, 19____. _____, Judge of the _____ Court.

The within claim is rejected this ____ day of ____, 19____
 ____, Administrator of said Estate.
 ____, Judge of the ____ Court.

Explanatory notes. 1. These indorsements are to be made on the back of the Creditor's Claim.

§ 453. Form. Affidavit that creditor had no notice.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
 [Title of form.]

State of ____,
 County² of ____, } ss.

____, being duly sworn, says: That he is a creditor of the said ____, deceased; that he had no notice of the death of deceased, or of notice to creditors, until the ____ day of ____, 19____, by reason of being out of the state at the time of such death, to wit, in the state of ____; and that a decree of distribution has not yet been entered in the matter of the above-entitled estate. He therefore makes this affidavit, and presents herewith to the administrator³ of such estate his claim against said estate, and further says, upon his oath, that the amount of said claim, to wit, the sum of ____ dollars (\$____), is justly due to the said claimant; that no payments have been made thereon which are not credited; and that there are no offsets to the same, to the knowledge of said affiant.

Subscribed and sworn to before me this ____ day of ____, 19____. _____, Notary Public, etc.⁴

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Or, administratrix, executor or executrix, etc., according to the fact. 4. Or other officer taking the oath.

§ 454. Form. Affidavit to creditor's claim, by one other than the claimant.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
 [Title of form.]

State of ____,
 County² of ____, } ss.

____, being duly sworn, says: That he is the managing agent³ of ____, whose foregoing claim is herewith presented

to the administrator ⁴ of said deceased; that affiant has personal knowledge of all the facts of said claim, and makes this affidavit in behalf of the said claimant, —, who is absent from the state; ⁵ that the amount of said claim, to wit, the sum of — dollars (\$—), is justly due to the said claimant; that no payments have been made thereon which are not credited; and that there are no offsets to the same, to the knowledge of affiant.

Subscribed and sworn to before me this — day of —, 19—. —, Notary Public, etc.⁶

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Or other capacity in which affiant is acting. 4. Or, administratrix, or administrator or administratrix with the will annexed; or, executor or executrix of the last will and testament of; or the plural of any of these. 5. Or state any other good reason why the claimant cannot make the affidavit. 6. Or other officer, according to the fact.

§ 455. Form. Affidavit of corporation to creditor's claim.

[Title of court.]

[Title of estate.]

{ No. —.¹ Dept. No. —
[Title of form.]

State of —, }
County ² of —, } ss.

—, being duly sworn, says: That the — Company, whose claim is herewith presented to the administrator ³ of said deceased, is a corporation, organized, acting, and existing under the laws of the state of —; that affiant is the president ⁴ of such corporation, and has personal knowledge of all the facts of said claim; that the amount of said claim, to wit, the sum of — dollars (\$—), is justly due to the said claimant; that no payments have been made thereon which are not credited; and that there are no offsets to the same, to the knowledge of said affiant.

Subscribed and sworn to before me this — day of —, 19—. —, Notary Public, etc.⁵

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Or, administratrix, or administrator or administratrix with the will annexed, or executor or executrix of the last will and testament of; or the plural of any of these, according to the fact. 4. Or, secretary, or other officer, as the case may be. 5. Or other officer taking the oath.

§ 456. Form. Affidavit by partnership to creditor's claim.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]State of _____,
County² of _____, } ss.

_____, being duly sworn, says: That the _____ Company, whose foregoing claim is herewith presented to the administrator³ of said deceased, is a copartnership, composed of _____, _____, and _____,⁴ doing business under the firm name and style of _____; that affiant is a member of such copartnership, and has personal knowledge of all the facts of said claim; that the amount of said claim, to wit, the sum of _____ dollars (\$_____), is justly due to the said claimant; that no payments have been made thereon which are not credited; and that there are no offsets to the same, to the knowledge of said affiant.

Subscribed and sworn to before me this _____ day of _____, 19____. _____, Notary Public, etc.⁵

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Or, administratrix, etc., according to the fact. 4. Give names of copartners, and name of firm. 5. Or other officer taking the oath.

§ 457. Affidavit in support of claim. Allowed claim to bear same interest as judgments. Every claim which is due, when presented to the executor or administrator, must be supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant. If the claim be not due when presented, or be contingent, the particulars of such claim must be stated. When the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by the claimant. The oath may be taken before any officer authorized to administer oaths. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. If the estate be insolvent, no greater rate of interest shall be allowed

upon any claim after the first publication of notice to creditors than is allowed on judgments obtained in the superior court. **Kerr's Cyc. Code Civ. Proc., § 1494.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 822, p. 314.
- Arizona.** Rev. Stats. 1901, par. 1743.
- Colorado.** 3 Mills's Ann. Stats., secs. 4783, 4788, 4789.
- Idaho.*** Code Civ. Proc. 1901, sec. 4137.
- Kansas.** Gen. Stats. 1905, §§ 2958, 2962, 2963.
- Montana.*** Code Civ. Proc., sec. 2604.
- Nevada.** Comp. Laws, sec. 2894.
- New Mexico.** Comp. Laws 1897, sec. 1967.
- North Dakota.** Rev. Codes 1905, § 8100.
- Oklahoma.** Rev. Stats. 1903, sec. 1620.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1160.
- South Dakota.*** Probate Code 1904, § 171.
- Utah.** Rev. Stats. 1898, secs. 3852, 3855.
- Washington.** Pierce's Code, § 2534.
- Wyoming.** Rev. Stats. 1899, sec. 4750.

§ 458. **Superior judge may present claim, and action thereon.** Any judge of a superior court may present a claim against the estate of a decedent for allowance to the executor or administrator thereof, and if the executor or administrator allows the claim, he must in writing designate some other judge of the superior court of the same or an adjoining county, who, upon the presentation of such claim to him, is vested with power to allow or reject it, and the judge presenting such claim, in case of its rejection by the executor or administrator, or by such judge as shall have acted upon it, has the same right to sue in a proper court for its recovery as other persons have when their claims against an estate are rejected. **Kerr's Cyc. Code Civ. Proc., § 1495.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1744.
- Idaho.** Code Civ. Proc. 1901, sec. 4138.
- Montana.*** Code Civ. Proc., sec. 2605.
- Nevada.** Comp. Laws, sec. 2895.
- North Dakota.** Rev. Codes 1905, § 8102.

Oklahoma. Rev. Stats. 1903, sec. 1622.

South Dakota. Probate Code 1904, § 173.

Utah. Rev. Stats. 1898, sec. 3854.

Washington.* Pierce's Code, § 2537.

§ 459. Allowance and rejection of claims. When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allow the claim, it must be presented to a judge of the superior court for his approval, who must in the same manner indorse upon it his allowance or rejection. If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day; and if the presentation be made by a notary, the certificate of such notary, under seal, shall be prima facie evidence of such presentation and the date thereof. If the claim be presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time. If the claim be payable in a particular kind of money or currency, it shall, if allowed, be payable only in such money or currency. **Kerr's Cyc. Code Civ. Proc., § 1496.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 823, p. 314.

Arizona. Rev. Stats. 1901, par. 1745.

Idaho. Code Civ. Proc. 1901, sec. 4139.

Montana. Code Civ. Proc., sec. 2606.

Nevada. Comp. Laws, sec. 2896.

New Mexico. Comp. Laws 1897, secs. 1967, 1999.

North Dakota. Rev. Codes 1905, § 8103.

Oklahoma. Rev. Stats. 1903, sec. 1623.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1161.

South Dakota. Probate Code 1904, § 174.

Utah. Rev. Stats. 1898, sec. 3853.

Washington. Pierce's Code, § 2535.

Wyoming. Rev. Stats. 1899, sec. 4751.

§ 460. Form. Notary's certificate of presentation of claim.

[Title of court.]

[Title of estate.]

{	No. ____ ¹	Dept. No. ____
	[Title of form.]	

I, the undersigned, hereby certify: That on the ____ day of ____, 19__, I presented the annexed claim of ____, accompanied by the proper affidavit, to ____, administrator ² of the estate of ____, deceased, personally, at ____,³ the place mentioned in the notice to creditors heretofore published; that said presentation was made at the request of said claimant; that said administrator ⁴ refused to indorse on said claim his allowance or rejection thereof;⁵ and that he kept said claim for ten days, when he returned it to me, with his refusal to make any indorsement thereon.⁶

Witness my hand and official seal this ____ day of ____, 19__.

[Seal] ____, Notary Public in and for the County ⁷ of ____, State of ____.

Explanatory notes. 1. Give file number. 2. Or, executor, etc. 3. Name the place. 4. Or, executor, etc. 5. Or, that he took the claim and retained possession; or, destroyed it; or, refused to receive it, etc., according to the fact. 6. In case of destruction, a copy of the claim, if one was taken, may be attached to the certificate. 7. Or, City and County.

§ 461. Approved claims or copies to be filed. Claims secured by liens. Description. Lost claims. Every claim allowed by the executor or administrator, and approved by a judge of the superior court, or a copy thereof, as hereinafter provided, must, within thirty days thereafter, be filed in the court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration. If the claim be founded on a bond, bill, note, or any other instrument, a copy of such instrument must accompany the claim, and the original instrument must be exhibited, if demanded, unless it be lost or destroyed, in which case the claimant must accompany his claim by his affidavit, containing a copy or particular description of such instrument, and stating its loss or destruction.

Claims secured by liens may be described. If the claim, or any part thereof, be secured by a mortgage or other lien which has been recorded in the office of the recorder of the county in which the land affected by it lies, it shall be sufficient to describe the mortgage or lien, and refer to the date, volume, and page of its record.

Lost claims. If, in any case, the claimant has left any original voucher in the hands of the executor or administrator, or suffered the same to be filed in court, he may withdraw the same when a copy thereof has been already, or is then, attached to his claim. A brief description of every claim filed must be entered by the clerk in the register, showing the name of the claimant, the amount and character of the claim, rate of interest, and date of allowance. **Kerr's Cyc. Code Civ. Proc., § 1497.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1746.
- Colorado.** 3 Mills's Ann. Stats., sec. 4786.
- Idaho.*** Code Civ. Proc. 1901, sec. 4140.
- Montana.** Code Civ. Proc., sec. 2607.
- Nevada.** Comp. Laws, sec. 2896.
- North Dakota.** Rev. Codes 1905, § 8104.
- Oklahoma.** Rev. Stats. 1903, sec. 1624.
- South Dakota.*** Probate Code 1904, § 175.
- Utah.** Rev. Stats. 1898, secs. 3852, 3854.
- Washington.** Pierce's Code, § 2536.
- Wyoming.** Rev. Stats. 1899, sec. 4752.

§ 462. Rejected claims to be sued for within three months. When a claim is rejected either by the executor or administrator, or a judge of the superior court, the holder must bring suit in the proper court against the executor or administrator within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim shall be forever barred. **Kerr's Cyc. Code Civ. Proc., § 1498.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 823, p. 314.
- Arizona.*** Rev. Stats. 1901, par. 1747.

- Idaho.*** Code Civ. Proc. 1901, sec. 4142.
Montana.* Code Civ. Proc., sec. 2608.
Nevada. Comp. Laws, sec. 2897.
North Dakota.* Rev. Codes 1905, § 8105.
Oklahoma. Rev. Stats. 1903, sec. 1625.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1161.
South Dakota.* Probate Code 1904, § 176.
Utah.* Rev. Stats. 1898, sec. 3856.
Washington. Pierce's Code, § 2538.
Wyoming. Rev. Stats. 1899, sec. 4753.

§ 463. Claims barred by statute of limitations. Examination by judge. No claim must be allowed by the executor or administrator, or by a judge of the superior court, which is barred by the statute of limitations. When a claim is presented to a judge for his allowance, he may, in his discretion, examine the claimant and others, on oath, and hear any legal evidence touching the validity of the claim. No claim against any estate, which has been presented and allowed, is affected by the statute of limitations, pending the proceedings for the settlement of the estate. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 498), § 1499.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 823, p. 314.
Arizona. Rev. Stats. 1901, par. 1748.
Idaho. Code Civ. Proc. 1901, secs. 4141, 4143.
Montana. Code Civ. Proc., sec. 2609.
Nevada. Comp. Laws, sec. 2898.
North Dakota. Rev. Codes 1905, § 8106.
Oklahoma. Rev. Stats. 1903, sec. 1626.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1161.
South Dakota. Probate Code 1904, § 177.
Utah. Rev. Stats. 1898, sec. 3857.
Washington. Pierce's Code, § 2539.
Wyoming. Rev. Stats. 1899, sec. 4754.

§ 464. Claims must be presented before suit. No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce

the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint, but no counsel fees shall be recovered in such action unless such claim be so presented. **Kerr's Cyc. Code Civ. Proc., § 1500.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1749.
- Kansas.** Gen. Stats. 1905, § 2957.
- Montana.*** Code Civ. Proc., sec. 2610.
- Nevada.** Comp. Laws, sec. 2899.
- North Dakota.** Rev. Codes 1905, §§ 8099, 8106.
- Oklahoma.** Rev. Stats. 1903, sec. 1627.
- South Dakota.** Probate Code 1904, §§ 170, 178.
- Utah.*** Rev. Stats. 1898, sec. 3858.
- Washington.** Pierce's Code, § 2540.
- Wyoming.** Rev. Stats. 1899, sec. 4755.

§ 465. **Time of limitation.** The time during which there shall be a vacancy in the administration must not be included in any limitations herein prescribed. **Kerr's Cyc. Code Civ. Proc., § 1501.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1750.
- Idaho.*** Code Civ. Proc. 1901, sec. 4144.
- Montana.*** Code Civ. Proc., sec. 2611.
- Nevada.*** Comp. Laws, sec. 2900.
- North Dakota.** Rev. Codes 1905, § 8106.
- Oklahoma.*** Rev. Stats. 1903, sec. 1628.
- South Dakota.*** Probate Code 1904, § 179.
- Utah.** Rev. Stats. 1898, sec. 3859.
- Washington.*** Pierce's Code, § 2541.
- Wyoming.** Rev. Stats. 1899, sec. 4756.

§ 466. **Claims in action pending at time of decease.** If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator, for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentations required. **Kerr's Cyc. Code Civ. Proc., § 1502.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1751.
Idaho.* Code Civ. Proc. 1901, sec. 4149.
Kansas. Gen. Stats. 1905, § 2956.
Montana.* Code Civ. Proc., sec. 2612.
Nevada. Comp. Laws, sec. 2901.
North Dakota. Rev. Codes 1905, § 8107.
Oklahoma.* Rev. Stats. 1903, sec. 1629.
South Dakota.* Probate Code 1904, § 180.
Utah.* Rev. Stats. 1898, sec. 3860.
Washington.* Pierce's Code, § 2542.
Wyoming.* Rev. Stats. 1899, sec. 4757.

§ 467. **Allowance of claim in part.** Whenever any claim is presented to an executor or administrator, or to a judge, and he is willing to allow the same in part, he must state in his indorsement the amount he is willing to allow. If the creditor refuse to accept the amount allowed in satisfaction of his claim, he shall recover no costs in any action therefor brought against the executor or administrator, unless he recover a greater amount than that offered to be allowed. **Kerr's Cyc. Code Civ. Proc.,** § 1503.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1752.
Idaho.* Code Civ. Proc. 1901, sec. 4145.
Montana.* Code Civ. Proc., sec. 2613.
Nevada. Comp. Laws, sec. 2902.
North Dakota. Rev. Codes 1905, § 8107.
Oklahoma.* Rev. Stats. 1903, sec. 1630.
South Dakota.* Probate Code 1904, § 181.
Utah.* Rev. Stats. 1898, sec. 3861.
Washington.* Pierce's Code, § 2543.
Wyoming. Rev. Stats. 1899, sec. 4758.

§ 468. **Effect of judgment against executor.** A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the judge; and the judgment must be that the executor or administrator pay, in due course of administration, the

amount ascertained to be due. A certified transcript of the original docket of the judgment must be filed among the papers of the estate in court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment. **Kerr's Cyc. Code Civ. Proc.**, § 1504.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 824, p. 315.

Arizona. Rev. Stats. 1901, par. 1753.

Idaho. Code Civ. Proc. 1901, sec. 4146.

Montana.* Code Civ. Proc., sec. 2614.

Nevada. Comp. Laws, sec. 2903.

North Dakota. Rev. Codes 1905, § 8108.

Oklahoma. Rev. Stats. 1903, sec. 1631.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1162.

South Dakota. Probate Code 1904, § 182.

Utah.* Rev. Stats. 1898, sec. 3862.

Washington.* Pierce's Code, § 2544.

Wyoming.* Rev. Stats. 1899, sec. 4759.

§ 469. Execution not to issue after death. If one is levied, the property may be sold. When any judgment has been rendered for or against the testator [or] intestate in his lifetime no execution shall issue thereon after his death, except as provided in section six hundred and eighty-six. A judgment against the decedent for the recovery of money must be presented to the executor or administrator like any other claim. If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof; and the officer making the sale must account to the executor or administrator for any surplus in his hands. A judgment creditor having a judgment which was rendered against the testator or intestate in his lifetime, may redeem any real estate of the decedent from any sale under foreclosure or execution, in like manner and with like effect as if the judgment debtor were still living. **Kerr's Cyc. Code Civ. Proc.**, § 1505.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 825, p. 315.

Arizona.* Rev. Stats. 1901, par. 1754.

- Idaho.*** Code Civ. Proc. 1901, sec. 4151.
Montana.* Code Civ. Proc., sec. 2615.
Nevada. Comp. Laws, sec. 2904.
North Dakota. Rev. Codes 1905, §§ 8109, 8169.
Oklahoma. Rev. Stats. 1903, sec. 1632.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1163.
South Dakota. Probate Code 1904, § 183.
Utah.* Rev. Stats. 1898, sec. 3863.
Washington. Pierce's Code, § 2545.
Wyoming. Rev. Stats. 1899, sec. 4760.

§ 470. **What judgment is not a lien on real property of estate.** A judgment rendered against a decedent, dying after verdict or decision on an issue of fact, but before judgment is rendered thereon, is not a lien on the real property of the decedent, but is payable in due course of administration. **Kerr's Cyc. Code Civ. Proc., § 1506.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1755.
Idaho.* Code Civ. Proc. 1901, sec. 4150.
Montana.* Code Civ. Proc., sec. 2616.
North Dakota. Rev. Codes 1905, § 8170.
Oklahoma.* Rev. Stats. 1903, sec. 1633.
South Dakota.* Probate Code 1904, § 184.
Wyoming.* Rev. Stats. 1899, sec. 4761.

§ 471. **Doubtful claims may be referred. Effect of referee's allowance or rejection.** If the executor or administrator doubts the correctness of any claim presented to him, he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy to some disinterested person, to be approved by the superior court, or a judge thereof. Upon filing the agreement and approval of such court or judge, in the office of the clerk of the court for the county in which the letters testamentary or of administration were granted, the clerk must enter a minute of the order referring the matter in controversy to the person so selected, or, if the parties consent, a reference may be had in the court; and the report of the referee, if confirmed, establishes or rejects the claim the same as if it had been

allowed or rejected by the executor or administrator and judge. **Kerr's Cyc. Code Civ. Proc.**, § 1507.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, secs. 826, 827, p. 315.

Arizona.* Rev. Stats. 1901, par. 1756.

Idaho.* Code Civ. Proc. 1901, sec. 4147.

Montana.* Code Civ. Proc., sec. 2617.

North Dakota. Rev. Codes 1905, § 8110.

Oklahoma. Rev. Stats. 1903, sec. 1634.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1164.

South Dakota. Probate Code 1904, § 185.

Utah. Rev. Stats. 1898, sec. 3864.

Washington. Pierce's Code, § 2546.

Wyoming. Rev. Stats. 1899, sec. 4762.

§ 472. Form. Reference of claim.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

It appearing that _____, the administrator² of the estate of _____, deceased, doubts the correctness of the claim of _____, for the sum of _____ dollars (\$____), presented against said estate on the _____ day of _____, 19____; that said administrator³ has entered into an agreement with said claimant to refer the matter in controversy, the correctness of said claim, to _____, Esq., for investigation; and that the said _____ is a disinterested person; this court⁴ therefore approves of such reference; and said agreement and approval having been filed in the office of the clerk of the court for the county⁵ in which the letters of administration were granted;—

It is ordered, That the matter in controversy be referred to the person so selected,⁶ and that said referee make to this court a report, with all convenient dispatch, as to whether said claim, or any part thereof, should be allowed or rejected.

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2, 3. Or, executor of the last will and testament, etc. 4. Or, the judge of this court. 5. Or, city and county. 6. If the parties consent, a reference may be had in the court.

§ 473. Form. Referee's report as to correctness of creditor's claim.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To the Honorable the ____² Court of the County³ of ____,
State of ____.

A controversy having arisen between ____, a creditor of said estate, and ____, the administrator⁴ thereof, as to the correctness of the claim of said ____ for the sum of ____ dollars (\$____), presented against said estate, —

I, the undersigned, referee, to whom such controversy has been referred to take evidence and report upon the facts respecting the liability of said estate upon such claim, hereby report that I have performed my duties as such referee, and find that all matters stated in said claim are true, and that such claim is just and correct.⁵ I therefore recommend that it be allowed and approved, and that a decree be entered to that effect.⁶

Respectfully submitted.

Dated ____, 19__.

____, Referee.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4. Or, executor, etc. 5. Or whatever the finding may be. 6. Or whatever other recommendation may be made.

§ 474. Trial by referee, how confirmed, and its effect. The referee must hear and determine the matter, and make his report thereon to the court in which his appointment is entered. The same proceedings shall be had in all respects, and the referee shall have the same powers, be entitled to the same compensation and subject to the same control, as in other cases of reference. The court may remove the referee, appoint another in his place, set aside or confirm his report, and adjudge costs, as in actions against executors or administrators, and the judgment of the court thereon shall be as valid and effectual, in all respects, as if the same had been rendered in a suit commenced by ordinary process. **Kerr's Cyc. Code Civ. Proc., § 1508.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.** Rev. Stats. 1901, par. 1757.
Idaho.* Code Civ. Proc. 1901, sec. 4148.
Montana.* Code Civ. Proc., sec. 2618.
North Dakota.* Rev. Codes 1905, § 8111.
Oklahoma.* Rev. Stats. 1903, sec. 1635.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1165.
South Dakota.* Probate Code 1904, § 186.
Washington. Pierce's Code, § 2547.
Wyoming.* Rev. Stats. 1899, sec. 4763.

§ 475. **Liability of executor, etc., for costs.** When a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause. **Kerr's Cyc. Code Civ. Proc., § 1509.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1758.
Idaho.* Code Civ. Proc. 1901, sec. 4213.
Kansas. Gen. Stats. 1905, § 2960.
Montana.* Code Civ. Proc., sec. 2619.
Nevada.* Comp. Laws, sec. 2905.
North Dakota.* Rev. Codes 1905, § 8112.
Oklahoma.* Rev. Stats. 1903, sec. 1636.
South Dakota.* Probate Code 1904, § 187.
Utah.* Rev. Stats. 1898, sec. 3865.
Wyoming.* Rev. Stats. 1899, sec. 4764.

§ 476. **Claims of executor, etc., against estate.** If the executor or administrator is a creditor of the decedent, his claim duly authenticated by affidavit must be presented for allowance or rejection to a judge of the superior court, and its allowance by the judge is sufficient evidence of its correctness, and must be paid as other claims in due course of administration. If, however, the judge reject the claim, action thereon may be had against the estate by the claimant, and summons must be served upon the judge, who may appoint an attorney, at the expense of the estate, to defend the action. If the claimant recover no judgment, he must

pay all costs, including defendant's reasonable attorneys' fees, to be fixed by the court. **Kerr's Cyc. Code Civ. Proc.**, § 1510.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, secs. 828, 829, p. 316.
- Arizona.** Rev. Stats. 1901, par. 1759.
- Colorado.** 3 Mills's Ann. Stats., sec. 4784.
- Idaho.** Code Civ. Proc. 1901, sec. 4152.
- Kansas.** Gen. Stats. 1905, § 2972.
- Montana.*** Code Civ. Proc., sec. 2620.
- Nevada.** Comp. Laws, secs. 2895, 2906.
- North Dakota.** Rev. Codes 1905, § 8113.
- Oklahoma.** Rev. Stats. 1903, sec. 1637.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., §§ 1166, 1167.
- South Dakota.** Probate Code 1904, § 188.
- Utah.** Rev. Stats. 1898, sec. 3866.
- Washington.** Pierce's Code, § 2548.
- Wyoming.*** Rev. Stats. 1899, sec. 4765.

§ 477. **Executor neglecting to give notice to creditors, to be removed.** If an executor or administrator neglects for two months after his appointment to give notice to creditors, as prescribed by this chapter, the court must revoke his letters, and appoint some other person in his stead, equally or the next in order entitled to the appointment. **Kerr's Cyc. Code Civ. Proc.**, § 1511.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1760.
- Idaho.*** Code Civ. Proc. 1901, sec. 4153.
- Montana.*** Code Civ. Proc., sec. 2621.
- Nevada.** Comp. Laws, sec. 2907.
- North Dakota.*** Rev. Codes 1905, § 8114.
- Oklahoma.** Rev. Stats. 1903, sec. 1638.
- South Dakota.*** Probate Code 1904, § 189.
- Washington.** Pierce's Code, § 2549.

§ 478. **Form. Order of removal for neglecting to give notice to creditors.**

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

It being shown to the court that ———, administrator² of the estate of ———, deceased, has neglected for two months

after his appointment to give notice to creditors, as prescribed by law; that a citation has issued for him to show cause for such neglect; that said citation has been served and returned, as provided by law and directed by this court; and that said administrator³ has made default;—

It is ordered, That the letters of administration⁴ heretofore granted to the said —, as administrator⁵ of the estate of —, deceased, be, and the same are hereby, revoked; that — be, and he is hereby, appointed administrator of said estate; and that letters of administration⁶ issue to him upon his taking the oath, and giving a bond in the sum of — dollars (\$—), with sureties to be approved by the judge of this court.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2, 3. Or, executor. 4. Or, letters testamentary. 5. Or, executor. 6. Or, in the case of an executor removed, that letters of administration with the will annexed issue, etc.

§ 479. **Executor to return statement of claims.** At the same time at which he is required to return his inventory, the executor or administrator must also return a statement of all claims against the estate which have been presented to him, if so required by the court, or a judge thereof, and from time to time thereafter he must present a statement of claims subsequently presented to him, if so required by the court, or a judge thereof. In all such statements he must designate the names of the creditors, the nature of each claim, when it became due, or will become due, and whether it was allowed or rejected by him. **Kerr's Cyc. Code Civ. Proc., § 1512.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 1761.

Idaho. Code Civ. Proc. 1901, sec. 4154.

Kansas. Gen. Stats. 1905, § 2959.

Montana.* Code Civ. Proc., sec. 2622.

Nevada. Comp. Laws, sec. 2908.

North Dakota. Rev. Codes 1905, § 8115.

Oklahoma. Rev. Stats. 1903, sec. 1639.

South Dakota. Probate Code 1904, § 190.

Utah. Rev. Stats. 1898, sec. 3867.

Washington. Pierce's Code, § 2550.

Wyoming. Rev. Stats. 1899, sec. 4766.

§ 480. Payment of interest-bearing claims. If there be any debt of the decedent bearing interest, whether presented or not, the executor or administrator may, by order of the court, pay the amount then accumulated and unpaid, or any part thereof, at any time when there are sufficient funds properly applicable thereto, whether said claim be then due or not; and interest shall thereupon cease to accrue upon the amount so paid. This section does not apply to existing debts unless the creditor consent to accept the amount. **Kerr's Cyc. Code Civ. Proc., § 1513.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1762.

Idaho.* Code Civ. Proc. 1901, sec. 4155.

Montana. Code Civ. Proc., sec. 2623.

North Dakota. Rev. Codes 1905, § 8116.

Oklahoma. Rev. Stats. 1903, sec. 1640.

South Dakota. Probate Code 1904, § 191.

Utah.* Rev. Stats. 1898, sec. 3868.

Wyoming. Rev. Stats. 1899, sec. 4767.

§ 481. Manner of closing estates when claims are unpaid and claimant cannot be found. Whenever any claim has been presented to an executor or administrator, and to the court, and has been allowed and approved, but the same shall not have been paid, and the estate is in all other respects ready to be closed, if it be made to appear to the satisfaction of the court or judge, by affidavit, or by testimony taken in open court, that the same cannot be, and has not been, paid because the claimant cannot be found, the court or judge shall make an order fixing the amount of said claim, with interest, if any, and directing the executor or administrator to deposit the amount with the county treasurer of the county in which the estate is being probated, who shall give a receipt for the same, and who shall be

liable upon his official bond therefor. Such executor or administrator shall at once make the deposit in accordance with such order of court and shall forthwith proceed to close up and settle such estate. Upon the final settlement of his accounts, the receipt of such treasurer shall be received as a proper voucher for the payment of such claim, and shall have the same force and effect as if executed by such claimant.

[Deposit in state treasury.] When the amount so deposited is not claimed within five years the court or judge, upon such showing by the affidavit of the county treasurer, must direct the same to be deposited in the state treasury for the benefit of such claimant, or his legal representative, to be paid to him, whenever, within five years after such deposit, proof to the satisfaction of the state controller and state treasurer is produced that he is entitled thereto. When so claimed, the evidence and the joint order of the controller and treasurer must be filed by the treasurer as his voucher, and the amount of the claim paid to the claimant, or his legal representative, on filing the proper receipt.

[When amount of claim escheats to state.] If no one claims the amount, as herein provided, the claim devolves and escheats to people of the state of California and shall be placed by the state treasurer to the credit of the school fund. This section shall be applicable to any and all estates now pending in which a decree of final discharge has not been granted. **Kerr's Cyc. Code Civ. Proc., § 1514.**

CLAIMS AGAINST ESTATE.

1. Notice to creditors.

- (1) In general.
- (2) When not necessary.
- (3) Time of, dependent on value of estate.
- (4) Additional notice. New notice.
- (5) Publication.
- (6) Decree establishing notice.
- (7) Order vacating decree.
- (8) Decree of no debts.

2. Claims in general.

- (1) Jurisdiction of courts.
- (2) Meaning of terms.
- (3) What is a claim.
- (4) Statement of particulars.
- (5) Affidavit or verification.
- (6) Claim is good in form when.

3. Presentation of claims.

- (1) In general.
- (2) Necessity of.
- (3) Place. Persons to act. Waiver.

- (4) Absence from state.
- (5) Manner of presentment.
- (6) Amendment of claims.
- (7) What claims must be presented.
- (8) "Contingent claims."
- (9) Claim of executor or administrator.
- (10) What claims need not be presented.
- (11) Same. Vendor's lien.
- (12) Same. Specific property.
- (13) Effect of presentment.
- (14) Effect of non-presentment.
- (15) Effect of death.
- (16) Presentation after death.
- 4. Allowance and rejection of claims.
 - (1) In general.
 - (2) Passing on claims. In general.
 - (3) Same. Rejection of claims.
 - (4) Right to consider claim rejected.
 - (5) Power of court and judge.
 - (6) Filing of claims.
 - (7) Defective verification.
 - (8) Amendment of claim.
 - (9) Objections to allowance.
 - (10) Effect of allowance. In general.
 - (11) Same. Presumption. Evidence.
 - (12) Judgment of allowance.
 - (13) Arbitration. Reference.
 - (14) Claims properly allowed.
 - (15) Claims that will be rejected.
 - (16) Claim of executor or administrator.
 - (17) Absence from state.
 - (18) Judgments.
 - (19) Contingent claims.
 - (20) Interest.
 - (21) Contest of claims. Vacating allowance.
- 5. Suits on claims.
 - (1) In general.
 - (2) Jurisdiction.
- (3) Presentation, when necessary.
- (4) No presentation necessary when.
- (5) Contingent claims.
- (6) Services.
- (7) Pleadings. Sufficiency of complaint.
- (8) Pleadings. Allegation as to presentation of claim.
- (9) Pleadings. Amendment of complaint.
- (10) Pleadings. Answer. Bill of particulars.
- (11) Pleadings. Variance.
- (12) Parties. Administrator, only, is necessary when.
- (13) Evidence. In general.
- (14) Evidence. Presentation. Payment. Burden.
- (15) Evidence. Plaintiff's statutory inability to testify.
- (16) Evidence. Admissions of decedent.
- (17) Interest.
- (18) Set-off. Counterclaim.
- (19) Findings. Recovery of costs.
- 6. Limitation of actions. Special statutes of limitation.
 - (1) In general.
 - (2) Application of statutes. Special and general.
 - (3) Barred claims not to be allowed. Exception.
 - (4) Suits to be commenced when.
 - (5) Statute commences to run when.
 - (6) Arrest, staying, or suspension of statute.
 - (7) Revival of actions. Waiver of statute.
 - (8) Action is not barred when.
 - (9) Action is barred when.
 - (10) Pleading. Defense.
- 7. Judgment against executor or administrator.
 - (1) In general.
 - (2) Default. Amendment.

- (3) Form of judgment.
- (4) Recovery. Costs.
- (5) Effect of judgment.
- (6) Execution.
- 8. Enforcement of claims against estates.
 - (1) In general.
 - (2) By attachment.
- 9. Action pending against decedent at time of his death. Presentation of claim.
 - (1) In general.
 - (2) Practice. Substitution. Supplemental complaint.
- 10. Death of one against whom right of action exists.
 - (1) Right of action preserved.
 - (2) Effect of, as to statute of limitations.
- 11. Foreclosure of mortgages. In general.
 - (1) Presentation of claim. Purpose of.
 - (2) Presentation. When necessary.
 - (3) Presentation. When not necessary.
 - (4) Distinct proceedings.
 - (5) Presentation. Form of.
 - (6) Pleadings. Parties.
 - (7) Presentation. Failure to present.
 - (8) Effect of allowance. Right to foreclose.
 - (9) Judgment. Interest.
 - (10) Sale. Holder as purchaser.
- (11) Redemption. Surplus.
- 12. Foreclosure of mortgages. Limitation of actions.
 - (1) In general.
- 13. Foreclosure of mortgages. Death of mortgagor.
 - (1) In general.
 - (2) Enforcement without presentation.
 - (3) Express waiver in complaint.
 - (4) Limitation of actions. In general.
 - (5) Limitation of actions. Death before maturity.
 - (6) Limitation of actions. Death of defendant pending action.
 - (7) Redemption.
- 14. Mortgages on homesteads.
 - (1) In general. Parties to foreclosure.
 - (2) Presentation of claim. When necessary.
 - (3) Presentation of claim. When not necessary.
 - (4) Limitation of actions.
- 15. Trusts. Deeds of trust.
 - (1) In general.
 - (2) Presentation is necessary when.
 - (3) Recovery of specific property.
 - (4) Deeds of trust.
- 16. Appeal.
 - (1) In general.
 - (2) Right of appeal. Jurisdiction.

1. Notice to creditors.

(1) In general. A notice to the creditors of a decedent, requiring them to present their claims to the executor or administrator, may designate the office of his attorney as the place where he transacts the business of the estate, and as the place for the presentation, although he may be engaged in transacting some kind of business elsewhere: *Bollinger v. Manning*, 79 Cal. 7, 13; 21 Pac. Rep. 375. But a claim may be presented to him before the publication of notice to creditors: *Janin v. Browne*, 59 Cal. 37, 43. In a statute that requires creditors

to present their claims to the executor or administrator "at the place of his business," the words "place of his business" should be construed to include the place where the administrator transacts the business of the estate, though he may be engaged in transacting some kind of business elsewhere. He may properly designate the office of his attorney as the place where he transacts the business of the estate, and designate that as the place for the presentation of claims: *Bollinger v. Manning*, 79 Cal. 7, 13; 21 Pac. Rep. 375. It is unnecessary, under the Nevada statute, that the notice to be given by an executor or an administrator to the creditors of an estate should specify whether the place where the claims are to be presented is his place of residence or is his place of business: *Douglass v. Folsom*, 21 Nev. 441; 33 Pac. Rep. 660. Where the statute does not expressly require the administrator to sign the notice personally, he may authorize his attorney to sign it in his name and in his behalf: *Meikle v. Cloquet* (Wash.), 87 Pac. Rep. 841, 843.

(2) When not necessary. Notice to creditors is not necessary where it can result in no possible good. The law does not require vain things. Hence where the widow is entitled to have the whole estate set apart to her, as where it does not exceed the statutory limit, publication of notice to creditors is not necessary: *Estate of Atwood*, 127 Cal. 427, 430; 59 Pac. Rep. 770; *Estate of Palomares*, 63 Cal. 402.

(3) Time of, dependent on value of estate. Under the California statute, if the estate exceeds ten thousand dollars in value the executor or administrator is to call upon the claimants to present their claims within ten months from the date of the first publication of notice. If the estate is less than ten thousand dollars, then to present them within four months. But, while he is so called upon to designate the time, his designation is not, of course, a judicial determination of the value of the estate, and is not binding upon any creditor or claimant, if the time limit is not the time prescribed by law according to the value of the estate. A wrong determination, by an executor or administrator, of the value of the estate, and publication of notice accordingly, cannot deprive creditors of their rights. From the fact that the notice to creditors must be published immediately after he is appointed, and that the executor or administrator, after his appointment, has three months within which to return the inventory and appraisement, it is plainly observable that the law does not contemplate that he shall obtain information from the appraisements for the purpose of fixing the time specified in the notice in which creditors may present their claims. It would seem, therefore, that he must, for himself, and at his own risk, investigate and determine the time in which creditors may appear and present their claims; and a wrong determination of that fact, by him, may often result in serious consequences, for his decision of the fact is in no sense judicial, and

therefore not binding and conclusive upon the creditors. The law, in effect, says that when the estate is of greater value than ten thousand dollars the creditors are entitled to ten months' notice. It does not say that when the executor or administrator determines the value to be greater than ten thousand, the notice shall be given for ten months; but it is the fact, and not the executor's or administrator's determination of the fact, that is controlling. The law gives the creditors certain rights as to the time within which they may present their claims, and no executor or administrator, by giving a four months' notice, where he should have given a ten months' notice, can in any way deprive creditors of those rights: *Paterson v. Schmidt*, 111 Cal. 457, 458; 44 Pac. Rep. 161.

(4) **Additional notice. New notice.** When the probate judge makes an order for the publication of notice to creditors, he may also direct additional notice at any time within the period allowed for the presentation of claims: *Johnston v. Superior Court*, 105 Cal. 666, 668; 39 Pac. Rep. 36. The only effect of giving insufficient notice is to operate as an extension of the time for the presentation of claims, until due and proper notice shall be given: *Pitte v. Shipley*, 46 Cal. 154, 161. If the probate judge determines, when proof of publication is made, that the publication did not give notice to creditors, it is his duty to direct notice to be given, as though there had been no previous attempt to do so, and the time for the presentation of claims will begin to run from the time of the giving of the new notice: *Johnston v. Superior Court*, 105 Cal. 666, 669; 39 Pac. Rep. 36.

(5) **Publication.** The court has no power to designate in its original order the newspaper in which the notice to creditors shall be published; this is a function to be performed by the executor or administrator. A provision in the statute, that if there is no newspaper published in the county, the court is to designate the newspaper in which the notice is to be published, implies that the power of the court to designate the newspaper exists only in the case specified: *Brouse v. Law*, 127 Cal. 152, 153; 59 Pac. Rep. 384. The legal period of publication, however, is to be fixed by the judge. Until he acts, it cannot be known whether the period of publication will exceed the statutory minimum or not. Without an order, therefore, there can be no legal period of publication, and consequently no authority for publishing. A publication in advance of the order of the court is of no validity; and the best evidence of publication is the newspaper itself: *Wise v. Williams*, 88 Cal. 30, 34; 25 Pac. Rep. 1064. The affidavit of publication is only *prima facie* evidence of the facts therein stated, and may be contradicted by the files of the newspaper in which the notice was published, showing that such notice was not published for the time required by law: *Wise v. Williams*, 88 Cal. 30, 34; 25 Pac. Rep. 1064. If a publication is to be made not less

than once a week for four weeks, and the affidavit of publication shows that it was published on August 7th, 14th, 21st, and 28th, but the files of the newspaper introduced in evidence show that the notice was not published on August 28th, which contradicts the affidavit, it results that there were only three publications after the order for publication was made: *Wise v. Williams*, 88 Cal. 30, 34; 25 Pac. Rep. 1064. A failure to publish such notice does not dispense with the necessity of presenting claims before suit thereon, but only with the necessity of presenting them within the time prescribed by the statute: *McFarland v. Fairlamb*, 18 Wash. 601; 52 Pac. Rep. 239, 240. It is only in those cases where the court, in its discretion, by reason of the circumstances, deems it proper to require a more extended publication than the minimum required by the statute that it is necessary to specify the time of publication in the order. In all other instances the order may be silent in that respect, and when it is so, a publication of proper notice thereunder, not less than the minimum number of times required by the statute, is a compliance with the law, and constitutes legal notice to the creditors: *Hensley v. Superior Court*, 111 Cal. 541, 542; 44 Pac. Rep. 232. The executor or administrator is required to publish the notice to creditors in a newspaper for the length of time directed, calling upon all persons having claims against him to exhibit their claims, with the necessary vouchers, either at his place of residence or business, as specified in the notice; and he is further called upon to prescribe in this notice the time limit within which their claims must be presented: *Estate of Wilson*, 147 Cal. 108, 110; 81 Pac. Rep. 313.

(6) Decree establishing notice. If legal notice to creditors has been given, and due proof thereof made, it is the duty of the court to make an order or decree showing that due notice to creditors has been given, and directing that such order or decree be entered in the minutes of the court and recorded: *Hensley v. Superior Court*, 111 Cal. 541, 543; 44 Pac. Rep. 232. But a decree establishing due notice to creditors is not conclusive. It may be shown by proof that the publication of notice to creditors was insufficient: *Wise v. Williams*, 88 Cal. 30, 34; 25 Pac. Rep. 1064; *Estate of Wilson*, 147 Cal. 108, 111; 81 Pac. Rep. 313. Upon the application of the executor or administrator for a decree declaring that due notice to creditors has been given, the court will examine the character of the publication that has been made, and, if it shall then determine that its character and form have been such as not to give a sufficient notice for the presentation of claims against the estate, it will refuse to make such decree: *Brouse v. Law*, 127 Cal. 152, 154; 59 Pac. Rep. 384. A failure to file proof of the publication of the notice to creditors within the time prescribed by the statute does not affect the validity of the notice, if it was properly given. The time within which a creditor is required to present his claim begins to run from the first publication of the

notice, and not from the filing of the proof thereof with the county clerk. The publication, and not the filing, is therefore the vital fact to be considered, and the date of the filing is not jurisdictional. The statute requiring it to be made within a certain time is directory, and not mandatory: *In re Conant's Estate*, 43 Or. 530; 73 Pac. Rep. 1018, 1020. The statute contemplates that an executor or administrator may obtain his decree establishing due notice to creditors after the notice has in fact been given, by presenting and filing a copy thereof, with the affidavit of due publication, and upon the production of such other testimony as may be satisfactory to the court. While, in practice, such decrees are taken always as a matter of course upon the presentation and inspection of the statutory proofs, it may sometimes happen that the question of the value of the estate is an exceedingly close one, and that valuable rights may depend on an exact determination of the value. It is not incumbent, therefore, upon the trial judge to make his decree at haphazard, or upon partial, and what may prove subsequently to be most unsatisfactory, proof. The wisest course to pursue in such a case might well be to wait until the time for distribution has arrived, when all the parties are regularly before the court, and when the value of the estate can be accurately determined: *Estate of Wilson*, 147 Cal. 108, 110; 81 Pac. Rep. 313.

(7) **Order vacating decree.** The question of the value of an estate is often a close one, and the order directing publication of notice in some designated newspaper is made without knowledge of the actual value of the estate. It follows, therefore, that the order of the trial court vacating its decree establishing due notice to the creditors is in no sense a judgment upon the facts, so as to constitute *res judicata* between the parties, and has no other or further effect than to clear the way for a proper determination of the question as to the disputed value of the estate. If the determination of that question has been reserved until the time for distribution has arrived, and it has been made to appear clearly that the estate was of less value than ten thousand dollars, a publication of notice to creditors for four months would be sufficient, and the court's decree establishing due notice would be in all respects regular: *Estate of Wilson*, 147 Cal. 108; 81 Pac. Rep. 313, 314.

(8) **Decree of no debts.** A decree that there are no debts cannot be entered until the time limited in the notice to creditors has expired, and if no such notice has been given, the *ex parte* affidavits of persons interested in the estate are not sufficient to prove that there are no debts outstanding: *In re Higgins' Estate*, 15 Mont. 474; 39 Pac. Rep. 506, 510.

2. Claims in general.

(1) **Jurisdiction of courts.** The estate of a deceased person is within the jurisdiction and under the control of the probate court.

Executors and administrators are appointed by and render their accounts to that court, and the whole subject-matter of such estates, and their settlement and distribution, comes within its jurisdiction and under its scrutiny: *Dodson v. Nevitt*, 5 Mont. 518; 6 Pac. Rep. 358. Though county courts are vested with jurisdiction pertaining to courts of probate, the two jurisdictions are as separate and distinct as if conferred upon separate tribunals. While sitting in the transaction of probate business, the nature and jurisdiction of the county court must be sought in the general nature and jurisdiction of the probate courts as they are known in the history of the English law and the jurisprudence of this country. The allowance or ordering of the payment of claims against estates that are in process of administration has always been considered an appropriate subject for the jurisdiction of probate courts. It follows that, although a county court has civil jurisdiction of an amount not exceeding five hundred dollars, it has, while sitting in the transaction of probate business, jurisdiction to adjudicate and allow a claim for more than five hundred dollars against an estate: *In re Morgan's Estate*, 46 Or. 233; 77 Pac. Rep. 608.

(2) **Meaning of terms.** The word "due" is sometimes used, in the statute, in two senses; namely, in the sense of "payable" and in the sense of "owing." Thus in the clause "if the claim be not due when presented," etc., and in the clause "if the claim which is due," etc., the term is used in the sense of payable; and in the clause "justly due," it is used in the sense of owing: *Crocker-Woolworth Nat. Bank v. Carle*, 133 Cal. 409, 411; 65 Pac. Rep. 951. The words "claimant" and "claim" are used, respectively, as synonymous with "creditor" and "legal demand for money" to be paid out of the estate: *Gray v. Palmer*, 9 Cal. 616, 636; *Estate of McCausland*, 52 Cal. 568. "Claims against an estate" are those in existence at the date of the death of the deceased. Other claims against the estate are those incurred by the administrator or executor in settling the estate, and are properly denominated "expenses of administration": *Dodson v. Nevitt*, 5 Mont. 518; 6 Pac. Rep. 358.

(3) **What is a claim.** The term "claim," as used in connection with the estate of a deceased person, has reference to such debts or demands against the decedent as might have been enforced against him in his lifetime by personal action for the recovery of money, and upon which a money judgment could have been rendered. A balance struck upon an account between parties is such a demand as would constitute a sufficient cause of action: *Estate of Swain*, 67 Cal. 637; 8 Pac. Rep. 497, 500; *Fallon v. Butler*, 21 Cal. 24; 81 Am. Dec. 140; *Estate of McCausland*, 52 Cal. 568; *Stuttmeister v. Superior Court*, 72 Cal. 487, 489; 14 Pac. Rep. 35. The word "claim" is broad enough to embrace a mortgage or any other lien against the estate: *Ellis v. Polhemus*, 27 Cal. 350, 354; but the word "claim" or "demand" does not include a family allowance: *Estate of McCausland*, 52 Cal. 568, 577.

All wages due a clerk for services rendered, before as well as during the last allowance of a deceased employer, fall within the second class of claims against his estate, and are included in the term "wages of servants" as used in the Kansas statute respecting executors and administrators and the settlement of estates of deceased persons: *Cawood v. Wolfley*, 56 Kan. 281; 43 Pac. Rep. 236. A vendor of real estate has a lien upon the same in the hands of the administrator for the unpaid purchase-money: *Cahoon v. Robinson*, 6 Cal. 225, 226. Where an attorney compromises a claim against an estate, on a contract made with the administrator, several years after the intestate's death, the claim of such attorney for services is not a claim against the estate: *Lust v. Patterson*, 2 Col. App. 306; 30 Pac. Rep. 253, 254. A payment made by the heirs of an intestate on the latter's mortgage indebtedness, before one of such heirs is appointed as administrator, is not a claim against the estate; and cannot be made such by the heir's subsequent appointment as administrator: *Estate of Heeney*, 3 Cal. App. 548; 86 Pac. Rep. 842. So if heirs choose to bring suit to remove a cloud from their property, no one can object; but the expenses of such litigation are to be adjusted and paid by the parties to the action, and not by the estate of which the property forms a part: *Estate of Heeney*, 3 Cal. App. 548; 86 Pac. Rep. 842, 844. If a large amount of the separate funds of the husband is commingled with a comparatively trifling amount of the separate funds of the wife, the husband's separate property is not to be forfeited, but the wife, at most, can have a claim only against the estate of her husband for her funds so commingled: *Estate of Cudworth*, 133 Cal. 462, 468; 65 Pac. Rep. 1041.

(4) **Statement of particulars.** It is not required that a claim against an estate should state the facts with all the preciseness and detail required in a complaint, and the sufficiency of such a claim is not to be tested by the rules applicable to pleadings. It should, of course, sufficiently indicate the nature and amount of the demand to enable the executor and judge in probate to act advisedly upon it; and when it does this, it is sufficient. The claimant is not required to show the circumstances in which the claim originated, and the conduct of the parties in reference thereto: *Pollitz v. Wickersham* (Cal.), 88 Pac. Rep. 911, 916. As an illustration of a sufficient statement of particulars of claims, see *Mauer v. King*, 127 Cal. 114, 116; 59 Pac. Rep. 290. It is a sufficient statement of the "particulars" of claims based on contract, if such statement shows the date of the contract, the names of the parties, the amount to be paid, when it is to be paid, and the kind of money is also stated: *Landis v. Woodman*, 126 Cal. 454, 456; 58 Pac. Rep. 857. In the case of a simple, plain, ordinary promissory note, there is no necessity for stating any other particulars than those appearing upon its face. The business world would be badly handicapped in dealing with commercial paper if a

history of such paper were required to accompany it from its inception throughout its long and devious travels. To obtain such a history would be impossible in numberless cases: *Landis v. Woodman*, 126 Cal. 454, 456; 58 Pac. Rep. 857. A claim against the estate of a deceased person, for services rendered to him in his lifetime, which were agreed to be paid for out of the proceeds of the sale of certain parcels of real estate, that remained unsold at his death, is not void for uncertainty in not describing such real estate, as the only necessity for any reference to the land arises out of the fact that the claim should show that it was not barred by the statute of limitations, and the description of the land is not essential to that fact: *Thompson v. Orefña*, 134 Cal. 26, 29; 66 Pac. Rep. 24.

(5) **Affidavit or verification.** The affidavit to a claim against the estate of a deceased person must be made before an officer authorized to administer oaths: *Winder v. Hendricks*, 56 Cal. 464, 465. If the statute requires creditors, in filing claims against a decedent's estate, to file an affidavit stating that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of the "affiant," an affidavit, filed by a creditor, that there are no offsets to the same to the knowledge of said "claimant" is sufficient, where the same person was "claimant" and "affiant." The use of one word rather than the other in such a case is wholly immaterial: *Davis v. Browning*, 91 Cal. 603, 605; 27 Pac. Rep. 937; *Dorais v. Doll*, 33 Mont. 314; 83 Pac. Rep. 884; *Warren v. McGill*, 103 Cal. 153; 37 Pac. Rep. 144, 145. So the verification to a claim against the estate of a decedent is sufficient where it was in substantial compliance with the law in force at the time it was made: *Poncein v. Furth*, 15 Wash. 201; 46 Pac. Rep. 241, 242. If it is stated in the claim that it is for the sum of four hundred dollars, but in the affidavit to the claim it is stated "that the amount thereof, to wit, the sum of four hundred, is justly due," etc., the omission of the word "dollars" is not fatal to the affidavit: *Hall v. Superior Court*, 69 Cal. 79, 80; 10 Pac. Rep. 257. It is not material that the claim is verified, as in the case of a claim based upon a judgment, if the statute does not require it to be verified: *Estate of Crosby*, 55 Cal. 574, 578. The verification of a claim against the estate of a deceased person is sufficient if it substantially complies with the statute: *Griffith v. Lewin*, 129 Cal. 596, 598; 62 Pac. Rep. 172. Thus if the claim contains a copy of the promissory note on which it is founded, and states that no part thereof has been paid, except the specified amount, and that a specified balance is due for principal and interest to a given date, an affidavit to the claim, reciting that the balance is justly due the claimant up to such date; that no payments have been made thereon which are not credited; and that there are no offsets to the same to the knowledge of the affiant,—is good, although the verification was made about two weeks after the date to which such bal-

ance referred: *Griffith v. Lewin*, 129 Cal. 596, 598; 62 Pac. Rep. 172. Surplusage does not vitiate the verification, where it contains all that the statute requires. If the verification states that the sum is justly due to the claimant, and that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of the claimant or affiant, "except some small items, the exact amount of which is not known to affiant," but which he is willing to have credited when the same is shown by the administrator, such exception does not vitiate the verification: *Guerian v. Joyce*, 133 Cal. 405, 406; 65 Pac. Rep. 972. Where the statute requires the affidavit to set forth the reason why it is not made by the claimant, when it is not so made, an affidavit, by claimant's attorney, that the claimant is a corporation, and that none of its officers, except said attorney, reside in the county, is a sufficient compliance with the statute: *Empire State Min. Co. v. Mitchell*, 29 Mont. 55; 74 Pac. Rep. 81, 82. But the affidavit is defective if it does not assign some reason which would relieve the claimant from making it: *Maier Packing Co. v. Frey* (Cal. App.), 89 Pac. Rep. 875, 876. So if the agent of a claimant presents a mortgage note to an executor or administrator of a deceased mortgagor, and makes an affidavit thereto, which fails to give any reason why it was not made by the claimant, and states that there are no offsets, "to the knowledge of the claimant," instead of "to the knowledge of affiant," as required by the statute, and the claim is rejected as a claim against the estate, such presentation is fatally defective, and will not support an action or judgment upon the note: *Perkins v. Onyett*, 86 Cal. 348, 350; 24 Pac. Rep. 1024. The statute requiring an affidavit to be attached to a claim showing that it is due, and that there have been no payments and no offsets, is not applicable to a judgment. In the case of a judgment, no such affidavit is required: *Cullerton v. Mead*, 22 Cal. 95, 99. The demand of an attorney for services rendered an administrator during the progress of the settlement of the estate of a decedent, which has been allowed and approved, is not technically a "claim" against the estate, but will be treated as such: *Stuttmeister v. Superior Court*, 72 Cal. 487; 14 Pac. Rep. 35.

(6) **Claim is good in form when.** A claim against the estate of a deceased person, for services rendered, is sufficient in form, though it is in the form of an account showing the total number of days of service, the rate of payment per day, the amount paid on account, and the balance due: *Duncan v. Thomas*, 81 Cal. 56, 57; 22 Pac. Rep. 297. Under a statute which provides that claims presented in the probate court for allowance shall be heard summarily, and without the form of pleading, it is not proper practice to interpose a demurrer to a claim therein: *Hayner v. Trott*, 46 Kan. 70; 26 Pac. Rep. 415. A claim is good in form where it is presented to a probate court for allowance, and alleges that the debtor therein named owes the party

presenting it a stated sum for commissions paid upon the sale of certain machines, for which notes were taken that are uncollectable, and copies of said notes are attached, showing the amount of the same, and the amount of the commissions paid thereon is also shown, and said claim is verified, and has attached thereto contracts which provide that, when commissions have been paid on notes that are uncollectable, they shall be refunded: *Hayner v. Trott*, 46 Kan. 70; 26 Pac. Rep. 415. So a claim based upon a promissory note which has not matured at the time the claim is presented is sufficient, if it is in the usual form and contains a copy of the note, followed by the required statutory affidavit. No other particulars of the claim need be stated where the promise to pay is not contingent, but is absolute, though the time of payment of the note depends upon the completion of another contract: *Crocker-Woolworth Nat. Bank v. Carle*, 133 Cal. 409, 410; 65 Pac. Rep. 951. A verified claim on a note, setting out a copy of the note, is sufficient without producing the original instrument, if the original is not demanded, particularly if the attorney for the estate afterwards informs the claimant that his claim may be considered as "rejected": *McFarland v. Fairlamb*, 18 Wash. 601; 52 Pac. Rep. 239, 241.

3. Presentation of claims.

(1) **In general.** Claims against the estate of a decedent may be presented to the executor or administrator thereof before the publication of notice to creditors to present their claims, but it is not usual to do so: *Ricketson v. Richardson*, 19 Cal. 330, 354; *Janin v. Browne*, 59 Cal. 37, 43. A claim must be presented within the time prescribed by the notice: *Davidson v. Rankin*, 34 Cal. 503. There is no statute in California which, in terms, denies to a creditor and resident of a sister state the right to present his claim in the courts of California, whether the administration in the courts of that state be primary or ancillary; and, under the principle of comity, such a claim should be entertained: *McKee v. Dodd* (Cal.), 93 Pac. Rep. 854, 856. The commencement of a suit, and the service upon the executor or administrator of a verified complaint, within the time in which a claim could have been properly presented, operates as a presentation of the claim: *Clayton v. Dinwoodey* (Utah), 93 Pac. Rep. 723, 726. The commencement of a suit and its continuous prosecution operates as a presentation of the claim, and obviates the necessity of presentation: *Clayton v. Dinwoodey* (Utah), 93 Pac. Rep. 723, 726. There should be an actual presentation of the claim within the time prescribed, or something done by the party equivalent to it. The presentation need not be in any particular form, but must be sufficient to give such notice to the executor or administrator of the existence of the debt or demand, its character and amount, as would enable him with reasonable certainty to provide for its payment. Mere knowledge on the part of the executor or administrator of the existence of the claim is not enough.

The party holding the claim or demand must pursue some measures to present his demand, and not remain passive or sleep upon his right. The bringing of a suit or action at law or in equity, is in some jurisdictions regarded as an actual presentation: *Clayton v. Dinwoodey* (Utah), 93 Pac. Rep. 723, 726.

(2) **Necessity of.** The holder of a claim against the estate of a deceased person cannot maintain any action thereon unless the claim has first been presented to the executor or administrator for allowance or rejection: *Dodson v. Nevitt*, 5 Mont. 518; 6 Pac. Rep. 356, 359; *Etchas v. Orefia*, 127 Cal. 588; 60 Pac. Rep. 45; *Morse v. Steele*, 149 Cal. 303; 86 Pac. Rep. 693. And there is no exception to this rule, except as to one who has been absent from the state. The statute is imperative, and applies to all claims arising upon contracts, and a court is not authorized to make an exception to relieve from hardship or to aid apparent equities. The requirement is a statute of limitations, and the claims that are due or contingent must be presented within the time limited by the notice, and any claim not so presented is barred forever: *Morrow v. Barker*, 119 Cal. 65, 66; 51 Pac. Rep. 12. All claims, whether due or not due, stand upon the same footing as to the time of presenting the same for allowance: *Estate of Swain*, 67 Cal. 637, 639; 8 Pac. Rep. 497. The failure to publish notice to creditors, as provided by the statute, does not dispense with the necessity of presenting the claim before suing thereon. The only effect of such failure is to dispense with the necessity of presenting the claim within the time prescribed by the statute: *McFarland v. Fairlamb*, 18 Wash. 601; 52 Pac. Rep. 239, 241. Nor does the statute which regulates the presentation of the claim affect the question of the necessity of presenting it: *Pitte v. Shipley*, 46 Cal. 154, 161. If any claim is made against the estate of deceased, it is necessary to present the same; otherwise no presentation is necessary: *Sharpstein v. Friedlander*, 54 Cal. 58. The law in force at the time governs as to the presentation of all claims to the representative of the estate for allowance: *Hibernia S. & L. Soc. v. Hayes*, 56 Cal. 297, 298. A contingent claim and a claim not due must be presented according to the statute after the same becomes due or absolute: *Pico v. De la Guerra*, 18 Cal. 422, 428. Claims must be presented, not merely filed with the county clerk. A mere filing with such officer does not make the claim a charge upon the estate: *Pico v. De la Guerra*, 18 Cal. 422, 428. It is compulsory upon a claimant to present his claim under oath, stating all offsets and credits, before he can maintain an action or be paid his claim. The purpose of the law is to ascertain the balance existing, and to give to both the claimant and to the estate the benefit of all just offsets, whether the estate be solvent or insolvent: *Ainsworth v. Bank of California*, 119 Cal. 470, 476; 63 Am. St. Rep. 135; 51 Pac. Rep. 952; 39 L. R. A. 686. If a married woman owns a mine in her own right and as her separate property, and employs an agent to rent

such mine for her and to account for the proceeds to her, and she brings an action against him to recover the same, it is no defense to such claim for rents that the agent had expended money for plaintiff's husband, in representing certain quartz-mining claims, which had been conveyed by the husband to such agent for the purpose of sale, where the facts clearly show that the agent held the title to such quartz claims in trust for the deceased husband, in his lifetime, and, after his death, in trust for his estate, and where the estate had not been administered. In such a case, where the plaintiff was appointed administratrix of her husband's estate, claims against it must have been presented to the administratrix for allowance before a suit could be commenced thereon: *Rutherford v. Talent*, 6 Mont. 132; 9 Pac. Rep. 821.

REFERENCES.

Necessity of presenting ward's claim against estate of deceased guardian: See note 58 L. R. A. 86.

(3) **Place. Persons to act. Waiver.** Claims against an estate of a deceased person may be legally presented at the place where the notice directs them to be presented, whether the administrator or executor is there to receive them or not. Absence from the state makes no difference in this rule: *Douglass v. Folsom*, 21 Nev. 441; 33 Pac. Rep. 660. The owner of a claim is the proper person to present it. Thus so long as a note and mortgage remain in the possession of the mortgagee, unassigned, he is the only person that can lawfully present the demand for allowance, and if he fails to present it within the time specified in the notice to creditors, the demand, as a claim against the estate generally, is barred by the statute: *Marsh v. Dooley*, 52 Cal. 232, 235. Under the statutes of Nevada, it is not a sufficient presentation of a claim against an estate to hand it to the "attorney for the estate," at least, not without showing that it actually reached the administrator within the proper time for the presentation of claims. There is no such officer as attorney of record, or attorney generally, for an estate. An attorney's employment with reference to the estate must always be in a particular matter, and with that matter his legal connection with the estate ends: *Douglass v. Folsom*, 21 Nev. 441; 33 Pac. Rep. 660. Even where an attorney is authorized by the executor to receive the presentation of particular claims, that does not authorize the attorney to receive claims generally, and to bind the executor by their presentation, without regard to whether they ever reached him. The attorney is simply the vehicle through which such claims are conveyed to the administrator, and this no more authorizes him to receive other claims generally than it would have authorized the post-office department to do so, had that been the instrument of conveyance chosen. The presentation of a claim left at the place designated in the notice to creditors is legal, regardless of whether it is ever delivered to the executor or administrator, but a claim against an estate, not

presented to the executor, nor presented at the place designated in the notice, but presented to an attorney who is acting for the estate, is not legally presented: *Douglass v. Folsom*, 22 Nev. 217; 38 Pac. Rep. 111. An executor or administrator cannot waive the necessity of presenting a claim against an estate for allowance: *Harp v. Calahan*, 46 Cal. 222, 233. An executor or administrator cannot waive the statutory regulation of the probate law that imposes the loss of a claim if it is not presented within the time prescribed: *Defries v. Cartwright*, 10 Haw. 249, 251. Where the business of a decedent has been conducted by the executor or administrator at a profit, obligations incurred by him for goods furnished in the conduct of the business are claims against the estate, and not against him personally. Such claims may therefore be presented for allowance either by the creditors or by the successor of the executor or administrator: *Fleming v. Kelly*, 18 Col. App. 23; 69 Pac. Rep. 272, 273.

(4) **Absence from state.** When it is made to appear to the satisfaction of the court or judge, by the affidavit of the claimant, or by other proof, that he had no notice requiring him to present his claim against an estate, as provided by the statute, it may be filed after the expiration of the statutory time for the publication of the notice to creditors, if within the time prescribed by statute specially applicable to such a case; as, before the decree of distribution is entered, or before the filing of the final account: *Cullerton v. Mead*, 22 Cal. 95, 99; *Morrow v. Barker*, 119 Cal. 65, 66; 51 Pac. Rep. 12; *Pacific States S. L. & B. Co. v. Fox*, 25 Nev. 229; 59 Pac. Rep. 4. No other proof of absence will be required than the claimant's own affidavit; nor is the time for filing his claim limited by the fact of his return to the state before the expiration of the time within which, by the terms of the notice, claims were required to be presented, for the law extends the time for presenting his claim, he being absent from the state during the time of the publication of the notice to creditors; and the statute requiring that it must appear "to the satisfaction of the executor or administrator and the probate judge" that the claimant had no notice does not give any power or right to say arbitrarily that they are not "satisfied," and therefore to reject the claim. The affidavit must show to the satisfaction of a reasonable, fair, and impartial mind that the claimant had no notice, and that is all that is required: *Cullerton v. Mead*, 22 Cal. 95, 99.

(5) **Manner of presentment.** The apparent purposes in requiring the presentation of claims accompanied with proper vouchers are: 1. To furnish the administrator with pertinent evidence touching their validity and justness, by means of which he may determine for himself whether they ought to be paid out of the funds of the estate; and 2. To enable him to justify his acts, in some measure at least, in accounting with the probate court: *Willis v. Marks*, 29 Or. 493; 45

Pac. Rep. 293, 296. The claimant is required to present his claim with the proper voucher. The voucher referred to is undoubtedly the affidavit of the claimant to the effect that the amount claimed is justly due, etc. The claim and the voucher go together, or, rather, the voucher must go with the claim, in order to constitute a valid presentation of the same: *Willis v. Marks*, 29 Or. 493; 45 Pac. Rep. 293, 296. No presentation of a claim against a decedent, to an executor or administrator, is effective without an affidavit that the claim is justly due: *Pico v. De la Guerra*, 18 Cal. 422, 427. A presentation of the claim, accompanied by a copy of the affidavit, instead of the original, is insufficient: *Ash v. Clark*, 32 Wash. 390; 73 Pac. Rep. 351, 353. The presentation of a claim to an administrator is in many respects analogous to the commencement of an action, but there are some differences, and one difference is important. One cannot maintain an action on a claim which will become due only on demand, until demand has been made, because it is unjust to subject a defendant to costs until he has neglected or refused to perform his obligation, but the administrator not only cannot perform on demand, but the mere presentation of the claim for an allowance does not subject the estate to payment of costs, and, in reality, the requirement that claims must be presented before suit can be brought is the statutory mode as well as the statutory requirement for making a demand upon an estate: *Maurer v. King*, 127 Cal. 114, 117; 59 Pac. Rep. 290. Where a decedent gave certain shares of mining stock in part payment for land purchased by him, and agreed to take back the stock from the vendor at the end of two years if the vendor should hold the stock at that time and so request it, a claim presented against the estate of the deceased purchaser, a few days after the expiration of the two years, by the vendor of the land, for the amount at which he agreed to take back the stock, and an offer to surrender the shares of the stock to the executor or administrator in the same condition in which they were received, accompanied by a copy of the contract attached to the claim, is a good presentation of the same: *Maurer v. King*, 127 Cal. 114, 116; 59 Pac. Rep. 290. Although an executor or administrator may demand the production, for his examination, of a promissory note which is made the basis of a claim, yet, if he does not do so, the presentation of a verified copy of the note by the claimant is sufficient: *First Nat. Bank v. Root*, 19 Wash. 111; 52 Pac. Rep. 521, 522. In Colorado, the manner of exhibiting a claim against the estate of a decedent, founded upon a promissory note, is by filing the note itself in the county court, and this must be done within a year from the granting of letters. It is not sufficient to file a copy of the note, and the knowledge of the executor or administrator of the existence of the note furnishes the claimant no excuse for a failure to file a claim as the statute directs: *In re Hobson's Estate* (Col.), 91 Pac. Rep. 929, 931. Although an executor or administrator knows of the existence of a note, or has it in his possession, yet if the holder asserts it as a claim

against the estate, and the executor or administrator neglects to comply with the request of the claimant to present the claim properly and have it allowed, this furnishes no excuse for the claimant's failure to file his claim in the probate court as the statute directs. If the claimant has been injured by the failure of the executor or administrator to carry out a supposed promise, the estate is not answerable therefor: *In re Hobson's Estate* (Col.), 91 Pac. Rep. 929, 931. Where a married woman rendered services as nurse to a person who afterwards died, her claim for such services is community property, and should be presented to the executor or administrator of the estate of the deceased in the name of her husband: *Smith v. Furnish*, 70 Cal. 424; 12 Pac. Rep. 392, 393. It is not necessary that a copy of the claim accompany a presentation of the claim, unless the law at the time required such copy, as in the case of a judgment: *Estate of Crosby*, 55 Cal. 574. A claim based on an oral agreement does not fall within a statute providing that a copy of the instrument on which the claim is founded must accompany the claim: *Dorais v. Doll*, 33 Mont. 314; 83 Pac. Rep. 884, 885. Although a document used as a bill of particulars has been presented to an executor or administrator on one occasion, yet it may be proved that the claim therein described was presented to him at another time: *Poor v. Smith*, 10 Haw. 467, 468.

(6) **Amendment of claims.** No substantial change can be made in the claim on file, either by way of amendment or otherwise, after the expiration of the time for the presentation of claims: *In re Sullenger*, 72 Cal. 549, 552; 14 Pac. Rep. 513. Where an order has been made directing the sale of decedent's property, upon a consideration of the claims against the estate theretofore allowed, and such order has been confirmed, no amendment of a claim can be made that affects the order of confirmation, or that will take away from it the force of the direction therein to execute a conveyance on payment of the purchase price. No amendment can be allowed that will affect any sale of the property made under such order, because the claim, after its amendment, would still have to be presented to the executor or administrator for allowance before it could become a charge upon the estate: *Estate of Turner*, 128 Cal. 388, 393; 60 Pac. Rep. 967. A creditor's claim against an estate is, in no sense of the word, a pleading, nor is there any such thing known to our law as the amendment of such a claim: *Pollitz v. Wickersham* (Cal.), 88 Pac. Rep. 911, 915. A mortgagee's claim may be amended by attaching the original note and mortgage thereto: *Kirnan v. Powning*, 25 Nev. 378; 60 Pac. 834, 838.

REFERENCES.

Amendment of claim: See head-line 4, subd. (8), post.

(7) **What claims must be presented.** A claim in favor of the United States, against the estate of a decedent, cannot be sued upon until after its presentation for allowance to the executor or adminis-

trator of such estate: *United States v. Hailey*, 2 Ida. 26; 3 Pac. Rep. 263, 264. Claims not due must be presented, or they are barred: *Pico v. De la Guerra*, 18 Cal. 422. No suit can be maintained against the executor or administrator of the estate of a deceased person on a claim for moneys received by the decedent in his lifetime, while acting as guardian of the plaintiff, until after such claim has been presented to the executor or administrator: *Gillespie v. Winn*, 65 Cal. 429; 4 Pac. Rep. 411, 412. A claim based on the liability of a decedent as a stockholder is a claim upon which no action can be maintained, though the amount, if any, that will have to be paid is not known, unless it has been presented within the time prescribed by the statute: *Barto v. Stewart*, 21 Wash. 605; 59 Pac. Rep. 480, 482. The word "claim" includes every species of liability that the executor or administrator can be called on to pay, or to provide for the payment of, out of the general fund belonging to the estate: *Barto v. Stewart*, 21 Wash. 605; 59 Pac. Rep. 480, 482. The word "due" is not used in the sense of "mature," in the statute prescribing the form of an affidavit to a claim, but was intended to apply to all claims, whether due or to become due, or contingent. The object of this provision is to secure good faith in their presentation, and is satisfied by an affidavit stating that the facts out of which the liability is claimed to arise are true: *Barto v. Stewart*, 21 Wash. 605; 59 Pac. Rep. 480, 482. One who holds a laborer's lien on logs cannot bring an action to foreclose the same against the executor or administrator of a deceased person, against whom the lien was acquired, without first presenting his claim to the executor or administrator: *Casey v. Ault*, 4 Wash. 167; 29 Pac. Rep. 1048. If a purchaser pays taxes on the property bought before the testator's death, by reason of a breach of a covenant in the deed, his claim against the estate is one that requires presentation: *Clayton v. Dinwoodey* (Utah), 93 Pac. Rep. 723, 726.

(8) "Contingent claims." If a code of laws designates three classes of claims against an estate, that must be presented, — 1. Claims due; 2. Claims not due; 3. Contingent claims, — this implies that the mere fact that a claim is not due does not make it contingent. If the amount of the claim and the date at which it is to become due are certain, it is not contingent, though not due. Therefore a contingent claim is not distinguished from other claims by the qualifying words "not due," but by the words "not absolute." A claim ceases to be contingent when it becomes absolute, though not yet due, as in the case of a contract to pay money after the future occurrence of a contingent event, in which the obligation becomes absolute before due; yet contingent claims may become absolute and due at the same time; and the probate law requires that all contingent claims that are provable and payable at any time shall be presented for allowance within the prescribed statutory time after the publication of notice to creditors, as a condition precedent to the commencement of actions thereon; otherwise, how can any provision whatever be made for

them before the estate is settled? Timely notice of all claims that may prejudicially affect an estate should be given to the administrator, so that he may have an opportunity to investigate their merits, and to contest them if advisable, before the evidence of their invalidity shall be lost. That they should be forever barred if not presented to him within the time prescribed by law is surely no greater hardship than that absolute claims should be so barred: *Verdier v. Roach*, 96 Cal. 467, 474, 478; 31 Pac. Rep. 554; *Janin v. Browne*, 59 Cal. 37. In *Pico v. De la Guerra*, 18 Cal. 422, a claim against the estate was predicated upon a guaranty to indemnify a surety upon a promissory note. Before the note became due and payable, the guarantor died, and the surety, before he had paid the note, presented a claim upon the guaranty, which the executor allowed and approved; but the allowance and approval were held unauthorized and void, because, as the claim against the estate was merely contingent upon payment, by the surety, of the promissory note of his principal, no cause of action accrued until the contingency happened, and no recovery could be had against the estate, either by presentation of an immature claim, or by a suit at law against the estate. A judgment obtained against sureties cannot be enforced by them after the death of their principal, as a claim against his estate, until they have paid such debt: *Estate of Hill*, 67 Cal. 238, 244; 7 Pac. Rep. 664. A covenant to indemnify a lessee must be presented as a contingent claim to the administrator of a deceased lessor within the time limited by the notice to creditors, or no action can be based thereon for a breach occurring after the time for presentation of claims has expired: *Verdier v. Roach*, 96 Cal. 467; 31 Pac. Rep. 554. A mere personal promise of reimbursement, which creates a contingent liability, must be presented to the administrator for allowance as a claim against the estate. If not so presented within the time fixed by statute, it is barred forever; and the executor or administrator has no power, without the authority of the court, to bind the estate by agreeing to delay the collection of the debt due the estate for a period of years, in order to determine whether a contingent right of set-off shall become absolute, when such contingent right has not been presented or allowed as a claim against the estate: *Maddock v. Russell*, 109 Cal. 417, 421, 424; 42 Pac. Rep. 139. The statute which allows one who has been absent from the state, and has had no notice of the time in which to present his claim against the estate of a decedent, to present it at any time before a decree of distribution is entered upon making an affidavit to the satisfaction of the court or judge thereof that he had no notice, applies alike to all claims, whether absolute or contingent: *Verdier v. Roach*, 96 Cal. 467, 469, 470; 31 Pac. Rep. 554.

REFERENCES.

Contingency of claim as affecting limitation of time for its presentation: See note 58 L. R. A. 82-90.

(9) **Claim of executor or administrator.** All persons having claims against the deceased must present them for allowance; the executor or administrator, to the probate judge alone; other creditors, to the executor or administrator, and if allowed, to the probate judge. If not thus presented within the time prescribed by the statute after the publication of notice for the presentation of claims, they are barred by the express provision of the statute; and the requirement to make the presentation, and the period within which it is to be made, are the same, whether the claims be held by the executor or administrator, or by other creditors of the deceased: *Estate of Taylor*, 16 Cal. 434. A claim due to an executor or administrator must be presented to the judge for allowance within the time allowed by law for the presentation of claims, or it cannot be allowed to him in his accounts: *In re Hildebrandt*, 92 Cal. 433; 28 Pac. Rep. 486. The mere fact that the executor or administrator, as such, has in his hands more money belonging to the estate than the amount of his claim does not entitle him to treat it as an offset to his claim, nor prevent him from making the statutory affidavit, "that there are no offsets to the same, to the knowledge of affiant." Money received by him, and that belongs to the estate, is held by him in his official capacity as such administrator, while the debt due him as a creditor of decedent is due to him in his individual capacity: *In re Hildebrandt*, 92 Cal. 433, 436; 28 Pac. Rep. 486. But an unauthorized appropriation by an executor or administrator of the funds of the estate cannot be made the basis of a claim by him against the estate: *Estate of Hill*, 67 Cal. 238, 241; 7 Pac. Rep. 664.

(10) **What claims need not be presented.** It is not necessary to present to the executor or administrator, for allowance, a judgment against the deceased: *Knott v. Shaw*, 5 Or. 482; *Estate of Brennan*, 65 Cal. 517; 4 Pac. Rep. 561; *Estate of Page*, 50 Cal. 40. A pledgee is not obliged to present his claim to the executor or administrator for allowance, unless he seeks recourse against other property of the estate than that pledged: *Estate of Kibbe*, 57 Cal. 407, 408. A distinction is to be made between the debts of deceased, and the expenses incurred or disbursements made by the executor or administrator in his management of the estate: *Deck's Estate v. Gherke*, 6 Cal. 666, 669. Claims against an estate, incurred by an executor or administrator in settling the estate, are expenses of administration, which are subject to the objection and exception of those interested in the estate, and are finally passed upon by the probate judge when the administrator or executor renders his accounts: *Dodson v. Nevitt*, 5 Mont. 518; 6 Pac. Rep. 358, 359. A claim for expenses of administration need not be presented to the executor or administrator for his approval; as, a claim for funeral expenses: *Potter v. Lewin*, 123 Cal. 146, 147; 55 Pac. Rep. 783; or for services rendered and money advanced, at the request of an administrator, for the benefit of the estate: *Gurnee v. Maloney*, 33 Cal. 85, 88; 99 Am. Dec. 352. The only claims required to be filed and

rejected before suit brought are those arising on contracts. Hence an action to abate nuisances and for damages caused by obstructing a private way may be maintained against the personal representatives of the deceased without first filing a claim against the estate: *Hardin v. Sin Claire*, 115 Cal. 460; 47 Pac. Rep. 363, 364. A cause of action in which equitable relief alone is sought is not a "claim" which it is necessary to present against the estate before the action can be maintained: *Toulouse v. Burkett*, 2 Ida. 184; 10 Pac. Rep. 26, 28. Nor is it necessary, before suit, to present against the estate a claim upon a demand for discovery and accounting, as such demand necessarily involves an uncertain amount. Where the demand is merely for equitable relief, or for uncertain and liquidated damages, it is not necessary to present it to the administrator for allowance or rejection; for it is obvious that in all such cases the exhibition would be but an idle ceremony: *Neis v. Farquharson*, 9 Wash. 508; 37 Pac. Rep. 697, 700. It is not necessary to present a claim against an estate for the amount of an unpaid subscription by the decedent for the stock of a savings bank before bringing a suit in equity against the administrator to recover the amount of such unpaid subscription: *Thompson v. Reno Sav. Bank*, 19 Nev. 242; 9 Pac. Rep. 121. There is no provision of the California code requiring the presentation of a claim to a guardian as there is in the case of an administrator: *Estate of Breslin*, 135 Cal. 21; 66 Pac. Rep. 962. A debt secured by a mechanic's lien made of record is not a claim that must be presented to an administrator for allowance or rejection: *Fish v. De Laray*, 8 S. D. 320; 66 N. W. Rep. 465. Taxes and street assessments paid under authority given in a mortgage are properly allowed upon the foreclosure of the mortgage against the estate of a decedent, if such payments were made after the presentation of the claim upon the note and mortgage. No separate presentation as to taxes and street assessments is required: *German S. & L. Soc. v. Hutchinson*, 68 Cal. 52, 54; 8 Pac. Rep. 627. A claim for an assessment for the improvement of a street, made after the death of the property owner, need not be presented: *Hancock v. Whittemore*, 50 Cal. 522, 523. Taxes assessed against or which are due upon property of the estate of a decedent are not claims against the estate which need to be presented to the executor or administrator for allowance: *Clayton v. Dinwoodey* (Utah), 93 Pac. Rep. 723, 725; *People v. Olvera*, 43 Cal. 492, 494.

(11) **Same. Vendor's lien.** A vendor of real estate has a lien on the same, in the hands of the executor or administrator of the purchaser, for the unpaid purchase-money: *Cahoon v. Robinson*, 6 Cal. 225, 226; and it is not necessary to present a claim for the purchase-money to the executor or administrator, if nothing is asked against the estate: *Kerns v. Dean*, 77 Cal. 555, 560; 19 Pac. Rep. 817. The lien of the vendor is of so high a nature that it is not extinguished by his death, but passes to his representatives. Nor is it discharged by the

death of the grantee, but may be enforced against his estate, or those into whose hands the property may come. If the vendor presents a claim against the estate of the deceased grantee for the amount of the unpaid purchase-money, it is not necessary for him to state that he claims a lien against the grantee's premises for the amount of such claim. It would probably be the better practice to make such statement, but its omission does not constitute a waiver of the lien, nor make it inequitable to enforce it. So long as the debt exists, the courts will not presume that the lien has been waived, except upon clear and convincing testimony. The filing of the claim does not give the vendor any security upon specific property, nor any lien upon any property. It simply maintains the same general rights which the vendor had before: *Selna v. Selna*, 125 Cal. 357, 361, 363; 73 Am. St. Rep. 47; 58 Pac. Rep. 16.

(12) **Same. Specific property.** The claimant of specific property is not a creditor of the estate, and is not bound to present his claim against it: *Gunter v. Janes*, 9 Cal. 643, 658. So an adverse claim, based upon a trust, is one which need not be presented against the estate for allowance. Where one seeks to recover from the representatives of an estate specific property, alleged to have been held in trust by the decedent at the time of his death, he is not seeking payment of a claim from the assets of the estate, is not required to present a claim as a creditor, and is not "a creditor of the estate." His action is not founded upon a claim or demand against the estate. There is a clear distinction between a demand for certain specific property on the ground that it is the property of the claimant held in trust by the decedent, and a claim of personal indebtedness on the part of the decedent based upon the fact that he has so mingled the trust property with his own as to make it impossible for the beneficiaries to follow and identify it. The latter may be a proper claim against the decedent upon the ground that there has been a breach of the trust and that a personal liability has therefore arisen, while the former cannot possibly be such a claim: *Estate of Dutard*, 147 Cal. 253, 256, 257; 81 Pac. Rep. 519. A claim upon the estate for certain specific property does not show any personal liability: *Estate of Dutard*, 147 Cal. 253, 258; 81 Pac. Rep. 519. If an administrator has wrongfully taken possession of certain horses, and the owner presents his claim for them, which is rejected, he is entitled to replevin the animals, though his suit is not brought within the time limited by statute on rejected claims. The plaintiff, in such a case, is not a "creditor" of the estate, and his claim is not within such statute: *Emele v. Williams*, 10 Haw. 123, 124. If recovery is sought of specific property alleged to have been held in trust by the decedent at the time of his death, a party seeking such recovery is not asking payment of the claim from the assets of the estate, and is therefore not required to present his claim as a creditor of the estate: *Brown*

v. Town of Sebastopol, 35 Cal. Dec. 621, 622 (June 6, 1908). The right to sue an executor or administrator for moneys alleged to be due an estate, and to which the executor or administrator asserts title in himself individually, is not conditioned upon the presentation of a claim therefor. The right to sue, in such cases, without presentation arises from the fact that the specific thing sued for is not a part of the decedent's estate, and the action will lie whenever the thing demanded can be identified in specie as the property of another: Sprague v. Walton, 145 Cal. 228, 235; 78 Pac. Rep. 645.

(13) **Effect of presentment.** The presentation of a claim against the estate of a decedent is not a demand of payment: Chase v. Evoy, 49 Cal. 467, 469. But it is practically the commencement of a suit upon the claim, and is sufficient to stop the running of the statute of limitations: Beckett v. Selover, 7 Cal. 215, 241; Wise v. Williams, 88 Cal. 30; 25 Pac. Rep. 1064. A party, by presenting his claim against the estate of a decedent, does not part with his right to enforce it against the person primarily liable: Thompson v. Bank of California, 4 Cal. App. 660; 88 Pac. Rep. 987, 990. The lien of a vendor is not waived by the presentation of his claim against the estate of a deceased vendee. Its only effect is to maintain the same general rights which the vendor had before the death of his grantee, to look not only to the land of the grantee, but also to the property owned by him; and even if he claims a lien against the granted premises, the omission of a statement, in the claim, that he claims a lien against the granted premises for the amount of such claim does not constitute a waiver of the lien, nor make it inequitable to enforce it: Selna v. Selna, 125 Cal. 357, 362; 73 Am. St. Rep. 47; 58 Pac. Rep. 16. Nor, in the case of a conditional sale, does the presentation of the plaintiff's claim for the unpaid purchase-money to the administrator of the purchaser's estate, and its approval by him and by the court, constitute such an election as debars the plaintiff from bringing a subsequent action to recover the possession of the property upon the assumption that the title has never passed to the purchaser: Holt Mfg. Co. v. Ewing, 109 Cal. 353, 356; 42 Pac. Rep. 435. If a party makes an attempt to present a claim to an executor or administrator for allowance, but from some cause fails to do so properly, he is not estopped from again presenting it in due form, if within proper time: Westbay v. Gray, 116 Cal. 660, 668; 48 Pac. Rep. 800. So a devisee is not estopped from claiming under the will by reason of the fact that he presented a claim against the estate, where such claim was presented in ignorance of the value of the property devised, was allowed only in part, was then withdrawn, and a written election made to take under the will: Estate of Thayer, 142 Cal. 453, 455; 76 Pac. Rep. 41.

(14) **Effect of non-presentment.** The effect of not presenting a claim within the statutory time from the first publication of notice to

creditors is, that it shall be barred forever, provided that if the claim is not then due, or if it is contingent, it may be presented within a specified time after it shall become due or absolute: *Davidson v. Rankin*, 34 Cal. 503, 504. A claim not presented is no charge against the estate, though it is verified and filed with the county clerk: *Pico v. De la Guerra*, 18 Cal. 422, 428. A mortgage claim upon a homestead cannot be foreclosed, unless the claim is presented for allowance against the estate of a decedent within the time limited for the presentation of claims: *Mechanics' B. & L. Assoc. v. King*, 83 Cal. 440, 443; 23 Pac. Rep. 376. The limitation, however, on the right to enforce a claim or debt, which is not presented to the executor or administrator within the prescribed statutory time after the publication of notice to creditors, is not a general statute of limitations, taking away all remedy as to every person liable, either personally or through his property, for the debt. It arises under a specific act adopted for a particular purpose, and has reference solely to the estates of deceased persons. It applies to no other subject-matter, and in no way affects the validity of the debt as against other persons who are liable for the debt, or whose property is liable: *Sichel v. Carrillo*, 42 Cal. 493, 499. Such a limitation does not apply to proceedings under a non-intervention will: *In re Smith's Will*, 43 Or. 595; 75 Pac. Rep. 133, 137. Hence, if executors are empowered by will to administer an estate without the intervention of the court, the failure of creditors to present their claims within a certain period after publication of a notice to do so does not bar their claims, as probate procedure relative to the administration of estates does not apply in such a case: *In re Smith's Will*, 43 Or. 595; 75 Pac. Rep. 133, 137; *Moore v. Kirtman*, 19 Wash. 605; 54 Pac. Rep. 24, 26; *In re McDonald's Estate*, 29 Wash. 422; 69 Pac. Rep. 1111, 1115. Nor is the claim of the government of the United States against the estate of a deceased surety, on the bond of a collector of internal revenue, barred by its failure to present a claim against such estate within the statutory time, as such government is exempt from all statutes of limitation, and therefore has a right to pursue the property of a deceased debtor into the hands of the distributee of any estate: *Pond v. Dougherty* (Cal. App.), 92 Pac. Rep. 1035, 1037.

(15) **Effect of death.** In an action on a promissory note, the suggestion of the death of the maker of the note, and the substitution of his administrator, and the continuance of the suit against the latter, subject the proceedings to such rules of the probate law as are applicable to proceedings for the collection of claims against the estate of a deceased person: *Myers v. Mott*, 29 Cal. 359, 363; 89 Am. Dec. 49. The doctrine that when the statute of limitations begins to run, a subsequent disability, as death of the party bound, etc., does not stop it, has no application where a judgment has been obtained against an intestate in his lifetime, but no execution levied. In such a case the

judgment creditor being prevented by the statute from suing after the death of the debtor, the statute ceases to run until presentation of the claim to the administrator, and the party is not bound to present it until after publication of the notice required by statute: *Quivey v. Hall*, 19 Cal. 97, 100. A judgment, whether rendered before or after death of the judgment debtor, must be presented as a claim against his estate. The lien of the judgment rendered against him during his lifetime is not released or affected by his death, pending the time limited by the statute for the continuance of such lien; and the presentation and allowance of the judgment as a claim does not destroy nor merge the judgment lien; nor do any of the grounds upon which one judgment has been allowed to be merged in another apply to the case of the allowance of a judgment as a claim against an estate, because the allowance of the claim is not, in any true sense, a judgment: *Morton v. Adams*, 124 Cal. 229, 230, 232, 233; 71 Am. St. Rep. 53; 56 Pac. Rep. 1038. The death of an insolvent before the return-day upon a petition has the effect of abating insolvency proceedings and all the orders therein; but where an execution was levied prior to his death, and the sheriff took the property into his custody under the execution, the property ceased to be subject to any control of the court in the proceedings in insolvency, and a court has no jurisdiction to make an order restraining the sheriff from selling the same: *Vermont M. Co. v. Superior Court*, 99 Cal. 579, 582; 34 Pac. Rep. 326.

(16) **Presentation after death.** Litigants must know, at their peril, of the death of an adversary. Negligence cannot be attributed to the dead, and though the heirs may sometimes lose by failure to have administration properly made, yet those having claims against the estate acquire no rights by the delay, except the extension of the time to collect their demands. Hence one who seeks to recover a judgment against the defendant is not entitled to recover a judgment that will bind his estate, unless, within the period allowed by law for the presentation of claims, he makes a presentation of his claim to the representative of the decedent: *Falkner v. Hendy*, 107 Cal. 49, 54; 40 Pac. Rep. 21, 386. A claim arising upon a contract presented by the administrator of a deceased claimant, after the time for presentation of claims has elapsed, is properly rejected, and an action thereon is barred. In case of the death of the person entitled to bring an action before the expiration of the time limited for the commencement thereof, an action may be commenced by his representatives after that time, and within the specified time from his death; but the first essential of the right to maintain or to prosecute it is the right to bring or to commence it, and the holder of the claim cannot maintain any action thereon, unless it shall have first been presented for allowance within the time prescribed by the statute: *Morrow v. Barker*, 119 Cal. 65, 66; 51 Pac. Rep. 12. In the event of the death of an executor or administrator, the claim which the creditor of the estate had against

him, by reason of his acts or omissions as executor or administrator, was one which became fixed in the lifetime of the executor, and was not contingent upon the fact that the estate might prove insolvent on an account taken after the death of the executor or administrator: *Estate of Halleck*, 49 Cal. 111, 116. If a person having a claim against an estate dies before the time limited for its presentation, his representative cannot maintain an action against the estate of another deceased person on the claim, where it has not been presented to the executor within the time prescribed by the statute for the presentation of claims: *Morrow v. Barker*, 119 Cal. 65; 51 Pac. Rep. 12. So a broken promise to provide, by will, a compensation for services rendered to the decedent must be presented as a claim against the estate, if reliance was placed thereon as a continuing contract for services up to the time of his death. If not so presented, it cannot be relied upon to save the bar of the statute as to part of the rejected claim for services presented against the estate: *Etchas v. Orefia*, 127 Cal. 588, 592; 60 Pac. Rep. 45.

4. Allowance and rejection of claims.

(1) **In general.** If there are two or more executors or administrators, the allowance of a claim by one of them is the act of all, and is binding upon all: *Willis v. Farley*, 24 Cal. 490, 501. A claim may be allowed though the executor or administrator has not filed any undertaking: *Estate of Houck*, 23 Or. 10; 17 Pac. Rep. 461; but an executor or administrator, who is personally interested in a claim against the estate, is disqualified from acting upon it: *Estate of Hill*, 67 Cal. 238, 244; 7 Pac. Rep. 664; *Estate of Crosby*, 55 Cal. 574, 578. The allowing or rejecting of a claim is an official act, which the attorneys of the executors or administrators have not the power to perform; but delivery of a rejected claim to the owner thereof, upon demand, is a mere ministerial act, which attorneys of the executors or administrators have a right to perform, when such claim is in their possession, and their action therein will bind the executors or administrators: *Cowgill v. Dinwiddie*, 98 Cal. 481, 484; 33 Pac. Rep. 439. The purpose and effect of a statute providing that where a claim is presented to an executor or administrator, and he disallows it, the claimant may present the same to the county court for allowance, on giving notice, and that the court is empowered to hear and determine the same in a summary manner, and to direct a concise entry of the order of allowance and rejection to be made on the record, which order shall have the force and effect of a judgment, from which an appeal may be taken, are to afford a summary method for the adjudication of claims by the court against the estates of deceased persons, without the necessity of technical pleadings. The proceeding is in the nature of an action, as contradistinguished from a suit, affording to the parties the right of trial de novo and trial by jury in the appellate court: *Pruitt v. Muldrick*, 39 Or. 353; 65 Pac. Rep. 20, 21.

(2) **Passing on claims. In general.** The executor or administrator is not required, on the presentation of a claim, immediately to indorse it "allowed" or "rejected"; nor must it be so indorsed within "ten days" after it is presented. The executor or administrator is not limited to any specific period in which he must take formal action to indorse his allowance or rejection of a claim. It may be conceded that it is not the duty of the executor or administrator to seek out one who has presented a claim, to notify such person that he — the executor or administrator — has neglected or refused to act on the claim for ten days after its presentation, or that he has indorsed it "rejected." And it may also be conceded that it is the duty of the claimant to inquire of the executor or administrator whether the claim he has presented has been acted upon, and how. But as there is no specific limitation of time within which the executor or administrator must allow or reject the claim, there is none in which the claimant is entitled to be informed of the action or non-action of the executor. If he neglects to inquire within three months after his claim has been actually indorsed "rejected," his suit on the claim will perhaps be barred. Nevertheless, if he cannot maintain a suit on his claim until it has been rejected, he has an absolute right to be informed of its rejection by the executor or administrator, who alone knows what formal action has been taken with respect to it. If information with respect to it is refused by the executor or administrator, the claimant may treat the previous presentation of his claim and secret action, if any, of the executor or administrator, as going for naught, and again present the claim: *Steward v. Hinkel*, 72 Cal. 187, 189; 13 Pac. Rep. 494. But if the statute makes it the duty of the executor or administrator, within a certain specified time, to indorse on a claim his approval or rejection thereof, his failure to indorse it within the time prescribed operates, in Nevada, as an allowance of the claim: *Kirman v. Powning*, 25 Nev. 378; 60 Pac. Rep. 834, 838. The claimant is entitled to the possession of the claim presented by him, if the executor or administrator has had a reasonable time in which to examine it, and may maintain an action to recover it: *Willis v. Marks*, 29 Or. 493; 45 Pac. Rep. 293, 296. If a claim, as presented, is allowed in full, the words "approved and allowed," indorsed thereon, without any limitation or reservation whatever, must be taken to refer to the claim on which they were indorsed, and if that purports, upon its face, to be a secured claim, it must be deemed to have been allowed as a secured claim: *Estate of McDougald*, 146 Cal. 191, 193; 79 Pac. Rep. 878. A money demand upon unpaid accounts against the estate of an intestate must be allowed, if at all, upon legal evidence sustaining the same; and such evidence must be taken and the claim passed upon at a regular session of the probate court. At least, the executor or administrator of the estate against whom the claim is made must either be present in court while the evidence is being taken of the claim passed upon, or he must have an opportunity to be present and to be heard: *Chaves v. Perca*, 3 N. M. 71; 2 Pac. Rep. 73, 74.

(3) **Same. Rejection of claims.** The rejection of a claim against the estate of a decedent, either by the executor, administrator, or county judge, is a condition precedent to the right to sue upon it: *In re Smith's Estate*, 13 N. D. 513; 101 N. W. Rep. 890. A claim against an estate may be rejected by an administrator, either by indorsing his written disallowance on such claims, or by neglecting or refusing to act thereon for a period prescribed by the statute after it is presented, and in either case the rejection is a rejection by the administrator: *Boyd v. Von Neida*, 9 N. D. 337; 83 N. W. Rep. 329. For the purpose of authorizing actions on claims, and of limiting the time in which suit must be brought, the constructive rejection which, by statute, follows as a result of ten days' neglect or refusal to allow it is equivalent to a rejection by written indorsement: *In re Smith's Estate*, 13 N. D. 513; 101 N. W. Rep. 890. The non-action of the administrator, upon a claim presented to him for allowance, for a period of time exceeding ten days next after the claim is filed with him for allowance, operates, under the statute, as a rejection of the claim; and the time limited for bringing suit on the claim begins to run at once after the ten-day period expires: *Farwell v. Richardson*, 10 N. D. 34; 84 N. W. Rep. 558. If the claim is presented at the office of the administrator's attorney, and it is indorsed "rejected" by such attorney, under the direction of the administrator, and such rejection is subscribed by the administrator named, it is a valid rejection of the claim: *Dorais v. Doll*, 33 Mont. 314; 83 Pac. Rep. 884, 885. The statute contemplates that no claim which has reached the status of a rejected claim will be presented to a county court for its allowance, and where such a claim is in fact presented to such court for allowance, and the same is rejected by the court, such rejection does not operate to fix any new period of time within which an action can be instituted upon the rejected claim: *Farwell v. Richardson*, 10 N. D. 34; 84 N. W. Rep. 558. The indorsement required to be made by the executor or administrator is evidence of his action, necessary to the claimant in bringing and maintaining an action to establish the claim, and if he secretly rejects the claim, and refuses to deliver it to the claimant, or to inform him of the action taken thereon, it operates, or may operate, as a fraud upon the claimant, and become inoperative as a rejection. Where the executor or administrator not only fails to inform the creditor of his action, but also refuses to do so, it may be considered that he has not acted at all. Secret action, which the creditor has no means of knowing, is equivalent to no action at all: *Cowgill v. Dinwiddie*, 98 Cal. 481, 484; 33 Pac. Rep. 439. The allowance of a claim against a decedent's estate, by an executor or administrator, for a portion of the full amount, is clearly a rejection of the remainder of the claim: *Jones v. Walden*, 145 Cal. 523; 78 Pac. Rep. 1046, 1047.

(4) **Right to consider claim rejected.** The question of reasonable time in which to allow or reject a claim is a matter of law, and should

be so declared by the court; and six months is clearly a reasonable length of time in which to determine whether an executor or administrator will allow or reject a claim: *Goltra v. Penland*, 45 Or. 254; 77 Pac. Rep. 129, 132. If a reasonable time elapses, without action on the part of the executor or administrator, the claimant is entitled to consider his claim as disallowed and to maintain an action thereon: *Goltra v. Penland*, 45 Or. 254; 77 Pac. Rep. 129, 132; *Gregory v. Clabrough's Executors*, 129 Cal. 475, 480; 62 Pac. Rep. 72. Where the statute requires the executor or administrator to whom a claim is presented to indorse thereon his allowance or rejection, with the day and date thereof, but does not, in terms, specify the time within which this must be done, and provides that if the executor or administrator, or the judge, refuses or neglects to indorse such allowance or rejection for "ten days" after the claim has been presented to him, it is optional with the claimant to consider his claim rejected after the tenth day, if it has not been so indorsed within ten days, but he need not so deem it unless he chooses: *Cowgill v. Dinwiddie*, 98 Cal. 481, 483; 33 Pac. Rep. 439. If the executor or administrator neglects, for more than ten days, to indorse either his allowance or rejection thereof, the claim, at the expiration of ten days, becomes a rejected claim by operation of law, and not before: *Rice v. Inskeep*, 34 Cal. 224, 226; *Bank of Ukiah v. Shoemaker*, 67 Cal. 147, 148; 7 Pac. Rep. 420; *Roddan v. Doane*, 92 Cal. 555, 558; 28 Pac. Rep. 604. And if the claim was presented to the administrator at the office of his attorney, the leaving of the claim at the attorney's office, with the attorney's clerk, in the absence of the administrator, is a sufficient presentation of the claim, and if it is not acted upon within the ten days, the creditor's right to consider it as rejected is not affected by the fact that the administrator afterwards demanded proof and vouchers: *Roddan v. Doane*, 92 Cal. 555, 558; 28 Pac. Rep. 604.

(5) **Power of court and judge.** Probate courts have jurisdiction to correct the classification of claims allowed against the estate of deceased persons at a term of the court subsequent to the allowance and erroneous classification thereof: *McPherson v. Wolfey*, 9 Kan. App. 67; 57 Pac. Rep. 257. An executor or administrator, by paying a claim after its allowance, does not divest the county court of jurisdiction of claims against the estate: *Clemes v. Fox*, 25 Col. 39; 53 Pac. Rep. 225, 228. If a claim has been presented to the administrator, and allowed by him within ten days after its presentation, no action can be maintained thereon until after its presentation to the judge, unless he rejects it within that period: *Nally v. McDonald*, 66 Cal. 530, 532; 6 Pac. Rep. 390. A claim may be approved and allowed by a county judge after it has been rejected either by non-action or by written indorsement, at any time before it is barred by the special or general statute of limitations: *In re Smith's Estate*, 13 N. D. 513; 101 N. W. Rep. 890. Where the claim has been lost, after its allowance by the executor or

administrator, the judge may approve a copy thereof: *Nally v. McDonald*, 66 Cal. 530, 533; 6 Pac. Rep. 390. When an executor or administrator rejects a claim, the rejection is complete and final, and cannot be changed or in any way affected by any future action of the judge. In such a case there is no reason for presenting a claim to the judge at all. It is only where a claim has been allowed by an executor or administrator that there is a necessity of presenting it to the judge, for he may reject it, notwithstanding its allowance by the executor or administrator. A claim may be conclusively rejected by either the administrator or the judge; and when there is a rejection by either, the statute commences to run from the date of such rejection: *Jones v. Walden*, 145 Cal. 523, 525; 78 Pac. Rep. 1046. When an executor or administrator rejects a claim against an estate, the rejection is complete and final, and cannot be changed or in any way affected by any future action of the judge. In such case there is no reason for presenting a claim to the judge at all, and it is only where a claim has been allowed by the executor or administrator that there is a necessity for presenting it to the judge, for he may reject it notwithstanding its allowance by the administrator: *Jones v. Walden*, 145 Cal. 523; 78 Pac. Rep. 1046, 1047. Although the judge had allowed a claim against the estate of a deceased person, he may, upon an ex parte application, afterwards set such allowance aside without notice to the claimant: *Estate of Sullenberger*, 72 Cal. 549, 552; 14 Pac. Rep. 513.

(6) **Filing of claims.** When a claim is allowed by the executor or administrator, and approved by the judge of the superior court, it must be filed in the court within the prescribed time, but as to rejected claims there is no such provision. It is the duty of the executor or administrator, on demand, to return rejected claims to claimants with his official action indorsed thereon: *Cowgill v. Dinwiddie*, 98 Cal. 481, 484; 33 Pac. Rep. 439. The allowance of a claim against the estate prevents the claim from becoming barred by the statute, although it has not been filed in the probate court, especially where the statute requiring it to be so filed does not declare by whom it should be so filed. It is the presentation of the claim that saves the debt from becoming barred: *Willis v. Farley*, 24 Cal. 490, 501. The allowance of a contingent claim admits and establishes the validity of the application, and entitles it to be filed in court and to rank among the acknowledged debts of the estate, to be paid in due course of administration, as the circumstances of the estate require: *Verdier v. Roach*, 96 Cal. 467, 475; 31 Pac. Rep. 554. The statute requiring judgments against administrators and claims against the estate, that have been allowed, to be filed in the probate court are merely directory, where there is no penalty prescribed for a failure to file them within the designated time: *Estate of Schroeder*, 46 Cal. 304, 316. Rejected claims need not be filed with the county clerk. It is only the claims

that have been allowed that are to be filed: *Saxton v. Musselman*, 17 S. D. 35; 95 N. W. Rep. 291, 292. A claim against the estate of a decedent, consisting of an itemized statement of expenditures made by the claimant for and on account of the deceased in his lifetime, with a balance due defendant of a specified amount after deducting a sum named in favor of the deceased from the total amount claimed to have been so expended for the deceased by the defendant, does not carry with it the acknowledgment of any indebtedness to the deceased or to the estate; but, on the contrary, negatives any such inference, and would not, of course, have been filed but for the claim of the claimant that the estate was indebted to him and not he to the estate: *Visher v. Wilbur* (Cal. App.), 90 Pac. Rep. 1065, 1069.

(7) **Defective verification.** The allowance of claims upon defective verification does not always render them void. Where claims have been allowed and approved by the administrator and the probate judge, and have been filed among the approved claims against the estate, such allowance *prima facie* establishes their validity. The heirs have the right to question the allowance at the settlement of the estate, but the burden of showing the invalidity of the allowance is cast upon them. The allowance of a claim, although made upon a defective verification, is a judicial act, which entitles the claim to rank as an acknowledged debt of the estate, to be paid in due course of administration, and if the claim is adjudged to be valid, the defective verification will not invalidate it. The allowance of a mortgage claim entitles it to rank as an acknowledged debt against the estate, to be paid in due course of administration, but because there is a defective verification of a claim upon a note secured by mortgage is no reason why the foreclosure of the mortgage should be denied. A mortgage is a mere incident of the debt it was intended to secure, and passes by the assignment of the debt, is discharged by a payment of the debt, and is barred by the statute of limitations when the debt is barred; and if the allowance of the claim on the mortgage was sufficient to make it an acknowledged debt of the estate, it is also sufficient to keep alive the mortgage, and to entitle the plaintiff to have it foreclosed: *Consolidated Nat. Bank v. Hayes*, 112 Cal. 75, 82; 44 Pac. Rep. 469; *Estate of Swain*, 67 Cal. 637; 8 Pac. Rep. 497.

(8) **Amendment of claim.** No substantial change can be made in a claim on file, either by way of amendment or otherwise, after the expiration of the time for the presentation of claims: *Estate of Sullenberger*, 72 Cal. 549, 552; 14 Pac. Rep. 513; *Dickey v. Dickey*, 8 Col. App. 141; 45 Pac. Rep. 228. But the claimant may be permitted to amend his claim as to any technical matter that does not substantially change the nature and character of the same: *Kirman v. Powning*, 25 Nev. 378; 60 Pac. Rep. 834, 838. If the account of a claimant against the estate of a decedent is contested, the court, upon motion, should

allow the claimant to file a more particular account of his claim: *Estate of Hidden*, 23 Cal. 362, 363.

REFERENCES.

Amendment of claim: See head-line 3, subd. 6, ante.

(9) **Objections to allowance.** An objection that a claim was never presented cannot be made after a decree allowing it. Such objections should be made during the pendency of proceedings: *Estate of Cook*, 14 Cal. 129, 130. An objection that a claim against a decedent's estate was not presented by the proper person is a matter in abatement only, and is waived by joining issue on the merits without raising it in the county court: *In re Morgan's Estate*, 46 Or. 233; 78 Pac. Rep. 1029, 1030. Under the Colorado statute, not only an executor or an administrator may object to the allowance of a claim, but also the heirs at law, devisees, legatees, or creditors, or others interested in the estate, may do so: *In re Hobson's Estate* (Col.), 91 Pac. Rep. 929, 931.

(10) **Effect of allowance.** In general. The allowance of a claim, by an executor or administrator and the probate judge, amounts to a judgment, not in a general sense, but of a qualified character only. It is simply a judgment as to the amount due and to whom due, and by the act of allowance and approval the claim is placed among the acknowledged debts of the estate; but before payment can be enforced, it is necessary to obtain a decree of the probate court for that purpose: *Magrow v. McGlynn*, 26 Cal. 420, 431; *Estate of Hidden*, 23 Cal. 362; *Pico v. De la Guerra*, 18 Cal. 422; *Walkerly v. Bacon*, 85 Cal. 137, 141; 24 Pac. Rep. 638. No claim against any estate, which has been presented and allowed, is affected by the statute of limitations, pending the proceedings for the settlement of the estate; and such proceedings are pending until the entry of a decree discharging the executor or administrator: *Dohs v. Dohs*, 60 Cal. 255, 260. When a claim against an estate has been allowed and approved and filed, it ranks among the acknowledged debts of the estate, to be paid in due course of the administration: *Estate of Loshe*, 62 Cal. 413, 415. A demand of an attorney for services rendered to an administrator or executor during the settlement of the estate, and which has been presented, allowed, and approved, and ordered to be paid out of the estate, in due course of administration, while not technically a "claim" against the estate, yet it will be treated as such: *Stuttmeister v. Superior Court*, 72 Cal. 487, 489; 14 Pac. Rep. 35. The appearance in a probate court, at a hearing upon a claim against an estate, and consent to the allowance of such claim, by one of two joint executors, without notice to or the concurrence of the other, is sufficient to bind the estate: *Cross v. Long*, 66 Kan. 293; 71 Pac. Rep. 524. The admissions of an executor, made in the allowance of

a claim against the estate, although the claim is allowed only in part, bind the estate: *Meinert v. Snow*, 3 Ida. 112; 27 Pac. Rep. 677. The presentation and allowance of a claim in part is not material in determining the question as to whether such claim is barred by the statute of limitations: *Potter v. Lewin*, 123 Cal. 146, 147; 55 Pac. Rep. 783. The allowance of a claim in part is clearly a rejection of the remainder, though when an administrator rejects a claim, the rejection is complete and final, and cannot in any way be affected by any future action of the judge: *Jones v. Walden*, 145 Cal. 523; 78 Pac. Rep. 1046. A verbal allowance of a claim against an estate is ineffective to give the claimant any cause of action against the estate: *Pitte v. Shipley*, 46 Cal. 154, 161. If a claim against an estate has passed beyond the jurisdiction of the administrator to allow the same, and has reached the status of a rejected claim, his indorsement of allowance upon such rejected claim is futile, and does not operate to allow or validate the claim, either in whole or in part, especially where it was outlawed at the time he indorsed his allowance thereon: *Farwell v. Richardson*, 10 N. D. 34; 84 N. W. Rep. 558.

REFERENCES.

Allowance of claims by executors and administrators, when and against whom conclusive: See note 65 Am. Dec. 121-127.

(11) **Same. Presumption. Evidence.** The presumption is, where a claim against the estate of a decedent has been allowed and approved as presented, that it was allowed upon vouchers and proof to the satisfaction of the executor or administrator and probate judge: *Estate of Swain*, 67 Cal. 637; 8 Pac. Rep. 497, 500. Under the statute of Oregon, the mere allowance of a claim by the executor or administrator is not even *prima facie* evidence in favor of its validity. The claimant must, on the settlement of an account, support his claim by proof of its validity, and by other evidence than the allowance of the administrator. The county court is not bound to approve a claim, simply because it has been allowed by the administrator; for, if such was the case, it would merely sit in a perfunctory manner to enter its approval upon the journal. The court acts judicially, and when objections are interposed to a claim, it must be supported by proof, as in other litigated controversies, or the claim must fail of its establishment, and the simple allowance by the administrator will not avail to make a *prima facie* case: *Chambers v. Chambers*, 38 Or. 131; 62 Pac. Rep. 1013, 1014, 1015. The final recognition of a claim as valid in no way depends upon the question whether the administrator or probate judge allowed it upon insufficient evidence. The law simply makes the allowance evidence, *prima facie*, of the claim, and casts the onus of proof upon him who contests it: *Estate of Crosby*, 53 Cal. 574, 579.

(12) **Judgment of allowance.** The judgment of a probate court allowing a claim against an estate in the form of a promissory note, which is not sworn to, is erroneous, but not void for want of jurisdiction: *Gutierrez v. Scholle*, 12 N. M. 328; 78 Pac. Rep. 50, overruling, on this point, *Clancey v. Clancey*, 7 N. M. 405; 37 Pac. Rep. 1105, 1107; 38 Pac. Rep. 168. A decree of the probate court, ordering a claim to be paid, at the instance of the administrator, and upon his petition, stating the amount and class of the claim, the person to whom due, and the amount of money in his hands ready to pay out as the court shall direct, is final and conclusive, and cannot be collaterally attacked; nor can it be attacked in any other proceeding upon the ground of the insufficiency of the evidence upon which it was rendered: *Estate of Cook*, 14 Cal. 129, 130. A judgment of allowance of a claim against the estate of a deceased person is not a complete and effective judgment until an order on the administrator to pay is obtained, and a proceeding to obtain such order is not an action on the judgment of allowance: *Gutierrez v. Scholle*, 12 N. M. 328; 78 Pac. Rep. 50. The presentation and allowance of a claim based upon a judgment lien, to be paid in due course of administration, is not inconsistent with the continuance of the lien, and such lien ranks with the recognized lien of a mortgage, and is not released or affected by the death of the judgment debtor, pending the time limited by the statute for the continuance of the lien. No difference is perceivable between the allowance of the claim by the administrator, and the judgment of the court allowing the claim, on suit brought after its rejection; the judgment establishes the claim the same as if it had been allowed: *Estate of Wiley*, 138 Cal. 301, 306; 71 Pac. Rep. 441. See *Morton v. Adams*, 124 Cal. 229; 56 Pac. Rep. 1038; 71 Am. St. Rep. 53.

(13) **Arbitration. Reference.** If an executor or administrator doubts the validity of any claim presented to him, he may agree, in writing, with the claimant that an order of reference be made by the court or judge concerning the same by filing such agreement. The order should be made accordingly. The referee is empowered to hear and determine the matter, and to report thereon to the court, in the same manner and with like effect as if the order were made in an action or suit on the claim: *Chambers v. Chambers*, 38 Or. 131; 62 Pac. Rep. 1013, 1014. The reference of a claim may be made in court by consent of the parties: *Hall v. Superior Court*, 69 Cal. 79; 10 Pac. Rep. 257. The referee should report his findings, in writing, to the court, and the facts found and conclusions of law must be separately stated. If the claim is referred to the superior court for its decision, the testimony taken before the judge sitting as a referee, although embodied in his report, is no part of the record, and cannot be reviewed upon appeal, unless embodied in a bill of exceptions and filed. It is only the finding of the referee which becomes part of the judgment

roll. The court or judge sitting as a referee is as distinct in law from the court acting as such in its own proper sphere as if a different referee had been selected. The code fixes one rule for the guidance of all referees, and they are alike, and, without exception, subject to its provisions: *Lee Sack Sam v. Gray*, 104 Cal. 243, 248; 38 Pac. Rep. 85. Claims against an estate may, under the approval of the probate court, be submitted by the executor or administrator to a referee: *Unterrainer v. Seelig*, 13 S. D. 148; 82 N. W. Rep. 394, 396. If a claim in favor of an estate has been referred to arbitrators, who have clearly determined by their award the amount due the estate, the fact that they have included matters, in their award, not submitted to them does not render the award invalid as to the matters properly submitted, as that portion of the award may be rejected: *Unterrainer v. Seelig*, 13 S. D. 148; 82 N. W. Rep. 394, 396. An executor or administrator has, at common law, the right to submit any controversies between himself and creditors of or debtors to the estate to arbitration: *Unterrainer v. Seelig*, 13 S. D. 148; 82 N. W. Rep. 394, 396. The statute of South Dakota does not deprive the executor or administrator of the common-law power to arbitrate claims, either against or in favor of the estate. It provides a certain mode of adjusting a certain class of claims, without the formal proceeding of an action, and leaves it to the option of the parties whether they will avail themselves of its provisions, but it was not intended to restrict or exclude the common-law right of arbitration: *Unterrainer v. Seelig*, 13 S. D. 148; 82 N. W. Rep. 394, 396.

(14) **Claims properly allowed.** Even where there is no testamentary disposition or direction, the court will allow a reasonable sum to be paid out of the funds of the estate for the erection of a monument over decedent's grave, putting the expenditure upon the ground of funeral expenses: *Van Emon v. Superior Court*, 76 Cal. 589, 590; 9 Am. St. Rep. 258; 18 Pac. Rep. 877; *Estate of Koppikus*, 1 Cal. App. 84; 81 Pac. Rep. 732. The burial of the dead is a necessity that the preservation of the health of the living enjoins, and the reasonable expenses connected therewith constitute a preferred charge upon the decedent's estate. What is a reasonable charge in such a case must be determined by the apparent condition of the estate that is burdened therewith. An estate appraised at two thousand four hundred dollars warrants the administrator in incurring expenses aggregating thirty-one dollars for funeral notices, carriages, and hearse hire: *In re Osburn's Estate*, 36 Or. 8; 58 Pac. Rep. 521, 523. If a nephew pays out money for traveling expenses prior to the death of his uncle, he cannot recover such expenses from the estate of his uncle after the latter's death, by reason of the relation existing between them; but if he incurs traveling expenses for the benefit of the estate, after his uncle's death, he is entitled to be compensated therefor in a reasonable amount: *Estate of McCullough*, 31 Or. 86; 49 Pac. Rep. 886,

887. The proper amount to allow on a claim against an estate for services rendered in consideration of a conveyance of land which the decedent failed to convey before his death is the value of the land agreed to be conveyed, without other proof of reasonable value: *Estate of Towne*, 143 Cal. 507, 510; 77 Pac. Rep. 446.

(15) **Claims that will be rejected.** One who renders a kindly and gratuitous service to another, with no intention at the time of asking for or receiving any pecuniary compensation, cannot afterwards make such act the subject of a claim. Hence gratuitous services to a decedent, in his lifetime, under such circumstances, cannot form the basis of a charge against his estate after his death: *Estate of Hanson*, 133 Cal. 38, 39; 65 Pac. Rep. 14. Where a son maintained his aged mother in his own home as a member of his family, the law will not imply a promise on her part to pay for her maintenance: *Jones v. Humphrey's Estate*, 10 Kan. App. 545; 63 Pac. Rep. 26. So it is proper to reject the claim of a child against the executor of his parent's estate for services rendered by such child to the parent, unless a clear promise on the part of the parent to pay therefor appears. Where services are rendered by one near relative to another, no promise is implied to pay for the services, and no compensation can be claimed therefor unless an express agreement, or its equivalent, to pay for the same is shown: *Wilkes v. Cornelius*, 21 Or. 348; 28 Pac. Rep. 135. The universally accepted rule is, that the estate of a deceased person is answerable for the funeral expenses and other debts. This being true, and it not appearing from the record that the estate of a decedent is insolvent, the question of the liability of his wife's estate for such expenses should not arise. If the executor or administrator of the estate of decedent's wife sets up a claim to property standing in the name of the deceased husband, such claim for funeral expenses cannot be allowed against the estate of the widow: *Burdsal's Estate v. Walley* (Col. App.), 32 Pac. Rep. 985, 986. If the sum of two hundred and forty dollars is an ample and liberal allowance for the purchase of a burial lot, it is proper to refuse the administrator credit for thirteen hundred dollars expended in the purchase of such lot, if the estate is insolvent: *Clemes v. Fox*, 6 Col. App. 377; 40 Pac. Rep. 843, 847.

(16) **Claim of executor or administrator.** If an administrator's claim against an estate is disallowed by the probate judge, the administrator's only remedy is to resign his trust and to bring suit as any other creditor of the estate: *Wilkins v. Wilkins*, 1 Wash. 87; 23 Pac. Rep. 411. If the administrator holds a claim against the estate which he represents, the county court has power to allow his claim, although he failed to file his undertaking as administrator: *Estate of Houck*, 23 Or. 10; 17 Pac. Rep. 461, 463. An executor or administrator cannot, under the guise of allowing a claim against himself as such, and in

favor of himself as a creditor, be permitted to put the assets of the estate beyond the reach of the rightful claimants, whoever they may be: *Clancey v. Clancey*, 7 N. M. 405; 37 Pac. Rep. 1105, 1107.

(17) **Absence from state.** While the statute provides that a creditor of the estate of a deceased person, who is absent from the state during the whole period of publication of the notice to creditors, and has no actual knowledge of the publication, may present his claim to the administrator at any time before the decree of distribution is entered, yet no other proof of such absence and want of knowledge is required than the affidavit of the claimant; and the statute does not give the executor or administrator, or the probate judge, any power or right to say, arbitrarily, that they are not "satisfied," and therefore reject the claim. All that is necessary is for the affidavit to show, to the satisfaction of a reasonable, fair, and impartial mind, that the claimant had no notice: *Cullerton v. Mead*, 22 Cal. 95, 99. But if the claimant returned to the state, and had actual notice of the publication of the notice to creditors for more than one month prior to the expiration of the time for filing his claim, and neglected to do so until long after that date, he does not come within the remedial provision of the statute. Hence, under such circumstances, if he does not present his claim within the time limited, it is barred by the statute: *MacGowan v. Jones*, 142 Cal. 593, 596; 76 Pac. Rep. 503.

(18) **Judgments.** A judgment may be allowed as a claim against an estate without the affidavit required in other cases showing that it is due, and that there have been no payments, and that there are no offsets: *Cullerton v. Mead*, 22 Cal. 95, 99. The presentation and allowance of a judgment as a claim against the estate of a decedent does not destroy or merge the judgment lien. None of the grounds upon which one judgment has been allowed to merge in another apply to the case of the allowance of a judgment as a claim against the estate: *Morton v. Adams*, 124 Cal. 229, 232, 233; 71 Am. St. Rep. 53; 56 Pac. Rep. 1038.

(19) **Contingent claims.** All contingent claims, which are provable and payable at any time, must be presented for allowance within the statutory time after publication of notice to creditors, as a condition precedent to the commencement of actions thereon. The requirement that an allowed claim shall be ranked "among" debts does not exclude from the ranks all claims which may not properly be termed legal debts. The statute plainly requires contingent claims to be presented for allowance, and that all allowed claims shall be filed in court and ranked "among" the acknowledged (allowed) debts, whether all such allowed claims are technical debts or not: *Verdier v. Roach*, 96 Cal. 467, 476, 478; 31 Pac. Rep. 554; *Pico v. De la Guerra*,

18 Cal. 422, 430. If the claim is allowed and approved, the allowance, *prima facie*, establishes its validity against the estate. If it is due, and is rejected, the claimant is required to establish its validity by suit upon it within the prescribed statutory time after the rejection, or if it is not due, then within a certain time after it becomes due; and if its validity is established by recovery thereon, the judgment entitles the claimant to rank as a creditor of the estate, and to payment in due course of administration; or, if the administrator allows the claim although not due, it entitles the claimant to rank in the same way, and, upon deducting a rebate of interest upon the claim, entitles him to payment of the principal sum, or to share in a distribution of the estate *pari passu* with creditors whose allowed claims are due: *Estate of Swain*, 67 Cal. 637, 640; 8 Pac. Rep. 497.

(20) **Interest.** An allowed claim against an estate draws interest at the legal rate from the date of its approval by the judge: *Estate of Glinn*, 74 Cal. 567, 569; 16 Pac. Rep. 396; *Estate of Olivera*, 70 Cal. 184; 11 Pac. Rep. 624; and this is true, although the demand on which another claim was founded did not bear interest: *Estate of Olvera*, 70 Cal. 184, 185; 11 Pac. Rep. 624. A claim against the estate of a decedent for funeral expenses bears interest after its allowance: *Estate of Cummins*, 143 Cal. 525; 77 Pac. Rep. 479. If a suit on a mortgage claim is not brought within the prescribed statutory time after the rejection of a claim for accrued interest, there can be no foreclosure of the mortgage therefor; but where there has been a stipulation respecting interest, which has been overlooked in drawing a decree of foreclosure, the judgment should be modified so as to conform with the stipulation: *Consolidated Nat. Bank v. Hayes*, 112 Cal. 75, 84; 44 Pac. Rep. 469. It is sometimes provided by the statute that, "if the estate be insolvent, no greater rate of interest shall be allowed upon any claim after the first publication of notice to creditors, than is allowed on judgments obtained in the superior court"; but such a statute applies only to claims which must be presented for allowance, or be barred forever, and which, when approved, are filed in the court and become acknowledged debts. It does not apply to an independent action brought by a mortgagee to foreclose his lien against the property of the estate, where he looks to the mortgaged property alone as security. In such an action the court acts independently of the administration of the estate, and may enforce the lien upon the property by a sale thereof for the full amount of the mortgaged debt, irrespective of the insolvent condition of the estate. The court, in such an action, is not called upon to "allow" a claim against the estate, which is to be paid in the course of administration, but merely determines the amount of the mortgage debt according to its terms, and directs a sale of the mortgaged property: *Visalia Sav. Bank v. Curtis*, 135 Cal.

350, 353; 67 Pac. Rep. 329; *Christy v. Dana*, 42 Cal. 174; *Richardson v. Diss*, 127 Cal. 58; 59 Pac. Rep. 197; *Estate of McDougald*, 146 Cal. 196; 79 Pac. Rep. 875. Such a statute, in specially mentioning insolvent estates as subjects of reduction of interest, *ex industria* excludes all estates not mentioned from the operation of this law reducing interest, and shows, as plainly as anything short of positive enactment can show, that it was the purpose and intention of the legislature that credits against solvent estates should continue after allowance to draw interest at any rate in excess of the legal rate that the contracts on which they were based will warrant: *Richardson v. Diss*, 127 Cal. 58, 60; 59 Pac. Rep. 197.

(21) **Contest of claims. Vacating allowance.** There are at least two points in the administration of an estate at which an approved claim may be contested; namely, when application is made for the sale of property, and when an account is rendered for settlement. But, in making the contest, the contestant has the affirmative, and must show cause: *Estate of Loshe*, 62 Cal. 413, 415. Heirs may question the allowance and approval of claims by the administrator and judge: *Beckett v. Selover*, 7 Cal. 215, 241; 68 Am. Dec. 237; and minor heirs are not estopped from questioning the correctness of the administrator's account by reason of proceedings in the probate court for a sale of the property to pay an alleged claim: *Estate of Hill*, 67 Cal. 238, 244; 7 Pac. Rep. 664. If the account of a claimant is contested, and he applies for leave to amend by filing a more full and particular account of his claim, the amendment should be allowed, and the court errs in refusing to give him an opportunity to prove that his claim has not been barred by the statute of limitations: *Estate of Hidden*, 23 Cal. 362, 363. An order of the probate court allowing a claim against the estate of a decedent is not open to collateral attack upon the ground that the statute of limitations had run against such claim before its allowance: *Van Dusen v. Topeka Woolen Mill Co.* (Kan.), 87 Pac. Rep. 74. And it is not sufficient ground for refusing to order the payment of a claim for professional services rendered the decedent in his lifetime, that such services were not worth the amount charged by him, and allowed by the administrator and by the probate judge: *Estate of McKinley*, 49 Cal. 152, 154. Not only may an executor or administrator object to the allowance of a claim, but the heirs at law, devisees, or legatees, or creditors, or others interested in the estate, may do so; and where the holder of a note asserts it as a claim against the estate, a general objection to it is sufficient, under a statute which expressly provides that formal pleadings shall not be required, and that, in case of a contested claim, the issue shall be formed, heard, and determined in the same manner as in actions before justices of the peace. Under this procedure, a plea of the statute of limitations, or that a copy, and not the note itself, was filed, may be orally interposed any time before or at the time of the

hearing: *In re Hobson's Estate* (Col.), 91 Pac. Rep. 929, 931. The allowance, by a judge, of a claim against the estate of a decedent, made on an *ex parte* application, may properly be set aside by him without notice to the claimant: *In re Sullenberger*, 72 Cal. 549, 552; 14 Pac. Rep. 513. Orders approving claims against an estate may be set aside, undoubtedly, upon the ground of fraud or mistake, but, in the absence of proof of such fraud or mistake, the appellate court will presume that, in setting aside such orders, the administrator's claim to protection for making payments under its previous orders was considered by the lower court, and, in the absence of anything in the record to the contrary, the appellate court will assume that the court below had jurisdiction, and that an approval order was set aside upon the ground of fraud or mistake, or upon both of these grounds: *Clemes v. Fox*, 25 Col. 39; 53 Pac. Rep. 225, 228. A proceeding to vacate the allowance of a claim against an estate is a direct attack upon the judgment of the probate court which that court has jurisdiction to entertain: *Lutz v. Balcom*, 59 Kan. 777; 53 Pac. Rep. 523.

5. Suits on claims.

(1) **In general.** The plaintiff, in his suit upon the claim of a decedent, is not estopped because of the prior presentation of a different claim, which was not approved, although the former claim was for a lesser amount. The doctrine of estoppel cannot be invoked in such a case, where the former claim was never read to nor seen by the executor or administrator, and was largely incorrect: *Warren v. McGill*, 103 Cal. 153, 155; 37 Pac. Rep. 144. The doctrine of estoppel cannot be invoked where, to give it effect, there must be an entire disregard of statutory law. Hence a plea of estoppel cannot be invoked against the substituted executors of the deceased member of a copartnership, so as to permit a judgment against them in violation of the statute requiring the presentation of a claim, on the ground that the deceased fraudulently induced plaintiff to believe that he was dealing with a copartnership, and not with him individually: *Frazier v. Murphy*, 133 Cal. 91, 98; 65 Pac. Rep. 326. So if a portion of a claim which has been filed has been allowed, and the remainder refused, the claimant is not estopped to sue, either at law or in equity, for the portion disallowed: *Walkerly v. Bacon*, 85 Cal. 137, 141; 24 Pac. Rep. 638. Where the plaintiff had conveyed a mining claim to the decedent before the latter's death, and the deceased failed to make payment therefor, and subsequently the plaintiff agreed to accept a specified sum of money and a farm, and plaintiff did not agree to release his claim for the purchase price of the mining claim until the title to the farm had been cleared and a deed given him, which latter agreement was not in writing, and was without consideration, such latter agreement was not binding upon either party, at law or in equity, and did not prevent a right of recovery against a representative of the estate for the amount due for the

mining claim: *Bull v. Payne* (Or.), 84 Pac. Rep. 697, 699. In an action against an executor on a claim against his decedent, it is no defense that the payment of such claim would exhaust the assets of the estate: *Grubbe v. Grubbe*, 26 Or. 363; 38 Pac. Rep. 182, 183, 184. A defendant administrator, in an action upon the claim of his decedent, that has been barred by the statute of limitations, has no power to bind the estate by waiving the defense of such statute. The administrator is prohibited from allowing or paying any claim that is barred, and for him to waive the defense of the statute of limitations would be to allow such a claim to be collected. In other words, the administrator would be fraudulently paying a claim that is barred. No such consent could be given so as to bind the estate. This rule is applicable to all trustees: *Vrooman v. Li Po Tai*, 113 Cal. 302; 45 Pac. Rep. 470, 472. If a claim against the estate of a deceased person has been presented to the executor or administrator, and allowed by him within the prescribed statutory time after its presentation, no action can be maintained thereon until that time has elapsed after its presentation to the judge, unless he rejects it within that period: *Nally v. McDonald*, 66 Cal. 530, 532.

REFERENCES.

Is an administrator or executor in such privity with a legatee, distributee, or creditor, that he may assert a personal defense of the latter to a claim against the estate? See note 8 L. R. A. (N. S.) 212, 214.

(2) **Jurisdiction.** The superior court has no jurisdiction of a suit on a note against the estate of a decedent, where the demand, exclusive of interest, does not amount to three hundred dollars; and the fact that the claim upon the note, with accrued interest, amounts to over three hundred dollars when presented to the administrator does not change the result. The action is upon the note. It is made necessary, under the statute, to present a claim of this kind to the representative of the deceased before an action can be maintained upon it, but when the action is brought it is upon the original claim or note. The presentation of the claim in no way changes the nature of the demand, nor the form in which the action must be brought: *Gallagher v. McGraw*, 132 Cal. 601; 64 Pac. Rep. 1080. If a defendant executor or administrator, in an action upon a claim against the estate, makes a voluntary appearance, the court acquires jurisdiction over him with the same effect as if he had been brought in by a summons upon him at that time: *Union Sav. Bank v. Barrett*, 132 Cal. 453, 455; 64 Pac. Rep. 713, 1071.

(3) **Presentation, when necessary.** It is a condition precedent to the right to maintain an action on a claim against the estate of a deceased person where recourse is had to such estate alone, that such

claim be first presented to the executor or administrator for allowance or rejection: *Dodson v. Nevitt*, 5 Mont. 518; 6 Pac. Rep. 358, 359; *Eustace v. Johns*, 38 Cal. 3. Or, as it is sometimes expressed, no action can be maintained upon a simple money demand or claim against an estate, whether such demand or claim be based upon a simple or special contract, or any other legitimate basis for a claim or demand payable out of the general assets, until the same has been duly presented to the executor or administrator for allowance, and by him disallowed or retained for more than the time specified in the statute, without the indorsement of his action thereon: *Eustace v. Johns*, 38 Cal. 3, 23. No action can be maintained on a claim if there has been no legal presentation of it within the time prescribed: *Zachary v. Chambers*, 1 Or. 321. If the claim has been rejected for want of verification, as not having been made before an officer authorized to administer oaths, no action can be maintained against the executor or administrator upon such claim: *Winder v. Hendricks*, 56 Cal. 464. Thus a claim in favor of the United States, against the estate of a decedent, cannot be sued on unless it has been properly presented. When the government of the United States is compelled to come into court to enforce its rights, it must come as any other suitor, and the proceeding in such action must be in accordance with the local laws in force when the suit is commenced: *United States v. Hailey*, 2 Ida. 26; 3 Pac. Rep. 263. No action can be maintained by a ward against the administrator of his deceased guardian to recover a sum of money received by the guardian in trust, where the claim was never presented for allowance, and it is not shown that the money received as the guardian of plaintiff ever came into the hands of defendant as administrator or otherwise: *Gillespie v. Winn*, 65 Cal. 429, 430; 4 Pac. Rep. 411. And a surviving partner cannot bring suit against the administrator of his deceased partner for his interest in the assets of the same, unless he has first presented his claim to the executor or administrator within the time prescribed by the statute: *McKay v. Joy* (Cal.), 9 Pac. Rep. 940. An action cannot be maintained against the representative of a deceased stockholder of a mining corporation, by reason of his individual liability for its debts, unless the claim arising therefrom was presented to his executors or administrators for allowance within the time prescribed by statute: *Davidson v. Rankin*, 34 Cal. 503, 506. And no action can lie to foreclose a laborer's lien on logs, against the executor of a deceased person, unless the claim has first been presented to the executor or administrator of decedent's estate: *Munholland v. Ault* (Wash.), 32 Pac. Rep. 294. No action can be maintained upon a claim until it is first presented, save in excepted cases, but the California statute does not require that the executor or administrator must reject the claim before an action can be maintained upon it: *Cowgill v. Dinwiddie*, 98 Cal. 481, 486; 33 Pac. Rep. 439. Under the Montana statute, both the presentation and the rejection of a claim are neces-

sary before an action can be maintained thereon; and a complaint which alleges a promise to pay, and simply the presentation of a claim against the estate, fails to state a cause of action: *Brown v. Daly*, 33 Mont. 523; 84 Pac. Rep. 883, 884.

(4) **No presentation necessary when.** As the statute which relates to the presentation of claims against estates before actions can be maintained thereon relates to claims arising upon contracts, other actions do not come within the rule. Thus no presentation of a claim is necessary before the bringing of an action to recover damages for wrongful acts: *Hardin v. Sin Claire*, 115 Cal. 460, 464; 47 Pac. Rep. 363. No presentation need be made in an action which is purely equitable, and in which purely equitable relief is sought: *Toulouse v. Burkett*, 2 Ida. 184; 10 Pac. Rep. 26, 28; *Tyler v. Mayre*, 95 Cal. 160, 168; 27 Pac. Rep. 160; 30 Pac. Rep. 196. A claim in favor of the attorney of an assignor, in trust, against the administrator of the assignee, in trust, need not be presented before suit: *Tyler v. Mayre*, 95 Cal. 160, 168; 27 Pac. Rep. 160; 30 Pac. Rep. 196. So a pledgee is not obliged to present his claim to the administrator of the pledgor, unless he seeks recourse against other property of the estate than that pledged: *Estate of Kibbe*, 57 Cal. 407, 408. The death of the grantor in a trust deed does not operate as a revocation of the power of sale contained in the deed, nor in any manner limit the effect of the deed. Hence a failure to present claims secured by such deed to the administrator of the deceased furnishes no ground for a court of equity to cancel the deed: *More v. Calkins*, 95 Cal. 435, 438; 29 Am. St. Rep. 128; 30 Pac. Rep. 583. Liens in general may be foreclosed without presentment of a claim against the estate, where no recourse against other property is waived and no deficiency judgment is sought: *Schadt v. Heppe*, 45 Cal. 433, 437. Where expenditures have been made for taxes and insurance, for the protection of property, subsequent to the presentation of a mortgage claim to the executor of the deceased mortgagor, they may properly be allowed on the foreclosure without demand or the presentation of a claim therefor: *Humboldt S. & L. Soc. v. Burnham*, 111 Cal. 343, 346; 43 Pac. Rep. 971. An action may be maintained without the presentment of a claim where the specific thing sued for is not a part of the decedent's estate. An action will lie whenever the thing demanded can be identified in specie as the property of another: *Sprague v. Walton*, 145 Cal. 228; 78 Pac. Rep. 645, 647. In Colorado, although the estate is in course of administration in the county court, a plaintiff is not for this reason required to present his claim to that court for allowance, but, at his option, may bring a suit thereon in the district court, without first having presented his claim to the county court: *Jones v. Perot*, 19 Col. 141; 34 Pac. Rep. 728, 731. An action against a special administrator to recover damages for the maintenance of a nuisance may be maintained without the presentation of a claim against the estate for

such wrongful act: *Hardin v. Sin Claire*, 115 Cal. 460; 47 Pac. Rep. 363, 364. A claim against the estate of a decedent, for property pledged, may be foreclosed without any presentation of a claim against the estate, if all recourse against the estate is expressly waived in the complaint: *Building and Loan Assoc. v. King*, 83 Cal. 440, 444; 23 Pac. Rep. 376; *Estate of Galland*, 92 Cal. 293, 294; 28 Pac. Rep. 287.

(5) **Contingent claims.** A contingent claim against the estate of a deceased person is a claim "not due." An action upon a rejected contingent claim, brought after such rejection, but before the claim has become due, is premature, and cannot be sustained. An action upon a rejected contingent claim must be brought within the prescribed statutory time after it becomes due; and if it never becomes due, no action can be sustained thereon: *Morse v. Steele*, 132 Cal. 456, 458; 64 Pac. Rep. 690. If a claim presented against the estate of a decedent as the guarantor of the faithful performance of the covenants of a lease is the foundation of an action, the complaint, upon its face, must show a present liability of the guarantor. It must show a presentation and rejection of the claim upon which the action is brought, or a legal reason excusing such presentation and rejection. If the complaint fails to do this, there can be no recovery: *Fratt v. Hunt*, 108 Cal. 288, 294; 41 Pac. Rep. 12. An action upon a contingent claim is barred, unless the same was presented within the time limited by the notice to creditors: *Verdier v. Roach*, 96 Cal. 467, 479; 31 Pac. Rep. 554. An action upon a rejected claim against the estate of a deceased person, based upon a promise to pay money when certain land is sold, is upon a contingent claim, and cannot be maintained before the land is sold. If any action can be maintained thereon at all, it must be within two months, or other specified statutory time after the claim becomes due: *Brooks v. Lawson*, 136 Cal. 10, 13; 68 Pac. Rep. 97.

(6) **Services.** Where a person, as nurse, companion, etc., rendered services to a decedent before his death, or voluntarily performed work or made voluntary payments, and no express contract to pay therefor appears, the law will not imply a contract to pay therefor, especially where the one who rendered such services or performed such work, or made such payments, is a member of the family of the employer; and, in order to sustain an action therefor, it must be proved, on the presentation of a claim against the estate, that there was an understanding that such services should be paid for. But it is not necessary that such proof be made of a direct and positive contract. It is sufficient that proof be made of words, acts, and conduct of the parties, and circumstances from which the inference may follow that there was an understanding that the services were not to be rendered gratuitously. When such is the case, there is a con-

tract upon which the value of the services can be recovered, and it is for the jury to say, from all the conduct of the parties, and from the circumstances in evidence, whether there was in fact such an understanding and agreement. In the absence of proof of any such agreement there can be no recovery: *Hodge v. Hodge* (Wash.), 91 Pac. Rep. 764, 765; *Lichtenberg v. McGlynn*, 105 Cal. 45; 38 Pac. Rep. 541; *McGlew v. McDade*, 146 Cal. 553; 80 Pac. Rep. 695. But the fact that the services to be performed under such a contract were to be, or were, performed in a foreign country does not affect plaintiff's right to maintain an action in the courts of this state against an administrator appointed here. Where the contract of the deceased is of an executory nature, and the personal representative can fairly and sufficiently execute all the deceased could have done, he may do so, and enforce the contract; e converso, the personal representative is bound to complete such a contract, and if he does not, may be made to pay damages out of the assets of the estate: *McCann v. Pennie*, 100 Cal. 547, 551; 35 Pac. Rep. 158. The fact that a husband is liable for necessary services rendered to the wife does not preclude her from making any contract which she sees fit in respect to those matters to be compensated out of her estate: *Bonebrake v. Tauer*, 67 Kan. 827; 72 Pac. Rep. 521. When a daughter nurses and cares for her mother for several years, including her last sickness, under an express contract that payment for such services will be provided for in the will of her mother, who dies intestate, the daughter may recover the reasonable value of such services from the estate of the deceased mother: *Griffith v. Robertson*, 73 Kan. 666; 85 Pac. Rep. 748. And it is not essential that the evidence in support of such express contract shall consist of a formal offer and acceptance; it may be established, like other disputed facts, by competent testimony: *Griffith v. Robertson*, 73 Kan. 666; 85 Pac. Rep. 748. A person employed as housekeeper, at an agreed price per week, cannot recover from the estate of such employer, who dies during the employment, compensation for services as nurse in addition to her weekly wages as housekeeper, when it does not appear that any agreement was ever made to pay for such extra services, or that the employer had any knowledge that she expected to charge therefor: *Houghton v. Kittleman*, 7 Kan. App. 207; 52 Pac. Rep. 898. In an action on a claim against the estate of a deceased person for services rendered at his request, the evidence must be confined to proof of services rendered within two years prior to the death of the decedent, as there is no right to allow a claim which has been barred by the statute of limitations: *Etchas v. Oreña*, 127 Cal. 588, 592; 60 Pac. Rep. 45. If one has rendered services to a deceased person as nurse, and it appears that the decedent, by his will, bequeathed to such person a sum of money in consideration of, and in payment for, services during his last sickness, an action brought by such person to recover the value of such services rendered is a renunciation of the bequest, and an elec-

tion by the plaintiff not to rely upon it as a payment for such services: *Smith v. Furnish*, 70 Cal. 424, 428; 12 Pac. Rep. 392. The judgment against the administrator on a claim for services can only have the effect of a claim duly allowed against the estate to be paid in due course, and cannot give the creditor any further rights. There is nothing in the mode of allowance which fixes the rank of a claim; and as there is no mode of allowance which can give a claim priority, it must follow that there can be no judgment establishing the validity of a claim which the administrator or court has refused to allow which can have that effect. The priority of claims must be determined by the probate court when the assets are finally marshaled, and the order of payment must be determined by that court: *McLean v. Crow*, 88 Cal. 644, 647; 26 Pac. Rep. 596.

(7) **Pleadings. Sufficiency of complaint.** In an action against an administrator upon a claim against the estate of a decedent, it is sufficient to aver non-payment by the deceased, and that the claim has been properly presented to and rejected by the administrator: *Wise v. Hogan*, 77 Cal. 184, 188; 19 Pac. Rep. 278. A complaint in an action by an administrator upon a claim against the estate of another person is sufficient against the objection that the administrative characters of the plaintiff and defendant are not sufficiently alleged, where, as to the plaintiff, the death of his intestate is alleged, and further, that on a certain day a decree was duly given and made, in a designated court, upon which letters of administration upon the estate of the decedent named were issued by the said court, etc.; where the allegation as to the defendant is in effect the same; and where, as to each, the allegation is, "that he duly qualified and entered upon the discharge of his duties as such administrator, and has ever since been, and now is, the duly qualified and acting administrator," etc.: *Wise v. Hogan*, 77 Cal. 184, 189; 19 Pac. Rep. 278. The complaint in such a case is sufficient if it shows a subsisting liability in favor of the plaintiff, and is verified according to the statute. It is not necessary to set out therein the evidence upon which the claimant expects to recover: *Goltra v. Penland*, 42 Or. 18; 69 Pac. Rep. 925, 926. The facts constituting the claim need not be set out with the same particularity required in a pleading, but may be stated in general terms; and if the claim is rejected, and an action is brought thereon, it is sufficient, if it appears that it is founded on the same claim or demand as that presented to the executor or administrator: *Goltra v. Penland*, 42 Or. 18; 69 Pac. Rep. 925, 926; *Pollitz v. Wickersham* (Cal.), 88 Pac. Rep. 911, 916. Although the details alleged in the complaint are more particular than is necessary, the complaint will support a recovery if it is upon the same cause of action set out in the claim, sets forth the same services, where the action is for the value of services, and states the same agreement referred to in the claim: *Thompson v. Oreña*, 134 Cal. 26, 29; 66 Pac. Rep. 24. An

avermment of non-payment is necessary to the sufficiency of a complaint for money claimed to be due on a contract. This is on the ground that the failure to pay constitutes the breach of a contract, and gives a right of action. Hence, in an action on a claim against the estate of a decedent, it is sufficient to allege non-payment by the deceased, and that the claim has been properly presented to and rejected by the administrator. The non-payment by the debtor is a breach of the contract, and gives a cause of action. The subsequent presentation of the claim to the administrator is made necessary by the statute before an action can be maintained, but this does not render it necessary to allege that he has not paid the claim: *Wise v. Hogan*, 77 Cal. 184, 188; 19 Pac. Rep. 278. A complaint in an action on an account against an executor is sufficient, as against the statute of limitations, where it does not appear upon the face of the complaint that the claim is barred. In such a case, that objection cannot be raised by demurrer, and may be determined on the trial: *Wise v. Hogan*, 77 Cal. 184; 19 Pac. Rep. 278, 280 (reversing *Wise v. Hogan*, 18 Pac. Rep. 784).

(8) **Pleadings. Allegation as to presentation of claim.** In an action upon a claim against the estate of a decedent, where it was not necessary to present such claim to the executor or administrator for allowance or rejection, it is not necessary that the plaintiff should set forth in his complaint any presentation of the claim: *Security Sav. Bank v. Connell*, 65 Cal. 574; 4 Pac. Rep. 580; *Toulouse v. Burkett*, 2 Ida. 184; 10 Pac. Rep. 26. But in a case where it was necessary for the claimant to present his claim against the estate, the allegation of presentation of the claim becomes material to plaintiff's complaint, and must be made and proved: *Rowland v. Madden*, 72 Cal. 17, 20; 12 Pac. Rep. 226, 870. The presentation is sufficiently averred where the complaint alleges that the claim sued upon was presented to the administrator within the time limited in the notice to creditors, and a copy of the claim presented, with the verification annexed, together with the indorsement thereon, is attached to the complaint: *Janin v. Browne*, 59 Cal. 37, 42. So a general allegation of presentment to the executor or administrator for the amount due and to become due, that the claim was duly verified in all respects according to law, and was duly allowed, and approved by the executor or administrator and judge, and was duly filed, etc., is a sufficient averment of the ultimate fact of presentation of the claim, as against a general demurrer, though the claim is not set out, nor attached to the complaint; such allegation is sufficient to authorize proof as to whether the claim, as presented, was sufficient in form or was properly presented: *Humboldt Sav. & L. Soc. v. Burnham*, 111 Cal. 343, 345; 43 Pac. Rep. 971. In an action on a claim against the estate of a deceased person, the complaint must show that the claim had been first presented to the executor or administrator, in order to state a cause of action: *Foley v.*

McDonnell (Wash.), 93 Pac. Rep. 321, 322. In a suit on a claim against the estate of a deceased person, the complaint, stating a cause of action sounding in contract, fails to state a cause of action if it does not aver that a claim for the cause of action sued on had been presented to the administrator: *Burke v. Maguire*, 35 Cal. Dec. 428, 429 (April 28, 1908). A failure to make an averment in the complaint, in an action on a claim against the estate of a decedent, that it was presented to the executor or administrator and rejected, where presentment is necessary, makes the complaint demurrable: *Morse v. Steele*, 149 Cal. 303; 86 Pac. Rep. 693. An allegation of presentment, though defectively stated, is good as against a general demurrer for want of facts: *Wise v. Hogan*, 77 Cal. 184, 188; 19 Pac. Rep. 278; *Chase v. Evoy*, 58 Cal. 348. Where the complaint alleges that the claim was presented in due form, but contains no allegation touching the publication of notice to creditors, the complaint is not demurrable for not alleging that the plaintiff presented his claim within the time limited in the notice to creditors: *McCann v. Pennie*, 100 Cal. 547, 552; 35 Pac. Rep. 158. It is not necessary, in the complaint on a claim against the estate of a decedent, to allege that notice to creditors has been published. It is not the publication of notice which is the prerequisite to the maintenance of an action on a claim, but the proper presentation of the claim and its rejection: *Harp v. Calahan*, 46 Cal. 222, 233; *Janin v. Browne*, 59 Cal. 37, 43. Hence an allegation, in such complaint, that the executor or administrator had waived the presentation of the claim for allowance is irrelevant and immaterial, as he has no power to waive the necessity of the presentment of the claim for allowance and rejection: *Harp v. Calahan*, 46 Cal. 222, 233.

(9) Pleadings. Amendment of complaint. In an action against the estate of a decedent, it is error to refuse the plaintiff permission to amend his complaint, if defectively stated, so as to state properly his cause of action: *Cowdery v. McChesney*, 124 Cal. 363, 365; 57 Pac. Rep. 221; *Anglo-Californian Bank v. Field*, 146 Cal. 644, 656; 80 Pac. Rep. 1080; *Vanderslice v. Matthews*, 79 Cal. 273, 277; 21 Pac. Rep. 748; but the complaint cannot be amended so as to set up a new or different cause of action: *Morehouse v. Morehouse*, 140 Cal. 88, 94; 73 Pac. Rep. 738. The plaintiff should be permitted to amend his complaint by inserting a waiver of all recourse against the property of the estate, other than that described in the complaint: *Anglo-Californian Bank v. Field*, 146 Cal. 644, 656; 80 Pac. Rep. 1080. The only way in which an action can be brought against an estate is to sue the administrator or executor in his representative capacity; and the rule is, that he cannot be sued in the same action upon his individual or personal liability, and in his representative capacity. Hence, if a complaint has been brought against him in his representative capacity, it cannot be so amended as to constitute an action against

him individually, as that would be an entire change of the party defendant, and a different suit: *Sterrett v. Barker*, 119 Cal. 492, 494, 495; 51 Pac. Rep. 695. The plaintiff in an action upon a claim against the estate of a decedent can recover only upon the claim as presented. He cannot recover upon any other cause of action: *Lichtenberg v. McGlynn*, 105 Cal. 45, 47; 38 Pac. Rep. 541; *McGrath v. Carroll*, 110 Cal. 79, 84; 42 Pac. Rep. 466; *Barthe v. Rogers*, 127 Cal. 52, 54; 59 Pac. Rep. 310; *Etchas v. Oreña*, 127 Cal. 588, 594; 60 Pac. Rep. 45; *Brooks v. Lawson*, 136 Cal. 10, 13; 68 Pac. Rep. 97. If the claim is upon a note, the plaintiff cannot change the nature of the demand, with reference to the jurisdiction of an action upon the note for the amount of the claim: *Gallagher v. McGraw*, 132 Cal. 601, 602; 64 Pac. Rep. 1080. No other cause of action can be properly alleged or proved, than that stated in the claim presented and passed upon by the executor: *Etchas v. Oreña*, 127 Cal. 588, 592; 60 Pac. Rep. 45. If the action is upon an original oral promise, against which the statute of limitations had run before the death of the decedent, the recovery is limited to the claim presented, and the complaint cannot be amended to set up a new cause of action upon a subsequent conditional promise: *Morehouse v. Morehouse*, 140 Cal. 88, 92; 73 Pac. Rep. 738, 739. If the action is upon a claim for certain specified services, for which specific compensation was demanded, he cannot recover a greater amount having no foundation in the claim as presented: *Barthe v. Rogers*, 127 Cal. 52, 54; 59 Pac. Rep. 310.

(10) **Pleadings. Answer. Bill of particulars.** In an action upon a claim against an estate, an allegation that the claim, duly verified, had been presented, is sufficiently denied by an affirmative allegation in the answer that the claim was not verified or presented as required by the statute: *Derby & Co. v. Jackman*, 89 Cal. 1, 4; 26 Pac. Rep. 610; and see *Rowland v. Madden*, 72 Cal. 17, 20; 12 Pac. Rep. 226, 870. Non-payment should be presumed from the alleged fact of the rejection of the claim: *Wise v. Hogan*, 77 Cal. 184, 188; 19 Pac. Rep. 278. A party suing on an account need not set forth specifically the items of the indebtedness. If the defendant is not satisfied with the general allegation of indebtedness, he may, within a specified time, demand a copy of the plaintiff's account. If he fails to avail himself of the right thus given him, he cannot be heard to say that the complaint is insufficient on the ground of uncertainty in that respect, and executors and administrators are governed by this rule of practice: *Wise v. Hogan*, 77 Cal. 184, 186; 19 Pac. Rep. 278. Where the allegation was that the claim presented "was duly verified by the oath of plaintiff, in the form prescribed by law, an objection that the complaint does not state facts sufficient to constitute a cause of action, because "it fails to show the due presentation of the claim to the administratrix" of the estate of the deceased is untenable: *Chase v. Evoy*, 58 Cal. 348, 352; and see *Guerian v. Joyce*, 133 Cal.

405, 408; 65 Pac. Rep. 972, for a much better allegation as to verification and presentment of the claim than did the complaint in the case last cited. In an action on a claim rejected by an administrator, an answer, pleading the statute of limitations, which alleges that the cause of action therein set forth did not accrue within six years from the commencement of the action is sufficient, without alleging that deceased had been a resident of the state for six years prior to his death: *Saxton v. Musselman*, 17 S. D. 35; 95 N. W. Rep. 291, 292.

(11) **Pleadings. Variance.** If the claim sued upon can be reconciled with the claim as presented to the executor or administrator, the recovery is upon the same cause of action as that set up in the claim; and the fact that plaintiff, in his complaint, has segregated and lumped certain items of the claim, without increasing or diminishing the amount of any item, and without alleging any different contract as to liability on any items other than those that appear on the face of the complaint, does not constitute a material variance: *Enscoe v. Fletcher*, 1 Cal. App. 659, 662; 82 Pac. Rep. 1075. While the recovery must be had on the same cause of action as that set up in the claim, and while no other or different contract or cause of action can be alleged or proved, yet, where the action is upon the identical notes rejected, and additional facts stated in the complaint are merely explanatory of the demand, and no different contract is stated than that set forth in the claim, the cause of action is upon the claim: *Enscoe v. Fletcher*, 1 Cal. App. 659; 82 Pac. Rep. 1075. Where the cause of action established by the findings is precisely the cause of action attempted to be set out in the claim and in the complaint, and by all, the claim asserted is one for money advanced by plaintiffs to the use of the decedent, which he had agreed to pay, there is no material variance: *Pollitz v. Wickersham* (Cal.), 88 Pac. Rep. 911, 916. In *Cheney v. McGravin* (Cal. App.), 93 Pac. Rep. 386, 387, an order granting a new trial on the ground of a variance between the claim presented against the estate of a decedent and the proof adduced in an action commenced on the claim by the plaintiff within the statutory time was reversed on the ground that there was no variance.

(12) **Parties. Administrator, only, is necessary when.** In an action to enforce claims of liens against an estate, where the same might have been maintained against the deceased, if living, the only necessary party defendant is the administrator. The heirs of the decedent need not be joined, and this applies to an action to foreclose a mortgage executed by the decedent: *McCaughey v. Lyall* (Cal.), 93 Pac. Rep. 681, 682.

(13) **Evidence. In general.** The only way that an account can be proved, ordinarily, is by establishing by evidence the several items

of the same, and the oral evidence of persons having personal knowledge of the transactions is the best evidence of the items, unless there is something to indicate that such items accrued in pursuance of, or are the result of, a written contract between the parties. The fact that one or both of the parties kept a book-account of their transactions does not affect the rule of evidence, and the oral testimony of eye and ear witnesses to the transactions in which the various items of an account accrued is still primary and not secondary evidence of such items. The books themselves are secondary or supplementary evidence: *Cowdery v. McChesney*, 124 Cal. 363, 365; 57 Pac. Rep. 221. In an action on a rejected claim against the estate of a decedent, it is proper to admit in evidence, as tending to discredit plaintiff's claim, a letter of the plaintiff to third persons bearing directly upon the transaction in controversy, and showing other unpaid claims in his favor against the estate amounting to a larger sum: *Sanguinetti v. Pelligrini*, 2 Cal. App. 294, 296; 83 Pac. Rep. 293. Where a daughter gave her father a general power of attorney, authorizing him to sell and convey her lands, and to manage the proceeds without any restrictions whatever, and he sold the land many years prior to his death, without notifying her of such fact, and she presented a claim against his estate on her demand, which was denied, and afterwards commenced suit upon the claim, in which she alleged and proved the foregoing facts, she is entitled to recover, in the absence of proof by the defense showing that the agency had been terminated more than six years prior to the commencement of the action. The agency was a continuing one, and plaintiff had a right to expect that, in case her property had been sold, the proceeds had been managed by him for her benefit: *Quinn v. Gross*, 24 Or. 147; 33 Pac. Rep. 535, 536, 537. In an action against the estate of a decedent, evidence that the plaintiff had given the decedent a check, and that the latter had collected it, is not proof of a loan to the decedent, nor sufficient to establish a claim against his estate: *Dickey v. Dickey*, 8 Col. App. 141; 45 Pac. Rep. 228. As to what evidence, other than that of plaintiff, is insufficient to establish a claim upon a note given by a decedent, see *Harding v. Grin*, 25 Or. 506; 36 Pac. Rep. 634. The proof of a fact admitted by the pleadings is harmless error. Hence, in a claim against the estate of a decedent, the introduction of his will in evidence is harmless error, where no issue is made upon its provisions: *Bonebrake v. Tauer*, 67 Kan. 827; 72 Pac. Rep. 521, 522. As to evidence sufficient to sustain a finding that the claim sued on arose from a debt of a firm of which the decedent was a partner, see *In re Morgan's Estate*, 46 Or. 233; 77 Pac. Rep. 608. In an action upon a note against the estate of decedent, it is proper to admit the note in evidence, where the holder has testified that no part of the principal or interest coupons attached thereto have been paid, but that decedent had paid other interest coupons amounting to a designated sum, as the payment of interest is prima

facie evidence of the execution of the note by decedent, and obviates the necessity of further proof of the genuineness of the signature: *McKay's Estate v. Belknap Sav. Bank*, 27 Col. 50; 59 Pac. Rep. 745, 747.

(14) **Evidence. Presentation. Payment. Burden.** In an action on a claim against the estate of a decedent, where recourse is had against the estate, there must be proof of the presentation of the claim to the executor or administrator of the estate before a recovery can be had thereon: *Rowland v. Madden*, 72 Cal. 17, 18; 12 Pac. Rep. 226, 870. There is no proof of the presentation, where there is no proof of the signature of the executor or administrator to the rejection of the claim: *Bank of Chico v. Spect* (Cal.), 11 Pac. Rep. 740. Where there is no issue raised as to the presentation of the claim, it is neither necessary nor proper for the rejected claim to be offered in evidence: *Guerian v. Joyce*, 133 Cal. 405; 65 Pac. Rep. 972. Where the action is to recover on a promissory note, and plaintiff introduces in evidence the note, with indorsements thereon, proves the signature of the deceased thereto, and the due presentation of the claim and its rejection, he thereby makes out a prima facie case of non-payment. Such evidence on the part of the plaintiff raises a presumption of non-payment, which, in law, entitles him to recover, and, it being thus shown that the note was not paid, the burden is cast upon defendant to prove by competent evidence that it had been paid; and the evidence must be such, whether direct or by raising legal presumptions, as to rebut the prima facie case made by the plaintiff: *Griffin v. Lewin*, 125 Cal. 618, 620; 58 Pac. Rep. 205. Although due presentation of the claim is not denied, still it must be proved: *Derby v. Jackman*, 89 Cal. 1, 4; 26 Pac. Rep. 610. Where the plaintiff charged that a claim, duly verified, was left with the attorney for the administrator, in accordance with the published notice, but that subsequently the claim as made out was lost or destroyed, so that the action of the administrator thereon could not be ascertained, but does not state that the claim was approved by the administrator, the inference is that he neglected to inform himself as to the action taken by the administrator, and a court cannot, in aid of the allegations of the complaint, presume that the administrator approved the claim. If any presumption is to be indulged in, it must be that either the claim was rejected or not acted upon, especially where no record appears that the executor or administrator has presented the same to the probate court for the latter's allowance or rejection, as he would have been required to do, where he had taken action thereon. Hence, under a statute requiring suit to be brought upon the claim within three months, no action can be maintained thereon where suit was not commenced until the expiration of eight months from the time of such alleged presentation: *Underwood v. Browne*, 7 Ariz. 19; 60 Pac. Rep. 700, 701. Proof of the presentation of plaintiff's claim to the executor

or administrator, and the rejection thereof by him, though expressly required by the statute, and that prohibits any recovery unless proof of the presentation is made, is not required, if defendant's supplemental answer admits the presentation and rejection as alleged: *Harrington v. Butte etc. Min. Co.*, 35 Mont. 530; 90 Pac. Rep. 748, 749. Whether a claim, as presented, was sufficient in form, or properly presented, is a matter of evidence, and a general allegation of presentation is sufficient to authorize proof as to such presentation: *Humboldt S. & L. Soc. v. Burnham*, 111 Cal. 343, 345; 43 Pac. Rep. 971. In an action against the executor or administrator on a claim against the deceased, the burden of proof of showing non-payment does not rest upon the plaintiff, but is upon the defendant to prove payment; and it is error to find payment merely because plaintiff does not prove that the claim is not paid: *Stuart v. Lord*, 138 Cal. 672, 674; 72 Pac. Rep. 112. The allegation of non-payment of a debt sued on, though necessary to make the complaint perfect, need not be proved; the burden of proof of payment is upon the defendant: *Melone v. Ruffino*, 129 Cal. 514, 519; 79 Am. St. Rep. 127; 62 Pac. Rep. 93; *Hurley v. Ryan*, 137 Cal. 461, 462; 70 Pac. Rep. 292.

(15) **Evidence. Plaintiff's statutory inability to testify.** Where the statute says that no claim which has been rejected, etc., shall be allowed by any court, referee, or jury, except upon some competent or satisfactory evidence, other than the testimony of the claimant, but says nothing about the proof necessary to establish the preliminary issue of the presentation and rejection of the claim, it is only on the trial of the merits of the rejected claim that the statute can apply. The issue as to whether the claim has been presented or rejected is not within the purpose of the statute or the mischief intended to be remedied. It is an issue to be determined from the testimony of living witnesses, to be tried out as any other question of fact, and decided upon the preponderance of the evidence; but, when it comes to the trial of the merits, the statute applies. It must be first shown, however, that the claim has been presented to the executor or administrator and rejected by him, and this can be done by any evidence satisfactory to the trier of fact: *Goltra v. Penland*, 45 Or. 254; 77 Pac. Rep. 129, 132. In an action upon a rejected claim against the estate of a decedent, the burden of proof is upon the plaintiff to establish his claim, and the statutory inability on the part of the plaintiff to testify in his own behalf does not relieve him from the necessity of producing sufficient evidence to prove his cause of action. His incompetency to testify may be his misfortune, but the defendant's obligation does not thereby vary: *Barthe v. Rogers*, 127 Cal. 52, 54; 59 Pac. Rep. 310; *Stuart v. Lord*, 138 Cal. 672, 677; 72 Pac. Rep. 142. As to when plaintiff in an action on a claim against the estate of a deceased person has established his claim

by satisfactory evidence other than his own testimony, see *Bull v. Payne* (Or.), 84 Pac. Rep. 697, 698.

REFERENCES.

Competency of witnesses to testify in an action on a claim against the estate of a decedent: See note § 1107, head-line 2, subd. 2, post.

(16) **Evidence. Admissions of decedent.** The general rule that evidence of admissions against interest is admissible applies to a case where one who has presented a bill or demand against the estate of a decedent, embodying certain statements as to the facts upon which it is founded, subsequently seeks to maintain an action utterly inconsistent with the facts previously asserted. In such a case the statements of the superseded pleading are admissible as admissions against interest on the part of the person making them: *Pollitz v. Wickersham* (Cal.), 88 Pac. Rep. 911, 915. As to the insufficiency of admissions of decedent to establish the value of any services rendered for the decedent individually, see *Lichtenberg v. McGlynn*, 105 Cal. 45, 48; 38 Pac. Rep. 541.

(17) **Interest.** Interest follows the contract according to the law in existence at the time and place of the contract, or of the performance of it. But a subsequent change of the legal rate of interest does not affect the contract: *Aguirre v. Packard*, 14 Cal. 171, 172; 73 Am. Dec. 645. If an account presented to an executor or administrator for allowance contains no item for interest, and the face of the paper does not show that interest results necessarily from the facts stated in the claim, interest cannot be recovered in the action founded upon such claim: *Aguirre v. Packard*, 14 Cal. 171, 172; 73 Am. Dec. 645; *Etchas v. Orefia*, 127 Cal. 588, 593; 60 Pac. Rep. 45. If an executor or administrator, refuses a legal claim against the estate, and the claimant afterwards brings suit thereon, and recovers judgment therefor, he is entitled to interest from the time of the presentation of his claim: *Pico v. Stevens*, 18 Cal. 376, 378. The statute which provides that "if the estate be insolvent no greater rate of interest shall be allowed after the first publication of notice to creditors than is allowed on judgments obtained in the superior court" does not apply to the foreclosure of mortgages where no recourse is had against the property of the estate other than that mortgaged. In such a case the estate has no interest in the land, and can in no manner be benefited by a reduction of the interest: *Christy v. Dana*, 42 Cal. 174, 178; *Visalia Sav. Bank v. Curtis*, 135 Cal. 350, 352; 67 Pac. Rep. 329.

(18) **Set-off. Counterclaim.** An executor or administrator of the estate of a deceased person has no right to set off any claim held by himself individually against a debt due from him as executor or

administrator to a creditor of his intestate: *Estate of Watkins*, 121 Cal. 327, 328; 53 Pac. Rep. 702. But in an action against an executor or administrator for the value of articles pledged, which were not returned upon demand and tender of the amount due, the indebtedness secured by the pledge is a proper subject to set off against the value of the articles: *Vanderslice v. Matthews*, 79 Cal. 273, 276; 21 Pac. Rep. 748. A person cannot avoid the payment of a debt owed to the administrator, by buying at a discount, after the death of the decedent, a claim against his estate, which accrued in his lifetime; and such purchase will not operate as a set-off to the debt: *Van Dusen v. Topeka Woolen Mill Co. (Kan.)*, 87 Pac. Rep. 74. One who is a creditor and also a debtor of an insolvent estate may have his claim against the estate set off against his debt to the estate, if both accrued during the lifetime of the deceased and are of such character as to constitute proper subjects of set-off in an action by or against the deceased if living: *Helms v. Harclerode*, 65 Kan. 736; 70 Pac. Rep. 866, 867. In an action to foreclose a mortgage by a distributee of the mortgagee's estate, claims of the mortgagor which must have been presented to the estate of the deceased mortgagee before suit, but were not so presented, cannot be pleaded as counterclaims to the mortgage: *Moore v. Gould*, 151 Cal. 723, 732; 91 Pac. Rep. 616.

(19) **Findings. Recovery of costs.** Where a claim was not presented against an estate within ten months after the notice to creditors, and an action is brought to recover the claim, which was disallowed, a finding is necessary from which it can be seen at what precise time the claim became due, in order to determine whether the presentation of the claim was made within the time required by the statute: *Elliott v. Peck*, 53 Cal. 84, 85. While suit may be brought upon an allowed claim, plaintiff cannot recover costs, as he recovers no more than the administrator was willing to allow: *Corbett v. Rice*, 2 Nev. 330.

6. Limitation of actions. Special statutes of limitation.

(1) **In general.** A claim may be conclusively rejected by either the administrator or the judge, and when there is a rejection by either, the statute limiting the time within which suit may be brought commences to run from the date of such rejection: *Jones v. Walden*, 145 Cal. 523; 78 Pac. Rep. 1046, 1047. That special regulation of the probate law that imposes the loss of a claim if not presented within the time prescribed is a statute of non-claim, frequently called a special statute of limitation: *Defries v. Cartwright*, 10 Haw. 249, 251. The general statute of limitations is not affected by the giving, or failure to give, notice to creditors of a decedent. Such notice is simply a matter of probate procedure: *McMillan v. Hayward*, 94 Cal. 357; 29 Pac. Rep. 774, 775. If the debtor has substituted a new obligation in place of an old one, a claim against his estate must be based

on the new obligation. Thus where a note is extinguished by the substitution of a new obligation in its place, and the maker of the note afterwards dies, the claim must be based on the new obligation and not on the note: *Estate of Sullenberger*, 72 Cal. 549, 551; 14 Pac. Rep. 513; *Etchas v. Oreña*, 127 Cal. 588, 593; 60 Pac. Rep. 45. So a broken promise to provide, by will, a compensation for services rendered to the decedent, if not presented as a claim against the estate, cannot be relied upon to save the bar of the statute as to part of a rejected claim for services presented against the estate: *Etchas v. Oreña*, 127 Cal. 588, 592; 60 Pac. Rep. 45. Where the statute gives to the plaintiff three years after the commencement of an action in which to make service and the return of summons, and declares, "but all such actions may be prosecuted if appearance has been made by defendant or defendants within said three years, in the same manner as if summons had been issued and served," the necessity of any service of the summons is obviated by the appearance, in the action, of the personal representative within three years. Such voluntary appearance gives the court jurisdiction over this representative, the same as if he had been brought in by the service of summons upon him at that time; and where this jurisdiction is acquired within three years after the commencement of the action, no rights of the estate, or of the person interested therein, are waived by his appearance: *Union Sav. Bank v. Barrett*, 132 Cal. 453, 455; 64 Pac. Rep. 713, 1071.

REFERENCES.

Acknowledgment of outlawed debt by devise or legacy reciting a consideration: See note 1 L. R. A. (N. S.) 1117.

(2) **Application of statutes. Special and general.** The special limitations of time within which suit must be brought against the estates of deceased persons are called, in many states, statutes of non-claim or of short or special limitations. These limitations exist independently of and collateral to the general law of limitations. The statute which allows a plaintiff three months after a claim is formally and officially rejected by the executor or administrator in which to bring his action may shorten, but cannot lengthen, the general statute of limitations: *Barclay v. Blackinton*, 127 Cal. 189, 193; 59 Pac. Rep. 834. The right to enforce his claim under statutes of limitation depends upon his own vigilance, and is often lost by his own laches. The policy of the law is to settle up the estates of deceased persons as speedily as possible, to pay the just debts and expenses, and to distribute the property to the rightful heirs or devisees. For this reason, statutes that shorten the period and time of presenting and bringing suits on claims against estates are justified and upheld. After a claim is barred by the general statute of limitations, it can never be allowed or made a valid claim against the estate by any act or neglect of the executor or administrator: *Barclay v. Blackinton*,

127 Cal. 189, 194, 195; 59 Pac. Rep. 834. If an action is brought more than four years and nine months after the maturity of a written promise of the decedent to pay money, and one year and seven months after the issuance of letters of administration, it is barred by the general statute of limitations: *Barclay v. Blackinton*, 127 Cal. 189, 191, 196; 59 Pac. Rep. 834. A three months' limitation provided by statute for the commencement of an action upon a rejected claim does not apply to a claim which it is not necessary to present to the executor or administrator, as one for funeral expenses: *Potter v. Lewin*, 123 Cal. 146; 55 Pac. Rep. 783. An action upon a rejected claim against the estate of a deceased person must be brought, if at all, within the prescribed statutory time after the same becomes due: *Brooks v. Lawson*, 136 Cal. 10, 14; 68 Pac. Rep. 97; *Morse v. Steele*, 132 Cal. 456; 64 Pac. Rep. 690. Where an obligation fixes the period of two years within which to exercise an option, a delay of four days after the expiration of the two years in presenting a money demand to the executor or administrator of the decedent is not unreasonable: *Maurer v. King*, 127 Cal. 114, 117; 59 Pac. Rep. 290. The bar of the statute relates only to claims against the estate; it in no way affects claims against other parties, or against the property of others, or the contracts of other parties, although the same demand may also be a claim against the estate; and where a note was executed by the husband and wife on the separate property of the wife, and where the note and mortgage were not presented for allowance against the estate of the husband within the time fixed by the statute, the bar of the probate act does not apply as to the wife: *Sichel v. Carrillo*, 42 Cal. 493.

REFERENCES.

Exceptions to and interruptions of statutes of non-claim: See note 3 Am. & Eng. Ann. Cas. 576. Contingency of claim as affecting limitation of time for its presentation: See note 58 L. R. A. 82-90.

(3) **Barred claims not to be allowed. Exception.** The statute prohibits the allowance of a claim against the estate of a deceased person, which has been barred by the statute of limitations: *Dorland v. Dorland*, 66 Cal. 189; 5 Pac. Rep. 77; *McGrath v. Carroll*, 110 Cal. 79; 42 Pac. Rep. 466; *Etchas v. Oreña*, 127 Cal. 588; 60 Pac. Rep. 45; *Barclay v. Blackinton*, 127 Cal. 189; 59 Pac. Rep. 834; *Reay v. Heazleton*, 128 Cal. 335; 60 Pac. Rep. 977; *In re Mouillerat's Estate*, 14 Mont. 245; 36 Pac. Rep. 185. Neither the executor nor the judge has any right to allow any part of a claim against the estate of a decedent, which has been barred by the statute of limitations: *Etchas v. Oreña*, 127 Cal. 588, 592; 60 Pac. Rep. 45; *Farrow v. Nevin*, 44 Or. 496; 75 Pac. Rep. 711. Where the claim against the estate of a decedent appears to have been barred by limitation, it will not be presumed to have been allowed by the court, unless that fact affirmatively appears by the record; and a mere indorsement upon an account of its

approval by some one styling himself "probate judge" is not sufficient evidence of its allowance by that officer: *Janes v. Brunswick*, 8 N. M. 345; 45 Pac. Rep. 878. Where the claim presented is a simple demand for money lent, accompanied by a demand for legal interest, and there is no hint or suggestion made of a trust, and the debts have long been barred by the statute of limitations, the executor or administrator has no discretion in the matter, but it is his plain duty to reject it: *McGrath v. Carroll*, 110 Cal. 79, 84; 42 Pac. Rep. 466. Notwithstanding the right to foreclose a mortgage or to collect a debt out of the real property of a deceased debtor is barred by the statute of limitations, the creditor still has the right to have his claim allowed by the administrator to be paid, as other claims of the estate must be paid, out of the personal property in the hands of the administrator belonging to the estate. The statute destroys the lien of the debt at the end of six years upon the deceased debtor's real property, but keeps it alive in so far as his personal property is concerned. The debt should, for that reason, be allowed as a claim against the estate: *Gleason v. Hawkins*, 32 Wash. 464; 73 Pac. Rep. 533, 534.

(4) *Suits to be commenced when.* Though the statute provides that if a claim is not presented within a designated time after the first publication of notice to creditors, it shall be forever barred, yet there is no bar if no publication was made: *Smith v. Hall*, 19 Cal. 85, 86. A suit not brought within such specified time after the rejection of the claim is not, of course, in time to avoid the bar of the statute: *Consolidated Bank v. Hayes*, 112 Cal. 75, 84; 44 Pac. Rep. 469. If the claim is presented to the executor, and allowed by him within the statutory time after its presentation, no action can be maintained thereon until the lapse of such time after its presentation to the judge, unless he rejects it within that period: *Nally v. McDonald*, 66 Cal. 530, 532; 6 Pac. Rep. 300. Where the statute requires the executor or administrator, to whom a claim is presented, to indorse thereon his allowance or rejection, with the day and date thereof, and provides that if he refuses or neglects to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day, but does not require that the executor or administrator shall reject a claim before an action can be maintained upon it, it is optional with the plaintiff, if his claim has not been so indorsed within ten days to deem it rejected, and he may bring an action thereon within three months after notice of such election; and, in the absence of other proof, suit brought is conclusive evidence of such election and notice thereof: *Gowgill v. Dinwiddie*, 98 Cal. 481, 483; 33 Pac. Rep. 439; *Bank of Ukiah v. Shoemaker*, 67 Cal. 147; 7 Pac. Rep. 420. See *Rice v. Inskeep*, 34 Cal. 224. Where the statute requires one whose claim against the estate

of a decedent has been rejected to bring suit within three months after such rejection, he cannot maintain a suit brought nearly eight months after the presentation of the claim, in the absence of any showing entitling him to equitable relief: *Underwood v. Brown*, 7 Ariz. 19; 60 Pac. Rep. 700, 702. If one who has a claim against the estate of a decedent commences an action thereon within the time in which a claim should have been presented, before giving the executor or administrator an opportunity to pass on the claim, such action is, at most, only prematurely brought. A premature institution of a suit may be ground for a plea in abatement, which, if interposed, has the effect of defeating or suspending the suit for the time being; but it is not ground for a plea in bar, and cannot have the effect of impairing or defeating the action altogether: *Clayton v. Dinwoodey* (Utah), 93 Pac. Rep. 723, 728.

(5) **Statute commences to run when.** The statute of limitations does not begin to run, where no administration exists on the decedent's estate at the time the cause of action accrues: *Heeser v. Taylor*, 1 Cal. App. 619, 621; 82 Pac. Rep. 977; *Estate of Bullard*, 116 Cal. 355, 357; 48 Pac. Rep. 219; *Smith v. Hall*, 19 Cal. 85; *Danglada v. De la Guerra*, 10 Cal. 386. A claim may be conclusively rejected by either the administrator or the judge; and when there is a rejection by either, the statute commences to run from the date of such rejection: *Jones v. Walden*, 145 Cal. 523, 525; 78 Pac. Rep. 1046; *Bank of Ukiah v. Shoemaker*, 67 Cal. 147, 148; 7 Pac. Rep. 420. The statute of limitations does not run against the claim between the date of its presentation to the executor or administrator and that of its rejection by the judge: *Nally v. McDonald*, 66 Cal. 530, 531; 6 Pac. Rep. 390. It is only where a claim has been allowed by an executor or administrator that there is any necessity of presenting it to the judge: *Jones v. Walden*, 145 Cal. 523, 525; 78 Pac. Rep. 1046. A statute which regulates actions upon rejected claims against the estates of deceased persons does not begin to run until a claim has been properly presented and rejected. If a party makes an attempt to present a claim for allowance, but from some cause fails to do so properly, this does not prevent him from subsequently presenting the claim in due form, if within proper time, and the statute of limitations does not begin to run until proper presentation of the claim is made, provided that it is made within the time prescribed by the statute: *Westbay v. Gray*, 116 Cal. 660, 668; 48 Pac. Rep. 800. The statute which fixes a limitation for the presentation of claims against an estate does not commence to run until a claim becomes absolute: *Gleason v. White*, 34 Cal. 258, 265. Where a claim has been twice presented and twice rejected, the statute of limitations commences to run from the date of the first rejection: *Gillespie v. Wright*, 93 Cal. 169, 171; 28 Pac. Rep. 862. The filing and withdrawal of a claim does not constitute the commencement of an action such as will prevent the statute of

limitations from running: *Morse v. Clark*, 10 Col. 216; 14 Pac. Rep. 327, 328. The general statute of limitations does not begin to run against a claim until it matures and can be enforced: *Thompson v. Oreña*, 134 Cal. 26, 28; 66 Pac. Rep. 24. The statute does not run against a trust claim until some repudiation of the trust made by the trustee is brought home to the knowledge of the trustor: *McGrath v. Carroll*, 110 Cal. 79, 81; 42 Pac. Rep. 466.

(6) **Arrest, staying, or suspension of statute.** The time during which a claim is in the hands of the executor or administrator for examination, without notifying the claimant that it has been rejected, should not be taken as a part of the time limited by the statute for the commencement of an action thereon: *In re Morgan's Estate*, 46 Or. 233; 77 Pac. Rep. 608, 610. The statute of limitations does not run, while the administration is pending and unsettled, as to a claim against the estate that has been allowed: *Estate of Schroeder*, 46 Cal. 304, 316; *Estate of Arguello*, 85 Cal. 151, 153; 24 Pac. Rep. 641. Hence the statute of limitations will not disqualify a creditor whose claim has been allowed from petitioning for an order of sale: *Estate of Arguello*, 85 Cal. 151, 154; 24 Pac. Rep. 641. Nor does the statute of limitations run, while the administration is pending and unsettled, as to a judgment that has been recovered against an executor or administrator for a debt of the estate: *Estate of Schroeder*, 46 Cal. 304, 317. When claims have been presented and allowed, none of the statutory limitations run against them: *In re Tuohy's Estate*, 33 Mont. 230; 83 Pac. Rep. 486, 491. Until the entry of a decree discharging the executor or administrator, the administration of the estate is still pending, and until then no claim against the estate which has been presented and allowed is affected by the statute of limitations: *Dohs v. Dohs*, 60 Cal. 255, 260. The allowance of a claim by an executor or administrator, and its approval by the judge, stops the running of the statute of limitations: *Barclay v. Blackinton*, 127 Cal. 189, 194; 59 Pac. Rep. 834; *Wise v. Williams*, 88 Cal. 30; 25 Pac. Rep. 1064; *Wise v. Williams*, 72 Cal. 544; 14 Pac. Rep. 204; *Willis v. Farley*, 24 Cal. 490; and this applies to a claim arising upon a mortgage and notes secured thereby: *Hibernia Sav. & L. Soc. v. Conlin*, 67 Cal. 178; 7 Pac. Rep. 477; *German Sav. & L. Soc. v. Hutchinson*, 68 Cal. 52; 8 Pac. Rep. 627; *Wise v. Williams*, 72 Cal. 544; 14 Pac. Rep. 204; 88 Cal. 30; 25 Pac. Rep. 1064. An executor's repeated promise to pay a claim against an estate which has not been barred by the statute of limitations does not suspend the running of the statute; the creditor is chargeable with knowledge of his legal rights, and is bound to know that the statute of limitations is constantly running against his claim; and if he allows the period of limitation to expire, his claim is thereafter barred, although the executor neglects his duty in failing to proceed with the administration, as that is no reason why the creditor should remain idle and allow the statute to continue to

run against his claim: *Bank of Montreal v. Buchanan*, 32 Wash. 480; 73 Pac. Rep. 482, 484. The time in which a creditor is prohibited from commencing an action upon his claim, either because the statutory time after the granting of letters testamentary or of administration has not expired, or because the question of allowance of the claim is pending before the executor and undecided, will not be deemed a part of the time limited for the commencement of the action thereon. The creditor must, of course, present his claim before it is barred by the statute of limitations; otherwise the executor or administrator is not authorized to allow it. The statute cannot be tolled by a mere failure to present the claim. After it has been presented, however, the claimant is prohibited from suing until it is disallowed, and the operation of the statute will be suspended during the time of such prohibition: *In re Morgan's Estate*, 46 Or. 233; 77 Pac. Rep. 608, 609. An action on a judgment claim against the estate of a decedent is barred, under the general statute of limitations, unless it is brought within six years; but the time intervening between the death of the judgment debtor and the qualification of his executor or administrator may be excluded in the computation of such period: *Whiteside v. Catching*, 19 Mont. 394; 48 Pac. Rep. 747, 748. When the statute of limitations has commenced to run, it continues to run, notwithstanding the death of defendant or an intervening disability, unless it is expressly provided otherwise in the statute. Disability of the defendant does not, in any case, prevent the running of the statute, nor will ignorance of the creditor as to the residence of the debtor, or that he has property which can be reached, or even of his own right of action, prevent the running of the statute. Whenever the statute has commenced to run, delay in bringing an action is always at the risk of an intervening disability, which may, in the absence of a statutory saving, prevent suit from being brought at all: *Davis v. Hart*, 123 Cal. 384, 388; 55 Pac. Rep. 1060. If not barred by the statute of limitations, the right of action on a claim against the estate of a decedent cannot be lost by reason of the negligence of the plaintiff in the prosecution of the claim on which the action is founded: *Nally v. McDonald*, 66 Cal. 530, 532; 6 Pac. Rep. 390.

(7) **Revival of actions. Waiver of statute.** An executor or administrator will not be permitted to waive either the general statute of limitations or the failure of a party to present his claim: *Boyce v. Fisk*, 110 Cal. 107, 117; 42 Pac. Rep. 473; *Reay v. Heazelton*, 128 Cal. 335; 60 Pac. Rep. 977; *Clayton v. Dinwoodey* (Utah), 93 Pac. Rep. 723. His waiver of the statute and allowance of a claim barred thereby are invalid: *Jones v. Powning*, 25 Nev. 399; 60 Pac. Rep. 833. An executor or administrator cannot, by appearing and answering a supplemental complaint in an action originally brought against the decedent, in which the summons was not returned within the time limited by the statute, waive the statute of limitations: *Vrooman v. Li Po Tai*,

113 Cal. 302, 306; 45 Pac. Rep. 470; *Reay v. Heazelton*, 128 Cal. 335; 60 Pac. Rep. 977; *Union Sav. Bank v. Barrett*, 132 Cal. 453; 64 Pac. Rep. 713, 1071. But a testator may express on the face of his will his intent that all his actual obligations shall be paid without reference to the law of limitations; and there is no good reason why that testamentary intent should not be carried out by his executors and administrators, as well as any other part of the will: *Glassell v. Glassell*, 147 Cal. 510, 512; 82 Pac. Rep. 42. If the statute of limitations has run, the debt cannot be revived, except by a promise in writing signed by the debtor: *Estate of Galvin*, 51 Cal. 215, 217.

(8) **Action is not barred when.** Where it has been agreed, by the terms of a written contract, entered into by defendant's testator and plaintiff's assignor, for the sale of land by the former to the latter, to return a deposit of money in case of failure to make title as agreed upon, the liability is upon the contract, and does not arise by implication. Hence an action to recover the deposit is not controlled by the two-year statute of limitations, and is not barred until the lapse of four years from the accrual of the cause of action: *Melone v. Ruffino*, 129 Cal. 514, 525; 79 Am. St. Rep. 127; 62 Pac. Rep. 93. Where a daughter executed and delivered to her father a general power of attorney, which authorized him to sell and convey her real property and to manage the proceeds without any restrictions whatever, and he sold the land, and died about seventeen years afterwards, without ever having informed his daughter of the condition of her property, and of his receiving any money on account of its sale, and fraudulently misinformed her concerning the facts, which she did not discover until after her father's death, and hence failed to demand the proceeds of such sale during his lifetime, her claim against his estate is not barred by the statute of limitations. The agency was a continuing one, and the statute would not commence to run until it was terminated, or until the agent had notified the principal that the proceeds of the sale of her property were at her disposal, and then, if she failed to demand them within the statutory period, her right of action would be barred. The agency being general and continuing, the money received by the testator on account of the sale of plaintiff's land must, in the absence of proof of the termination of such agency, be considered as held by him for her use and benefit: *Quinn v. Gross*, 24 Or. 147; 33 Pac. Rep. 535, 536. The Colorado statute does not prevent a claimant against the estate of a decedent from bringing an action at any distance of time, provided the same is not barred by some other statute, if the creditor can discover property not inventoried or accounted for by the executor or administrator, and such creditor has the right to have his claim passed upon by the court, and recover a judgment presently for the amount due, if any, to be satisfied out of any estate that may be found not inventoried or accounted for by the executor or administrator. Hence, although the claim of the creditor is not sued upon

within one year, nevertheless the same is not barred. The only effect of such failure to sue within that time is, that the creditor is deprived of the right to a distributive share in the inventoried assets. The suit may proceed to judgment that, however, must be special in character, and limited to a satisfaction out of the uninventoried property of the estate: *McClure v. Commissioners etc.*, 23 Col. 130; 46 Pac. Rep. 677, 679. In a case where an executor or administrator is empowered by will to administer an estate without the intervention of the court, the claim of a creditor against such estate is not barred by the fact that he did not present his claim within one year from the first publication of the notice to creditors, especially where his claim did not exist until after the expiration of the year specified in such notice: *In re MacDonald's Estate*, 29 Wash. 422; 69 Pac. Rep. 1111, 1115.

(9) **Action is barred when.** Under the statute, all claims must be presented within the time limited in the notice to creditors, or they are barred forever, except in cases where it is made to appear, by the affidavit of the claimant, to the satisfaction of the court or judge, that the claimant had no notice, by reason of being out of the state. Hence if a claim is not presented within such time, it is barred: *Melton v. Martin*, 28 Mont. 150; 72 Pac. Rep. 414; *Consolidated Nat. Bank v. Hayes*, 112 Cal. 75; 44 Pac. Rep. 469; *Morse v. Clark*, 10 Col. 216; 14 Pac. Rep. 327; *In re Hobson's Estate (Col.)*, 91 Pac. Rep. 929; and the claimant cannot be given relief on the ground of mistake, if the court is not satisfied that a mistake was ever made, and that the claimant could have discovered its existence within the time limited in the notice, by the exercise of reasonable diligence: *Melton v. Martin*, 28 Mont. 150; 72 Pac. Rep. 414. Under the Colorado statute of non-claim, a claim that has not been exhibited as the statute requires, within one year from the granting of letters testamentary, is barred except as to property that may be subsequently discovered or inventoried by the executor; and where there is no claim that there is any such property of the estate, the claim is completely barred: *In re Hobson's Estate (Col.)*, 91 Pac. Rep. 929, 931. Where no administrator has been appointed, the claim of a creditor will become barred by limitation at the end of three years after the last date at which the administrator might have been appointed: *Brown v. Baxter (Kan.)*, 94 Pac. Rep. 155, 574. A promissory note which has not been presented as a claim against the estate of a decedent is barred by the statute of limitations, where more than six years have elapsed since the note became due: *In re Hobson's Estate (Col.)*, 91 Pac. Rep. 929, 931. In the case of non-intervention wills, creditors must present their claims within one year of the publication of notice, and failure so to do bars such claim: *Foley v. McDonnell (Wash.)*, 93 Pac. Rep. 321, 322.

REFERENCES.

Claims against decedent's estate are barred when: See note 8 L. R. A. 651-652.

(10) **Pleading. Defense.** As between parties acting in their own right, the plea of the statute of limitations is unquestionably a personal privilege which may be waived. But an executor or administrator acting for others, and in a trust capacity, is not vested with this privilege, and has no power to waive such a defense. He will not be permitted, by his failure to invoke the plea of the statute of limitations, to suffer judgment upon the claim, which, when presented to him, he was bound by law to reject because of the bar of the statute: *Reay v. Heazelton*, 28 Cal. 335, 338; 60 Pac. Rep. 977. The failure of the executor or administrator to plead the bar of the statute of limitations cannot avail the claimant, since the duty to set up the bar of the statute rests upon the executor or administrator. In pleading the statute of limitations, the facts relied upon, or the facts constituting the defense, should be stated. A defense of the statute of limitations may be presented by demurrer when the pleadings show that the statutory time has elapsed. But the statute of limitations cannot be raised under a demurrer that the complaint does not state facts sufficient to constitute a cause of action. The statute must be pleaded: *Fullerton v. Bailey*, 17 Utah, 85; 53 Pac. Rep. 1020. To be raised by demurrer, the bar must affirmatively appear on the face of the petition; otherwise the objection must be taken by answer: *Columbia Sav. & L. Assoc. v. Clause*, 13 Wyo. 166; 78 Pac. Rep. 708, 709; *Wise v. Williams*, 72 Cal. 544, 548; 14 Pac. Rep. 204; *McCann v. Pennie*, 100 Cal. 547, 553; 35 Pac. Rep. 158. If it does not affirmatively appear upon the face of the complaint that the claim is barred by the statute of limitations, a demurrer based upon such statute is not allowable. The question as to whether the claim is or is not barred is a matter to be determined at the trial, if the claim does not appear on its face to have been barred when presented. The fact that it does not show upon its face whether it was or was not barred would not defeat a recovery: *Wise v. Hogan*, 77 Cal. 184, 187; 19 Pac. Rep. 278. If the statute provides that suit must be brought upon a rejected claim within three months after its rejection, and that if not so brought it is forever barred, an answer, in an action upon a rejected claim which alleges that the claim was duly presented at a date named, and that the same was not acted on within ten days thereafter, nor at all, and that more than three months after such ten-day period had expired before suit was commenced, states a complete defense: *Boyd v. Von Neida*, 9 N. D. 337; 83 N. W. Rep. 329.

7. Judgment against executor or administrator.

(1) **In general.** It is one of the very elements of the law, that, when a suitor reaches the parting of the ways in the pursuit of inconsistent remedies, he must elect which road he shall follow. The first step taken is an election, and the election, when made, is irrevocable. But this principle has no application to a case where there is no choice between two inconsistent remedies. Thus the mere filing of a com-

plaint, which cannot be sustained, and which was abandoned, cannot be urged as an estoppel against the assertion of a judgment against the estate which has not been satisfied and still remains in full force and effect. In such a case there is no election of remedies: *Shively v. Harris* (Cal. App.), 90 Pac. Rep. 971, 972. A judgment on a rejected claim against the estate of a decedent is subject to be afterward contested by any person interested in the estate, in the same manner and to the same extent as other allowed claims may be contested. But in all such cases the burden is upon the party contesting to show that the claim was not properly allowed: *Estate of More*, 121 Cal. 635, 639; 54 Pac. Rep. 148.

(2) Default. Amendment. A judgment by default may be taken against an executor or administrator, as well as any other party. A default must be taken as an admission of all the material allegations of the complaint: *Chase v. Swain*, 9 Cal. 130, 137. If a judgment against an executor or administrator is informal, in that it omits the provision that it is to be paid out of the estate "in the due course of administration," such omission may be supplied by an amendment, though made some years after the judgment was rendered, where such amendment is made by the records in the action: *Estate of Schroeder*, 46 Cal. 304, 316. Thus it is error to render a personal judgment against him, and such error being apparent on the judgment roll, it may be corrected even on appeal: *Davis v. Lamb* (Cal.), 35 Pac. Rep. 306, 307.

(3) Form of judgment. Upon the issue as to whether the estate of a decedent is indebted to the plaintiff upon a claim, a judgment in personam cannot be rendered against the executor or administrator: *Myers v. Mott*, 29 Cal. 359, 363; 89 Am. Dec. 49; *Rice v. Inskeep*, 34 Cal. 224, 226. A judgment against an executor or administrator should first ascertain the amount due, and adjudge the same to be a valid claim against the estate, and then provide that the same be paid by the defendant "in the due course of administration": *Fisher v. Chadwick*, 4 Wyo. 379; 34 Pac. Rep. 899; *Rice v. Inskeep*, 34 Cal. 224, 226; *Racouillat v. Sansevain*, 32 Cal. 376; *Kelly v. Bandini*, 50 Cal. 530; *Drake v. Foster*, 52 Cal. 225. In an action to foreclose a mortgage against the estate of a decedent, brought after the note and mortgage have been presented to the executor or administrator, and rejected, the judgment for a deficiency should provide that it be paid "in due course of administration": *Moore v. Russell*, 133 Cal. 297, 301; 85 Am. St. Rep. 166; 65 Pac. Rep. 624. No valid judgment can be entered against a testator after his death, and upon the substitution of the executor or administrator of defendant as defendant, in an action to recover money; and where plaintiff obtains judgment, such judgment should be made payable "in due course of administration," and not otherwise: *Preston v. Knapp*, 85 Cal. 559, 560; 24 Pac. Rep.

811; *Estate of Brennan*, 65 Cal. 517, 518; 4 Pac. Rep. 561. At common law, there could not be a joint judgment, even on the joint demand against the executor or administrator of a deceased obligor and the surviving obligors, for the reason that, as to the former, the judgment would be payable *de bonis testatoris*, and as to the latter, *de bonis propriis*. Nor has the rule been changed by the statute in California. There cannot be a joint judgment against all, for the reason stated: *Bank of Stockton v. Howland*, 42 Cal. 129, 130, 133. But an error in the judgment as to the executor or administrator does not invalidate the judgment as to the other defendants: *Bank of Stockton v. Howland*, 42 Cal. 129, 133; *Kelly v. Bandini*, 50 Cal. 530. At common law, the rule is absolute that the estate of a deceased joint contractor was not liable to the obligee in the joint contract except in case of the insolvency of the surviving joint obligor. If the survivor was solvent, there was a plain and adequate remedy by action at law against him. In such a case the liability of the estate of the deceased joint obligor was to contribute to him after the debt was collected from or paid by him. In case of his insolvency, the obligee in the joint contract could bring his action in equity against the administrators of the deceased joint obligor. But the English courts no longer follow the old common law, making the solvent surviving joint obligor alone liable to the obligee in the joint contract. They permit the action to be brought against the executors or administrators in the first instance, whether the survivor be solvent or not; and a statute which provides that any person may be made a defendant, who has or claims an interest in the controversy adverse to plaintiff, or who is a necessary party to a complete determination of the question involved does away with the common-law rule, where the petition alleges a joint and several contract, and one of the joint contractors is dead: *Fisher v. Chadwick*, 4 Wyo. 379; 34 Pac. Rep. 899, 900. The judgment rendered in an action in equity for an accounting against the administrator of a deceased administrator must be made payable out of his estate "in due course of administration": *Vance v. Smith*, 124 Cal. 219, 222; 56 Pac. Rep. 1031. A judgment against executors on a claim against the estate should be that they pay, "in due course of administration, the amount ascertained to be due." It should not be entered against them personally: *Clayton v. Dinwoodey* (Utah), 93 Pac. Rep. 723, 728. Under the statute of Utah, a judgment against an executor or administrator upon any claim for money against the estate of a deceased person must be, that the executor or administrator pay, in due course of administration, the amount ascertained to be due. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate or give to the judgment creditor any priority of payment. In such a case it is error to enter a personal judgment against the representative: *Smith v. Hanson* (Utah), 96 Pac. Rep. 1087, 1091.

(4) **Recovery. Costs.** In an action upon a rejected claim against the estate of a decedent, the claimant can recover only upon the cause

of action set forth in that claim: *Estate of Dutard*, 147 Cal. 253; 81 Pac. Rep. 519, 520; *Enscoe v. Fletcher*, 1 Cal. App. 659; 82 Pac. Rep. 1075. If the court finds that the claim has been paid and that nothing is due, no further finding on the evidence concerning the usury law of the place in which the debt was contracted is necessary: *Sanguinetti v. Pelligrini*, 2 Cal. App. 294; 83 Pac. Rep. 293, 296. A judgment on a claim draws interest at the legal rate: *Estate of Glenn*, 74 Cal. 567, 568; 16 Pac. Rep. 396; *Quivey v. Hall*, 19 Cal. 97. If the executor or administrator neglects or fails to indorse his allowance or rejection on a claim within ten days after its presentation, and the claimant elects to consider his claim rejected, but, pending an action thereon, it is approved and filed as an allowed claim, a judgment for costs is the maximum of plaintiff's relief: *Hall v. Cayot*, 141 Cal. 13, 16; 74 Pac. Rep. 299.

(5) *Effect of judgment.* The sole object of an action upon a rejected claim for money is to place it among the allowed claims against the estate. The judgment rendered against an executor or administrator upon any claim for money against the deceased only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the judge, and such judgment is no more effectual as an estoppel than an allowance of a claim would be, for it can be contested by the heirs on the settlement of an account in the same manner as a claim allowed by the executor or administrator and judge can be contested: *Hall v. Cayot*, 141 Cal. 13, 16; 74 Pac. Rep. 299; *Estate of More*, 121 Cal. 635; 54 Pac. Rep. 148; *McLean v. Crow*, 88 Cal. 644; 26 Pac. Rep. 596; *Estate of Glenn*, 74 Cal. 567; 16 Pac. Rep. 396; *Wells, Fargo & Co. v. Robinson*, 13 Cal. 133. And a judgment in favor of an executor or administrator upon a claim presented by him and rejected by the judge has no greater force and effect than a judgment upon any other rejected claim. It merely establishes the claim in the same manner and to the same extent as if it had been allowed: *Estate of More*, 121 Cal. 635, 638; 54 Pac. Rep. 148. A judgment against the estate of a decedent does not have the effect of giving the creditor any further right than if his claim had been allowed, nor does it determine the right of priority over other claims. That must be determined by the probate court when the assets are finally marshaled and the order of payment determined by that court: *McLean v. Crow*, 88 Cal. 644, 647; 26 Pac. Rep. 596. A judgment at common law was no evidence in an action against the heir: *Beckett v. Selover*, 7 Cal. 215, 228; 69 Am. Dec. 237; but in this country, where the real estate is a fund in the hands of the executor or administrator for the payment of debts, a judgment against the estate is prima facie evidence of indebtedness as against the heir: *Estate of More*, 121 Cal. 635, 638; 54 Pac. Rep. 148; *Estate of Schroeder*, 46 Cal. 304, 318. A judgment may afterward be contested by any person interested in the estate, but in all cases the burden is upon the

contestant to show that the claim is without merit: *Estate of More*, 121 Cal. 635, 639; 54 Pac. Rep. 148. If one is sued as an administrator, but he is not an administrator, a judgment against him in a representative capacity is void: *Willis v. Farley*, 24 Cal. 491, 502. A judgment against an executor, after the resignation of his trust and acceptance thereof by the probate court, and where the heirs were not made parties, does not bind the heirs: *Luco v. Commercial Bank*, 70 Cal. 339, 341; 11 Pac. Rep. 650. No judgment can properly be rendered against an executor or administrator, pending an appeal from an order removing him, and such judgment should be vacated, as the appeal does not revive or restore his powers, but he remains suspended from office pending the appeal, and has ceased from the date of the removal to be practically and in effect the executor of administrator of the estate until such time as the order may be reversed: *More v. More*, 127 Cal. 460, 463; 59 Pac. Rep. 823. As the presentation of a judgment lien as a claim against an estate does not destroy the lien, the recovery of another judgment upon the claim, if rejected, does not merge the original judgment nor destroy its lien. The executor or administrator cannot, by rejecting the claim and compelling the creditor to establish it by suit, take from the latter any right that would have attached to the claim had it been allowed without suit; and no difference is observable between the allowance of the claim by the executor or administrator or the court, and the judgment of the court allowing the claim on suit brought after its rejection; the judgment establishes the claim, the same as if it had been allowed: *Estate of Wiley*, 138 Cal. 301, 306; 71 Pac. Rep. 449. The mere dismissal of an action against an estate of a decedent by the plaintiff, and a judgment entered thereon without prejudice to his right to bring a new action on the same cause of action, is no bar to another action on the same claim: *Moore v. Russell*, 133 Cal. 297, 299; 85 Am. St. Rep. 166; 65 Pac. Rep. 624. When a judgment lien has attached to land, it continues two years from its inception, whether or not any execution has been levied. The issuance of execution is not necessary to the life of the judgment lien: *Estate of Wiley*, 138 Cal. 301, 305; 71 Pac. Rep. 441.

(8) **Execution.** After the death of the judgment debtor, no execution can issue; the creditor must then present his claim to the executor or administrator, like any other claim, and if rejected, may bring suit thereon: *Estate of Wiley*, 138 Cal. 301, 305; 71 Pac. Rep. 441; *Rice v. Inskeep*, 34 Cal. 224, 226. Upon a judgment rendered against the deceased in his lifetime, no execution can issue; but where an execution is issued before the death of the decedent, and actually levied, the property may be sold under it: *Balloe v. Rogers*, 9 Cal. 123, 127. A decree for the payment of money in probate proceedings cannot be enforced as for a contempt. The proper process is an execution: *Rostel v. Morat*, 19 Or. 181; 23 Pac. Rep. 900.

8. Enforcement of claims against estates.

(1) **In general.** If an administrator uses money belonging to an estate with which to buy property in his own name, and to all appearances in his individual capacity the administrator has the legal title, but he holds it in trust for the heirs, and one who, without notice of the rights of the estate, supplies labor and materials for a building thereon, acquires a mechanic's lien on the building and land, superior to the rights of the heirs: *Seibel v. Bath*, 5 Wyo. 409; 40 Pac. Rep. 756, 760. A creditor has the right to reduce his collaterals and to pursue his debtor by a judgment and execution until his claim is satisfied, subject to the limitation that the creditor may only have one satisfaction; and if he is a creditor of an insolvent estate of a decedent, who holds collateral security for his claim, but disposes of such collateral security after his claim has been proved, the amount received for the security is a payment pro tanto, and to that extent the debt is extinguished. He is therefore entitled to dividends only on the amount remaining due on the claim. He is not entitled to dividends on the whole claim as allowed, though the authorities on this question are divided: *Sullivan v. Erle*, 8 Col. App. 1; 44 Pac. Rep. 948, 949, 953. A creditor of an estate which cannot pay all claims in full is entitled to come in upon notice at the settlement of the administrator's account, and contest any allowed claim. He is injured by the allowance of a claim, for the reason that it reduces the percentage which he is to receive in case the estate does not pay its debts in full. He is interested in the estate, and there is facing him a final judgment, which is to his injury, given without his knowledge, and without his having a day in court. There has been no hearing to which he has been invited; there has been no adjudication at which he has been notified to appear. Of course, it may be said that he can be present at the probate court, or before the probate judge, during all the period during which claims may be filed, and watch for the presentation of the claim to which he believes he has a valid objection. But the law does not require anything of this sort: *In re Mouillerat's Estate*, 14 Mont. 245; 36 Pac. Rep. 185, 187. Where the note of a decedent is secured by shares of corporate stock, but the claim is not acted upon within the statutory time by the executor or administrator, and the claimant, deeming his claim rejected, brings suit upon the rejected note and security, he is entitled to enforce both, and to have an order of sale of his stock as against the executor who occupies the same position that the decedent would have occupied had he lived: *Hall v. Cayot*, 141 Cal. 13, 18, 19; 74 Pac. Rep. 299. A claimant against the estate of a decedent cannot recover the amount of his debt from the administrator's bondsmen, where he failed to file his claim against the estate until after the time set therefor, and made no attempt to have its validity determined by the court. The filing of the claim in the county court proves nothing, and, unless there is an allowance and an adjudication, there is no establishment of the debt as against the

estate, and no proof of its liability to pay: *Metz v. People*, 6 Col. App. 57; 40 Pac. Rep. 51, 53. A judgment obtained against the sureties on the bond of an official cannot be enforced by them as a claim against his estate, after his death, until they have paid such bond: *Estate of Hill*, 67 Cal. 238, 244; 7 Pac. Rep. 664. The holder of a note, delivered to him as the heir of an estate, may maintain an action thereon against the executor, though such note has not been indorsed or assigned to him: *Perry v. Wheeler*, 63 Kan. 870; 66 Pac. Rep. 1007. A creditor whose claim against the estate of a decedent has been presented, and rejected in whole or in part, may maintain a suit in equity for the enforcement of his rights: *Walkerly v. Bacon*, 85 Cal. 137, 141; 24 Pac. Rep. 638. In an action to foreclose the lien of a street assessment, after the death of the owner, the personal representatives of the deceased owner are not necessary parties defendant. His heirs or devisees are the only necessary defendants: *Phelan v. Dunne*, 72 Cal. 229, 231; 13 Pac. Rep. 662.

(2) **By attachment.** A probate judge has no authority to issue an order of attachment in an action pending in the district court upon a claim not due, and any levy of an order of attachment issued only by the probate judge is void: *Noyes v. Phipps*, 10 Kan. App. 580; 63 Pac. Rep. 659. Funds in the hands of an executor or administrator of an estate cannot be reached by a garnishment proceeding in an action against a distributee, before an order of distribution has been made, and while the estate remains unsettled: *Nelson v. Stull*, 65 Kan. 585; 68 Pac. Rep. 617, 618; *Norton v. Clark*, 18 Nev. 247; 2 Pac. Rep. 529; but property vested in a non-resident executor or administrator is subject to attachment and other process: *Barlow v. Cogan*, 1 Wash. Ter. 257. Even if a lien by execution could be levied upon specific property sold to a person before his death to satisfy a judgment for the purchase price, it does not follow that the proceeds of such property after sale by the administrator could be levied upon to satisfy such judgment, especially if the same has passed into the hands of the administrator, with other property, and has become so mixed that it cannot be ascertained how much of the goods sold by the administrator was sold by the plaintiff to the deceased, nor how much such goods brought. If the plaintiff has a right to any lien at all, it is for the specific goods sold to the deceased under and by virtue of the execution. The plaintiff has no legal claim to money in the hands of the administrator, even though the money accrued in part from the sale of the goods which had previously been sold to the decedent: *In re Farmer's Estate*, 17 Utah, 80; 53 Pac. Rep. 972. By the levy of an attachment at the commencement of an action, only a contingent lien upon the land is created; and until it is matured by a judgment the lien cannot be enforced against the property; and when judgment is finally obtained the plaintiff acquires no other than a creditor's interest in the land, except the right to enforce the lien by a sale of

the land. The rendition of the judgment, and of an order decreeing the sale of the real estate, does not transfer the title thereto, nor give any right of possession to the judgment creditor. Until the sale and conveyance are made, the right of possession remains in the debtor, and until the sale is completed in pursuance of the judgment and decree, neither the plaintiff nor the purchaser at the sale acquires any right to the lands, issues, or profits of the real estate. Hence where an administrator takes possession of the real estate of an intestate under an order of the probate court, and collects and receives rent for the same, an attaching creditor has no special right to the rents received, and no interest therein beyond that of a general creditor of the estate: *Kothman v. Markson*, 34 Kan. 542; 9 Pac. Rep. 218, 222. Where the creditor of the devisee attached real property devised before the distribution of the estate, his rights under the attachment levied will in no way be affected by the decree of distribution. He is not required to present his claim to the probate court, and is not entitled to participate in the distribution of the estate, but the property distributed continues to be subject to the lien of his attachment, if properly levied: *Martinovich v. Marsicano* (Cal.), 89 Pac. Rep. 333. Property of a decedent attached in his lifetime cannot be sold after his death to satisfy a judgment against him. The death of defendant destroys the attachment lien: *Myers v. Mott*, 29 Cal. 359, 367; *Ham v. Cunningham*, 50 Cal. 365, 367. The death of a defendant destroys the lien of an attachment, and the attached property passes into the hands of the executor or administrator, to be administered upon in due course of administration: *Myers v. Mott*, 29 Cal. 359, 367; 89 Am. Dec. 49. If the defendant died after the service of summons and the levy of an attachment, and before judgment, and the executor or administrator is substituted, and the action is continued against him, it is error for the court to render a judgment and enforce the lien of the attachment by a sale of the attached property and an application of the proceeds to the satisfaction of the demand: *Myers v. Mott*, 29 Cal. 359, 367; 89 Am. Dec. 49.

9. Action pending against decedent at time of his death. Presentation of claim.

(1) **In general.** The plaintiff in an action pending against a deceased person at the time of his death must present his claim against the estate to the executor or administrator of the estate of the deceased, where such presentation is necessary under the law, and cannot recover in his action unless proof of such presentation is made: *Derby & Co. v. Jackman*, 89 Cal. 1, 4; 26 Pac. Rep. 610; *Hibernia etc. Soc. v. Wackenreuder*, 99 Cal. 503, 597, 508; 34 Pac. Rep. 219; *Falkner v. Hendy*, 107 Cal. 49, 52; 40 Pac. Rep. 21, 386; *Vermont Marble Co. v. Black*, 123 Cal. 21, 22; 55 Pac. Rep. 599; *Gregory v. Clabrough's Executors*, 129 Cal. 475, 479; 62 Pac. Rep. 72; *Frazier v. Murphy*, 133 Cal. 91, 95; 65 Pac. Rep. 326. All that is required of the

plaintiff in such a case is simply to present his claim: *Gregory v. Clabrough's Executors*, 129 Cal. 475, 479; 62 Pac. Rep. 72. The presentation of a claim must be proved, although not denied in the answer, and no judgment for the plaintiff can be properly rendered upon the pleadings: *Derby & Co. v. Jackman*, 89 Cal. 1, 4; 26 Pac. Rep. 610. If the plaintiff fails to make the required proof, upon a trial had, against the personal representatives of the decedent, he should be nonsuited: *Vermont Marble Co. v. Black*, 123 Cal. 21, 23; 55 Pac. Rep. 599. A statute limiting the commencement of an action upon a rejected claim, which is past due, to a specified time, has no application to an action already pending; and the fact that the suit may have been revived against the executors more than three months after the rejection of the claim cannot affect the cause of action: *Gregory v. Clabrough's Executors*, 129 Cal. 475, 479; 62 Pac. Rep. 72. Proof of the presentation of a claim to the executor or administrator of the estate of defendant, where he died during the pendency of an action against him, and where the executor or administrator of his estate has been substituted as defendant, is not a fact essential to the validity of the judgment, where no issue has been made upon that question, but the failure to make the proof is ground for reversal, when objection is made in the trial court, and the exception is properly preserved, although the appeal was not taken within sixty days after the rendition of the judgment: *Falkner v. Hendy*, 107 Cal. 49, 53; 40 Pac. Rep. 21, 386. The objection must be first made in the court below; it is too late to raise the point for the first time in the supreme court: *Drake v. Foster*, 52 Cal. 225, 227. A statute which requires the plaintiff to present his claim to the representative of the estate, where the defendant dies pending the suit, simply means that, when an action is pending against the decedent at the time of his death, the plaintiff therein is not relieved from the duty of presenting for allowance the claim upon which it is based, when the claim is of that character that he would have been required to make such presentation in order to preserve its validity as a claim against the estate if such action had not been brought in the lifetime of the decedent: *Hibernia etc. Soc. v. Wackenreuder*, 99 Cal. 503, 507; 34 Pac. Rep. 219; *Frazier v. Murphy*, 133 Cal. 91, 96; 65 Pac. Rep. 326.

REFERENCES.

Death of defendant pending action against him; effect of, as to attachment: See head-line 8, subd. (2), *supra*.

(2) *Practice. Substitution. Supplemental complaint.* If a defendant dies pending an action against him, the proper practice is for the plaintiff to file a supplemental complaint, alleging the death, and due presentation of the claim: *Falkner v. Hendy*, 107 Cal. 49, 52; 40 Pac. Rep. 21, 386; *Bemmerly v. Woodward*, 124 Cal. 568, 570; 57 Pac. Rep. 561. The proper practice on the suggestion of the death of a party

after verdict and before judgment is to direct the entry of the judgment provided for in the statute, and then to suspend all further proceedings in the cause until an executor or administrator shall qualify and be substituted as a party: *Estate of Page*, 50 Cal. 40, 42. If the judgment in such a case is entered against the executor by name, payable in due course of administration, instead of being against the testator by name, such error does not render the judgment void, and it is not necessary to present it to the executor for allowance as a claim against the estate, but the executor must pay out of money in his hands applicable for that purpose: *Estate of Page*, 50 Cal. 40, 43. If a party against whom a money judgment has been rendered moves for a new trial, but dies before the motion is determined, and his executor is substituted as defendant, and prosecutes the motion, and obtains an order modifying the judgment, but no new judgment is rendered, the judgment as modified is a claim against the estate which should be paid in due course of administration, and no presentation thereof to the executor is necessary: *Estate of Brennan*, 65 Cal. 517, 518; 4 Pac. Rep. 561. If an appellant dies pending an appeal, a motion by his substituted executors to remand the cause to the lower court upon the ground that the judgment is incapable of enforcement for the reason that there was a want of proper presentation of it as a claim against the estate of the deceased will be denied. The enforcement of a judgment, or the right to withhold its enforcement, is a matter primarily within the jurisdiction of the court by which it was rendered. Upon the death of the appellant, the power of the lower court to enforce its judgment by execution terminated, and the respondent was remitted for its collection to the probate jurisdiction of the court having charge of the administration of the estate of the decedent, and to that court the executors must present any defense there may have been to its payment out of the assets of that estate: *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 193, 194; 91 Pac. Rep. 1029. Where a judgment had been obtained against a joint debtor in his lifetime, and he died pending his appeal from the judgment, and his executors were substituted pending the appeal, and obtained a reversal of the judgment, the executors are not released because of a failure to present the claims to them: *Megrath v. Gilmore*, 15 Wash. 558; 46 Pac. Rep. 1032. If a widow has no children, and dies pending her appeal from an order refusing to grant her application to have the whole estate set apart to her, her right does not survive to any one, and the proceedings abate by her death: *Estate of Bachelder*, 123 Cal. 466, 467; 56 Pac. Rep. 97. Although an order substituting the representative of a deceased person as a party to an action pending an appeal to the supreme court has been made, the regular and orderly method of procedure is to procure upon a proper showing a like substitution in the lower court. The propriety, if not the necessity, of such procedure must become manifest when it is considered that there will be thus avoided vexatious questions of the responsibility for costs and of the

effect which a judgment may have as a lien upon the property of the personal representative who may be found chargeable with costs, and whose name does not appear in the judgment-books: *Reay v. Heazleton*, 128 Cal. 335, 338; 60 Pac. Rep. 977. Where the statute provides that an action shall not abate by the death of a party, and that the same may be continued against his representative, or his successor in interest, the filing of a supplemental complaint, and the bringing in as defendants such executors or administrators is not the commencement of any action against them, but only a step in the progress of the original action to judgment; and where the original action was commenced within the time limited by the statute, the cause of action stated in the supplemental complaint is not barred by the provisions of such statute, though the time therein specified had expired before the filing of the latter complaint: *Hibernia etc. Soc. v. Wackenreuder*, 99 Cal. 503, 510; 34 Pac. Rep. 219. In the absence of proof of the presentation of the claim, a judgment against the executor or administrator as a substituted defendant, payable in due course of administration, and against their objection for want of such proof, is erroneous: *Frazier v. Murphy*, 133 Cal. 91, 95; 65 Pac. Rep. 326.

10. Death of one against whom right of action exists.

(1) *Right of action preserved.* If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, and the statute provides that an action may be commenced against his executors or administrators after the expiration of that time, and within one year after the issuing of letters testamentary or of administration, such statute applies only to cases where the statute of limitations has commenced to run. The object of the statute is, not to curtail, but to prolong the period for suing in the given category: *Smith v. Hall*, 19 Cal. 85, 86; *Estate of Bullard*, 116 Cal. 355, 357; 48 Pac. Rep. 219. The evident purpose of such a statute is to secure to a party, who has a cause of action against a decedent, one year after the appointment of a legal representative within which to bring his action. This may or may not have the effect of extending the time: *Barclay v. Blackinton*, 127 Cal. 189, 192; 59 Pac. Rep. 834. A party having a cause of action against the estate of a deceased person is not bound to cause administration to be had because the statute expressly extends his time for one year after the issuance of letters: *Davis v. Hart*, 123 Cal. 384, 388; 55 Pac. Rep. 1060. Upon the death of a judgment debtor, the plaintiff's right of action ceases; but the statute substitutes the presentation of the claim for suit, allowing the executor or administrator to acknowledge it and place it on the list of recognized debts of the estate. The right to sue does not come from the existence of the claim and the non-payment, but comes from the refusal of the executor or administrator to acknowledge it as a just claim against the estate. This right, therefore, does not accrue until

the presentation of the claim, and the party is not bound to present it until after publication of the notice to creditors. It would be unjust to hold that the claim is barred by the statute of limitations when the claimant was in no default: *Quivey v. Hall*, 19 Cal. 97, 100. It is a general rule of law, that when a right of action has accrued against a party who may be sued, the statute of limitations begins to run, and its running will not be suspended by the happening of any subsequent event, unless within some saving clause of the statute; and the subsequent death of the debtor or the lapse of time before the appointment of his personal representative is no exception to the rule. And this is true, although the debtor may die within the period fixed by the statute, and, by reason of litigation as to the right to probate, an executor or administrator may not be appointed until after the expiration of the time limited. To avoid the harshness and injustice of this rule, that often barred a cause of action, without any fault or laches on the part of the creditor, statutes have been passed that preserve to a creditor the right to bring an action within a specified time after the appointment of an executor or administrator, when the time limited would otherwise expire subsequently to the death of the debtor, and before the appointment of his personal representative. Hence, under statutes which provide that an action cannot be maintained against an executor or administrator until the rejection of the claim and the expiration of six months from the granting of letters testamentary, it is manifest that the allowance of six months after the issuing of letters testamentary, before an executor or administrator can be sued, is a statutory prohibition, and has the effect of suspending the operation of the statute during the time of the continuance of such prohibition: *Blaskower v. Steel*, 23 Or. 106; 31 Pac. Rep. 253, 254.

(2) *Effect of, as to statute of limitations.* Where no cause of action accrued to a person in his lifetime, but did accrue after his death, the statute of limitations began to run at the date of accrual, though there was no person in existence competent to sue, and continued to run from such date without cessation; but, where the cause of action has accrued to the testator or intestate in his lifetime, the running of the statute will not be stayed by his death until the grant of administration. "It is not easy," said Sanderson, J., "to perceive why, upon principle, any distinction should be made between the case where the cause of action accrues in the lifetime of the testator or intestate, and where it does not accrue until after his death. The only reason which can be given why the statute should not run in any case is, that there is no person to sue, therefore no person to whom laches can be imputed, but the reason applies to the latter case as well as to the former, and if an exception is allowed in the former, it ought also to be extended to the latter": *Tynan v. Walker*, 35 Cal. 634, 638; 95 Am. Dec. 152; *Hibernia Sav. & L. Soc. v. Conlin*,

67 Cal. 178, 180; 7 Pac. Rep. 477; *Estate of Bullard*, 116 Cal. 355, 356; 48 Pac. Rep. 219. If a cause of action accrues after the death of a person, the statute of limitations begins to run at the date of the accrual, though there is no person in existence competent to sue, and the statute continues to run from such date without cessation; and it makes no difference whether the cause of action was one accruing after the death of a person who would, if he had survived the accrual, been plaintiff in the action, or whether it is one where the action would have been against a person as defendant if he had lived until the cause of action came into existence: *Hibernia Sav. & L. Soc. v. Conlin*, 67 Cal. 178; 7 Pac. Rep. 477, 478. A claim against the estate of a decedent, which did not exist until after the expiration of the year specified in the notice to creditors, could not be affected by such notice, nor be barred because not presented to the executor or administrator within that time: *In re MacDonald's Estate*, 29 Wash. 422; 69 Pac. Rep. 1111, 1115. The statute of limitations will run upon a demand against the estate of a deceased person after a reasonable time has elapsed after the death of such person, and this, even though no executor or administrator has been appointed: *Black v. Elliott*, 63 Kan. 211; 65 Pac. Rep. 215. Where the plaintiff has failed to serve summons within the time prescribed by the statute after its issuance, his action must be dismissed, and it is immaterial that the defendant died within less than one year after the commencement of the action. The time, having begun to run during his lifetime, was not suspended by his death, nor by a failure to appoint an administrator of his estate. When once the statute of limitations begins to run, its running is not suspended by any subsequent disability. There is no exception to the bar of the statute, except it is found in the statute itself: *Davis v. Hart*, 123 Cal. 384, 388; 55 Pac. Rep. 1060; *Union Sav. Bank v. Barrett*, 132 Cal. 453; 64 Pac. Rep. 713, 1071. But the doctrine that when the statute of limitations begins to run, a subsequent disability, such as death of the party bound, etc., has no application where a judgment is obtained against an intestate in his lifetime and no execution is levied. In such a case, the judgment creditor being prevented by the statute from suing after the death of the debtor, the statute ceases to run until presentation of the claim to the administrator: *Quivey v. Hall*, 19 Cal. 97, 100.

11. Foreclosure of mortgages. In general.

(1) **Presentation of claim. Purpose of.** The presentation and allowance of a mortgage claim against the estate of decedent is to prevent the debt from being barred and the mortgage extinguished by limitation; but it does not preclude a subsequent action for the foreclosure of the mortgage, in which the estate may be subjected to costs and counsel fees: *Moran v. Gardemeyer*, 62 Cal. 96, 100; 23 Pac. Rep. 6; and, whether the claim be allowed or rejected, the creditor may at once proceed to foreclose his mortgage: *Willis v. Farley*, 24 Cal. 490, 499.

(2) **Presentation. When necessary.** If a mortgagee relies on the general assets in the hands of the executor or administrator of an estate for the payment of his debt, or any part of it, he must present the same in the manner and within the time required by the statute relating to the presentation of claims; and failing to do this, he is limited to the proceeds arising from the sale of the mortgaged property. In other words, a mortgage, to be available as a claim against the estate, must be presented as other claims: *Estate of Turner*, 128 Cal. 388, 392; 60 Pac. Rep. 967; *Pitte v. Shipley*, 46 Cal. 154; *Ellissen v. Halleck*, 6 Cal. 386; *Ellis v. Polhemus*, 27 Cal. 350; *Andrews v. Morse* (Kan.), 32 Pac. Rep. 640; *Reid v. Sullivan*, 20 Col. 498; 39 Pac. Rep. 338; *Scammon v. Ward*, 1 Wash. 179; 23 Pac. Rep. 439. Under the Colorado statute, a foreclosure of a mortgage can be had within one year from the death of the testator or intestate only by permission of the county court; and before a foreclosure can be had in any case, although one year may have elapsed, the debt or claim secured must have been presented and allowed by such court. The time within which such claims may be allowed is not fixed by statute, but where the claim is presented before the discharge of the administrator, and while the estate is still in process of administration, it is a sufficient compliance with the statute: *Sullivan v. Sheets*, 22 Col. 153; 43 Pac. Rep. 1012, 1013; *Reid v. Sullivan*, 20 Col. 498; 39 Pac. Rep. 338.

(3) **Presentation. When not necessary.** A mortgagee may foreclose his mortgage against the property of a decedent, described in the mortgage, without presentation of his claim to the executor or administrator of the estate, where he waives all claim to any other property of the estate: *Dreyfuss v. Giles*, 79 Cal. 409; 21 Pac. Rep. 840; *Anglo-Nevada Assur. Corp. v. Nadeau*, 90 Cal. 393; 27 Pac. Rep. 302; *German S. & L. Soc. v. Fisher*, 92 Cal. 502; 28 Pac. Rep. 591; *Heeser v. Taylor*, 1 Cal. App. 619; 82 Pac. Rep. 977; *Security Sav. Bank v. Connell*, 65 Cal. 574; 4 Pac. Rep. 580; *Andrews v. Marsh* (Kan.), 32 Pac. Rep. 640; *Fullerton v. Bailey*, 17 Utah, 85; 53 Pac. Rep. 1020; *Teel v. Winston*, 22 Or. 489; 28 Pac. Rep. 142; *Reed v. Miller*, 1 Wash. 426; 25 Pac. Rep. 334; *Bank of Sonoma v. Charles*, 86 Cal. 322, 327; 24 Pac. Rep. 1019; *Bank of Suisun v. Stark*, 106 Cal. 202; 39 Pac. Rep. 531. But, to do this, there must be an express waiver in the complaint: *Security Sav. Bank v. Connell*, 65 Cal. 574; 4 Pac. Rep. 580; *Dreyfuss v. Giles*, 79 Cal. 409; 21 Pac. Rep. 840; *Anglo-Nevada Assur. Corp. v. Nadeau*, 90 Cal. 393; 27 Pac. Rep. 302; *Bank of Sonoma County v. Charles*, 86 Cal. 322, 327; 24 Pac. Rep. 1019. The presentation of a note secured by mortgage as a claim against the estate, without the presentation of the mortgage, does not waive the mortgage, if there was no intention to waive or abandon it: *Bank of Sonoma County v. Charles*, 86 Cal. 322, 327; 24 Pac. Rep. 1019. The purpose of the statute as to waiving

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recourse is to require the plaintiff to put his waiver upon record in his complaint, so that there may be no question that he has waived recourse, etc.; and it is immaterial whether or not he made the waiver before his complaint was drawn by failure to present the claim to the executors within the time prescribed by the statute, or otherwise: *Anglo-Nevada Assur. Corp. v. Nadeau*, 90 Cal. 393, 396; 27 Pac. Rep. 302. It is not essential to a waiver that the claim of right waived should be enforceable. There may be a waiver or relinquishment of a claim to something without right: *Anglo-Nevada Assur. Corp. v. Nadeau*, 90 Cal. 393, 396; 27 Pac. Rep. 302. A suit to foreclose a mortgage given by a decedent may be maintained, though it was not due at the time the estate was closed and discharge made, and was not presented as a claim against the estate, where the complaint expressly waives all claim against any other property of the estate except the land described in the mortgage: *Dreyfuss v. Giles*, 79 Cal. 409; 21 Pac. Rep. 840. With the exception of a deficiency found to exist after a foreclosure sale, it is not necessary to present to an administrator a claim secured by mortgage upon the real property of a decedent: *Kelsey v. Welch*, 8 S. D. 255; 66 N. W. Rep. 390.

(4) **Distinct proceedings.** Where the statute gives to the holder of the mortgage the right to enforce the same "against the property of the estate subject thereto" without presentation of the claim to the executor or administrator, the holder of a claim secured by mortgage has two modes in which he may enforce its payment. He may institute an action for its foreclosure under such statute, in which the amount of his recovery will be limited to the proceeds of his security; or he may present his claim to the executor or administrator for allowance, and, under another provision of the statute, receive the amount allowed therefor from the proceeds of a sale made under the supervision of the probate court; and, if those proceeds are insufficient therefor, may share equally, with the other creditors, in the general assets of the estate, for the amount of such deficiency. The two proceedings are entirely independent of each other, and may be conducted in different forums. The proceedings to foreclose the mortgage may be taken after the presentation and allowance of his claim, or even after its rejection: *Visalia Sav. Bank v. Curtis*, 135 Cal. 350, 352; 67 Pac. Rep. 329; *Moran v. Gardmeyer*, 82 Cal. 96; 23 Pac. Rep. 6; *Hibernia etc. Soc. v. Conlin*, 67 Cal. 178; 7 Pac. Rep. 477. The manifest intention of the California statute is to give to the holder of a mortgage, where he holds a claim against the estate secured by it, that, if allowed, would rank with the acknowledged debts of the estate, an election to present the claim for allowance, have it allowed, and proceed to foreclose for the whole amount due on the claim, including any deficiency arising on the sale of the mortgage premises, or to present no claim, and sue on the mortgage alone, and obtain whatever may be realized on the sale of the mortgaged

premises under the decree of foreclosure: *Hibernia etc. Soc. v. Conlin*, 67 Cal. 178, 180; 7 Pac. Rep. 477.

(5) **Presentation. Form of.** Where the statute does not require the presentation of the mortgage to the administrator for allowance as a claim against the estate, as a condition to foreclosure, and the requirement as to filing the mortgage is not mandatory, the filing of a verified claim for the amount due, with the executor or administrator, apprising him of the nature and character of the claim, is a sufficient compliance with the statute relative to filing: *Kirman v. Powning*, 25 Nev. 378; 60 Pac. Rep. 834, 838. If the holder of a mortgage note seeks judgment against the estate of the decedent upon the debt, he must substantially comply with the provisions of the statute relative to the presentation of claims, and if he makes no attempt to comply with such provisions as to the affidavit, etc., by which a claim may be supported, he cannot maintain an action against the estate upon the note secured by his mortgage: *Perkins v. Onyett*, 86 Cal. 348, 351; 24 Pac. Rep. 1024. In presenting a mortgage claim against the estate of the deceased mortgagor, it is necessary to accompany the claim by a copy of the mortgage, or to describe it by reference to the date, volume, and page of its record. It is not sufficient to present a copy of the note which states that it is secured by mortgage of even date therewith: *Bank of Sonoma County v. Charles*, 86 Cal. 322, 327; 24 Pac. Rep. 1019. Nor does the mere recital in a promissory note, presented as a claim against the estate of a deceased person, that it is secured by mortgage, constitute a presentation of the mortgage, where no copy of the mortgage is set out in the claim, and no reference is made therein to the date, volume, or page of its record: *Estate of Turner*, 128 Cal. 388, 390; 60 Pac. Rep. 967. If a note secured by mortgage is presented as a claim against the estate, but no copy of the mortgage is attached to or presented with the note, and the mortgage is not described in the claim, and no reference is made therein to the date, volume, or page of its recordation, there is no presentation of the mortgage: *Evans v. Johnston*, 115 Cal. 180, 182; 46 Pac. Rep. 906. The presentation of a note secured by mortgage, and a claim against the estate of a decedent, is sufficient in form where there is attached to the claim a copy of the note and mortgage, showing all the indorsements on the mortgage, the date, volume, and page of its record in the recorder's office, and also containing a full and complete copy of the note: *Consolidated Nat. Bank v. Hayes*, 112 Cal. 75, 79; 44 Pac. Rep. 469. If a widow, who is the administratrix of the deceased, purchased with her own funds a note secured by mortgage upon all the real property of the deceased to preserve it from foreclosure, and took an assignment of the mortgage, the presentation by her of a secured claim against the estate is not based upon the assignment, but upon the note and mortgage; and if she presents a claim against the estate

for the debt, it is a sufficient description of the mortgage to comply with the statute, where it is stated in the claim that the note was secured by a mortgage upon the real property of the deceased described in the inventory on file, to which reference is made for further particulars, where the date of its execution and its acknowledgment is given in the claim, with the volume and page of record where it was recorded, to which reference was also made, and where the mortgage covered all the real property belonging to the deceased at the time of his death, and included all the real property described in the inventory. In such a case there could be no mistake as to the particular mortgage intended to be relied upon, and the only purpose of the required description is to identify the mortgage: *Estate of McDougald*, 146 Cal. 191, 193; 79 Pac. Rep. 878. The presentation of a claim against the estate of a decedent, founded on a note secured by a mortgage, is sufficient, without a description of the mortgage, if the presentation refers to the date, volume, and page of the record of the mortgage, showing that it is all real property, situated in a county stated, and was given to secure a note a copy of which is contained in the presentation: *Moore v. Russell*, 133 Cal. 297, 299; 85 Am. St. Rep. 166; 65 Pac. Rep. 624.

(6) **Pleadings. Parties.** In an action to foreclose a mortgage securing a note, the breach of the contract to pay the note is of the essence of the cause of action, and must be alleged; and a failure to aver non-payment of the note is fatal to the complaint, although no demurrer is interposed, and judgment goes by default, as the defect goes to the statement of a cause of action, and such defect is not waived by a failure to demur: *Ryan v. Holliday*, 110 Cal. 335, 337; 42 Pac. Rep. 891. The foreclosure of a mortgage is a case of equitable cognizance: *Willis v. Farley*, 24 Cal. 490. It is not necessary, in an action for the foreclosure of a mortgage, where all recourse against property of the estate, other than that mortgaged, is waived, to allege that the claim has been presented to an executor or administrator for allowance or rejection: *Security Sav. Bank v. Connell*, 65 Cal. 574; 4 Pac. Rep. 580. So if the mortgage was not executed by the deceased person, though the mortgaged land was afterwards purchased by the decedent in his lifetime, and became a part of his estate, it is not necessary, in an action to foreclose the mortgage, either to aver a presentation of a claim against the estate of the decedent, or an express waiver of any recourse against his general assets: *Ryan v. Holliday*, 110 Cal. 335, 338; 42 Pac. Rep. 891. The waiver, in an amended complaint in a former action, of all recourse against the estate, except as to the mortgaged premises, is effectual only in that action, and if the action is dismissed, it ceases to have any efficacy or binding force in a subsequent action, and does not preclude the proper presentation of a claim against the estate, or the enforcement of such a claim in the subsequent action:

Westbay v. Gray, 116 Cal. 660, 669; 48 Pac. Rep. 800. In an action to foreclose a mortgage against an estate, the executor represents the estate, and it is not necessary to make the heirs parties to the suit. A judgment against the executor would bind the heirs and devisees, and a sale under the judgment would relate to the date of the mortgage, and cut off the interest of all persons to the suit derived under the deceased mortgagor subsequently thereto: *Dickey v. Gibson*, 121 Cal. 276, 278; 53 Pac. Rep. 704; *Finger v. McCaughey*, 119 Cal. 59; 51 Pac. Rep. 13. Nor is it necessary that the administrator should be sued individually, in order to bar his right of succession to the mortgaged premises: *Finger v. McCaughey*, 119 Cal. 59; 51 Pac. Rep. 13.

(7) **Presentation. Failure to present.** The mortgagee's failure to exhibit his mortgage debt as a demand against the estate of a deceased mortgagor within the time prescribed by the statute for the presentation of claims after letters of administration have been granted will not ordinarily preclude him from foreclosing his mortgage lien and subjecting the mortgaged property to the payment of the debt: *Andrews v. Morse* (Kan.), 32 Pac. Rep. 640; *Reid v. Sullivan*, 20 Col. 498; 39 Pac. Rep. 338; *Reed v. Miller*, 1 Wash. 426; 25 Pac. Rep. 334; *Scammon v. Ward*, 1 Wash. 170; 23 Pac. Rep. 438; *Teel v. Winston*, 22 Or. 489; 29 Pac. Rep. 142; *Kirman v. Powning*, 25 Nev. 378; 60 Pac. Rep. 834; *Bank of Sonoma County v. Charles*, 86 Cal. 322; 24 Pac. Rep. 1019; *Dreyfuss v. Giles*, 79 Cal. 409; 21 Pac. Rep. 840. A mortgagee who has failed to present his claim to the administrator of a deceased mortgagor within the time prescribed by the statute does not thereby lose his remedy by foreclosure: *Kaikainahaole v. Allen*, 14 Haw. 527, 529.

(8) **Effect of allowance. Right to foreclose.** The allowance of a mortgage as a claim against the estate of a decedent does not bar its foreclosure: *German S. & L. Soc. v. Hutchinson*, 68 Cal. 52; 8 Pac. Rep. 627; *Wise v. Williams*, 72 Cal. 544; 14 Pac. Rep. 204; *Moran v. Gardemeyer*, 82 Cal. 96; 23 Pac. Rep. 6. Contra: *Falkner v. Folson's Executors*, 6 Cal. 412. The allowance and acknowledgment of a debt against the estate of a decedent is sufficient to keep alive the mortgage securing it, and to entitle the plaintiff to foreclose such mortgage, without any express waiver of recourse against the estate: *Consolidated Nat. Bank v. Hayes*, 112 Cal. 75, 82; 44 Pac. Rep. 469. Where a claim against a mortgagor, as indorser of a note of a third party, which was purchased by the mortgagee from the mortgagor, was not presented to the estate as a secured claim, but was presented and allowed as an unsecured claim against the estate, to be paid in due course of administration, the mortgagee is not authorized to buy up notes of a third party upon which the mortgagor was the simple indorser, and hold the same as secured by the mortgage:

Moran v. Gardemeyer, 82 Cal. 96, 99, 101; 23 Pac. Rep. 6. If an executor or administrator takes a mortgage to secure himself against a doubtful payment of a claim to the mortgagor, and the administrator afterwards goes into bankruptcy, a claim by the mortgagor for the money paid him by the administrator, and for the payment of which the mortgage was ordered foreclosed, is properly disallowed: *In re Myer* (N. M.), 89 Pac. Rep. 246, 249. Where appellant paid a mortgage to prevent a foreclosure thereof, and the mortgage, at the time of the payment, was a proper claim upon the land and against the estate of the deceased, but, after appellant had paid the mortgage, a claim was allowed in favor of the brothers of the deceased, which absorbed the entire estate, and left the appellant without anything to reimburse him for money paid to satisfy the mortgage, he is entitled to subrogation to an interest in the land equal to the amount of the mortgage debt paid: *Fullerton v. Bailey*, 17 Utah, 85; 53 Pac. Rep. 1020. If there has been no contest in the probate court in regard to a claim against the estate of a decedent upon a note secured by mortgage, the allowance of the plaintiff's claim is sufficient to make it an accepted debt of the estate, to keep alive the mortgage, and to entitle the plaintiff to have it foreclosed: *Consolidated Nat. Bank v. Hayes*, 112 Cal. 75, 82; 44 Pac. Rep. 469. The presentation or allowance of a mortgage claim does not affect the running of the statute of limitations against a mortgage, where it is not necessary to present such mortgage claim: *Hibernia S. & L. Soc. v. Conlin*, 67 Cal. 178; 7 Pac. Rep. 477. If a mortgagor has no interest in the property mortgaged, the mortgage creates no lien, and cannot properly be foreclosed: *Otto v. Law*, 127 Cal. 471; 59 Pac. Rep. 895.

(9) **Judgment. Interest.** Where the mortgage claim has been presented to the estate, and allowed, there can be no deficiency judgment. The amount of any deficiency will be payable, if at all, in the due course of administration, without any judgment to that effect: *Pechaud v. Riquet*, 21 Cal. 76, 77. Where a mortgage claim was presented to the executor or administrator of a decedent, and an action to foreclose the mortgage against the estate has been brought, a judgment for a deficiency should provide that it be paid "in due course of administration": *Moore v. Russell*, 133 Cal. 297, 301; 85 Am. St. Rep. 166; 65 Pac. Rep. 624. Although a mortgage against the property of a deceased person provides for a deficiency judgment, the mortgagee's claim is barred, where he did not present it to the executors or administrators within the time limited in the notice to creditors, published by the executors, and did not, after that, and before bringing an action, or at any time, present the notes sued on in the action, or any claim on account thereof, to said executors or their successors. The conclusion that he is not, under such circumstances, entitled to a deficiency judgment is in full accord with

the statute requiring the claim to be presented in such cases within one month after the deficiency is ascertained: *Thurber v. Miller*, 11 S. D. 124; 75 N. W. Rep. 900. A decree of foreclosure in an action brought against an executor or administrator after his discharge, is a nullity, and is no bar to a subsequent suit against the heirs of the deceased to enforce the mortgage and a sale of the mortgaged property: *Willis v. Farley*, 24 Cal. 490, 501. A mortgagee may enforce the lien of his mortgage against the property for the full amount thereof, including the conventional rate of interest. He is not limited to legal interest upon the mortgage debt, notwithstanding the insolvency of the estate: *Visalia Sav. Bank v. Curtis*, 135 Cal. 350, 353; 67 Pac. Rep. 329.

(10) **Sale. Holder as purchaser.** While the holder of a mortgage may become a purchaser at any sale under order of the court of the lands included in the mortgage, yet if, by reason of the failure to have the mortgage allowed as a claim against the estate, the mortgagee has waived his right to have the same considered as a lien upon the property, he is not entitled to demand a conveyance from the executor or administrator, without payment of the price at which such mortgagee had purchased the land. He cannot claim an application of the purchase-money as a credit upon the mortgage not presented and allowed as a claim against the estate: *Estate of Turner*, 128 Cal. 388, 392, 393; 60 Pac. Rep. 967.

(11) **Redemption. Surplus.** Unless the owner of a mortgage has, within one year, presented his claim against the estate of a decedent, he is not entitled to apply to the probate court to have his mortgage redeemed out of the personal assets of the estate, nor, in the alternative, to have the land sold and the proceeds applied on the debt: *Scammon v. Ward*, 1 Wash. 179; 23 Pac. Rep. 439, 440. If a mortgage is foreclosed upon an insolvent estate of a deceased mortgagor, the surplus, if any, should be paid to the administrator, and not to the heirs of the mortgagor, when it is required for the payment of debts. The administrator, in such a case, may recover from the assignee of the mortgage: *Whitney v. Ross*, 17 Haw. 453, 454.

12. Foreclosure of mortgages. Limitation of actions.

(1) **In general.** Where a mortgage claim has been allowed and approved, the right of the mortgagee to maintain an action to foreclose the mortgage is not affected by the statute of limitations, pending the proceedings for the settlement of the estate of the mortgagor: *German Sav. & L. Soc. v. Hutchinson*, 68 Cal. 52, 54; 8 Pac. Rep. 627; *Wise v. Williams*, 72 Cal. 544; 14 Pac. Rep. 204; but the assignee of a mortgage has no right to foreclose it against the estate of a deceased mortgagor for the benefit of the assignor, where the mortgagee is administrator of the estate of the mortgagor; and if he

commences a suit for foreclosure while the mortgagee is administrator, but such mortgagee, after ceasing to be administrator, is substituted as plaintiff in place of the assignee, the statute of limitations will run against the mortgage debt until the date of the substitution. If the action is then barred, no suit can be maintained: *Brown v. Mann*, 71 Cal. 192; 12 Pac. Rep. 51. The failure to appoint an administrator of the estate of a deceased mortgagor and debtor does not prevent the statute of limitations from running in favor of the mortgagor's heirs against an action to foreclose the mortgage: *Colonial etc. Mtge. Co. v. Flemington* (N. D.), 103 N. W. Rep. 929. Where a mortgagor died intestate, seised of the mortgaged land, before the mortgage debt was due, and left four heirs, only one of whom was a resident of the state; where no administrator was ever appointed; and where nearly fourteen years after the debt was due the heirs conveyed the land to defendant,—it was held that an action to foreclose the mortgage was barred as to one fourth of the land, but was not barred as to the remaining three fourths: *Colonial etc. Mtge. Co. v. Flemington* (N. D.), 103 N. W. Rep. 929. Under the California statute, "no claim against any estate, which has been presented and allowed, is affected by the statute of limitations, pending the proceedings for the settlement of the estate," etc. But it has been held, in an action where a husband and wife executed a joint promissory note, secured by mortgage on their community property, where, after the husband died testate, and the claim of the mortgage was filed against his estate, and where the claim was allowed and approved by the administrator, and duly allowed by the judge, that such statute has application alone to claims against the estate, and does not apply to any person who may happen to be jointly or severally indebted with the deceased upon such claim, and that, in such case, the general statute of limitations applies to all obligations of co-mortgagors or co-obligors generally, and in all cases where exception to its operation is not specifically made: *Vandall v. Teague*, 142 Cal. 471, 476; see *Tynan v. Walker*, 35 Cal. 634; 95 Am. Dec. 152. The settlement and distribution of the estate is no bar to the right to foreclose the mortgage against the distributee of the mortgaged property, or the grantee of such distributee: *Dreyfuss v. Giles*, 79 Cal. 409; 21 Pac. Rep. 840. The fact that the action was not commenced until after the expiration of the time for the presentation of claims against the estate does not bar the right of action: *German Sav. & L. Soc. v. Fisher*, 92 Cal. 502; 28 Pac. Rep. 591. Where the law as to the presentation of mortgage claims has been amended, after notice to creditors has been given and the time to present claims has expired, so that claims must be presented which would not before have to be presented, a mortgage, given by the deceased, falling due after the amendment is not barred by a failure to present the claim to the administrator: *Hibernia Sav. & L. Soc. v. Hayes*, 56 Cal. 297, 299.

13. Foreclosure of mortgages. Death of mortgagor.

(1) **In general.** If a husband and wife, during the husband's life, give a mortgage on a tract of land, such mortgage may be enforced, after the husband's death, against the heirs, but the mortgagee has no right to a personal judgment against any of the defendants: *Brown v. Orr*, 29 Cal. 120, 122. Where a mortgagor died, and the mortgagee filed a claim against his estate for the amount of the mortgage debt, without referring to the mortgage, an allowance of the same as an unsecured claim is not void, where there was in fact no mortgage: *Otto v. Long*, 127 Cal. 471; 59 Pac. Rep. 895. In an action to foreclose a mortgage executed by a person before his death, and where his widow was made administratrix of his estate as a party defendant, the purchaser at the foreclosure sale, after receiving his deed, is entitled to a writ of assistance against the administratrix for possession of the premises, where her answer to the application for the writ fails to show that she claims the property, or the possession thereof, by any right or title adverse to that of her deceased husband: *Finger v. McCaughey*, 119 Cal. 59, 61; 51 Pac. Rep. 13.

(2) **Enforcement without presentation.** If the mortgagor dies after selling land upon which he has given a mortgage, the mortgagee may enforce the mortgage against the subsequent purchaser, without presenting his claim to the executor or administrator for allowance: *Christy v. Dana*, 42 Cal. 174, 179. A failure to present a claim against an estate before bringing suit thereon is a mere matter of abatement, which is waived unless pleaded: *Bemmerly v. Woodward*, 124 Cal. 568, 574; 57 Pac. Rep. 561. An action to foreclose a mortgage does not abate by the death of the mortgagor pending the suit, but survives against his estate, and may be prosecuted against the representative of such estate, with the same effect as if the original defendant had not died: *Union Sav. Bank v. Barrett*, 132 Cal. 453, 454; 64 Pac. Rep. 713, 1071; *Hibernia etc. Soc. v. Wackenreuder*, 99 Cal. 503; 34 Pac. Rep. 219. If a married woman, having authority, executes a mortgage in her own name and afterwards dies, and the mortgagee seeks to foreclose, but does not ask for any judgment against the estate, and the estate no longer has any interest whatever in the property, it is unnecessary for the mortgagee to present the note and mortgage to the executor or administrator for allowance, and he can maintain an action for the foreclosure of the mortgage against the property without making the executor or administrator a party to the foreclosure suit: *Rickards v. Hutchinson*, 18 Nev. 215; 2 Pac. Rep. 52, 54; 4 Pac. Rep. 702. If a mortgage has been given to secure the debt of a third person, and the mortgagor afterwards dies, no presentation of the mortgage claim need be made to his personal representative: *Hibernia Sav. & L. Soc. v. Conlin*, 67 Cal. 178; 7 Pac. Rep. 477. If the mortgagor in a chattel mortgage agrees that, upon default, the mortgagee may take possession of the mortgaged property, either preliminary to foreclosure or for preservation, the right

of the mortgagee to take possession is not defeated by the death of the mortgagor; his right of possession is good against the mortgagor's administrator; and the mortgagee's claim to such possession is not such a claim as must be presented to the administrator for allowance or rejection: *Purdin v. Archer*, 4 S. D. 54; 54 N. W. Rep. 1043.

(3) **Express waiver in complaint.** In an action to foreclose a mortgage against the property of a deceased mortgagor, where the complaint contains a waiver, in the exact language of the statute, against any other property of the estate, the effect of such express waiver is not destroyed by a prayer for relief in which the plaintiff asks for judgment for "the amount due upon the said note and mortgage," and for costs "and counsel fees," and "that a receiver be appointed to take charge of the real estate until the same be sold, and to collect the rents and all the net income therefrom, to be applied on any deficiency which may remain due to plaintiff after said sale": *Hibernia etc. Soc. v. Wackenreuder*, 99 Cal. 503, 509; 34 Pac. Rep. 219.

(4) **Limitation of actions. In general.** The fact that one of two mortgagors dies does not have the effect of suspending the running of the statute of limitations as to the other mortgagor or as to his grantee: *Hibernia etc. Soc. v. Boland*, 145 Cal. 626, 628; 79 Pac. Rep. 365; *Vandall v. Teague*, 142 Cal. 471; 76 Pac. Rep. 35. If a mortgage is given by one person to secure the promissory note of another person, and the payor of the note dies, and the holder thereof fails to present either the note or mortgage to his administrator for allowance within the time prescribed by the statute after publication of notice to creditors, the claim is barred as against the estate, but the mortgage remains in force, and may be foreclosed at any time before it is barred, as against the mortgagor, by the statute of limitations; and this applies to a note made by the husband for his own debt, and where the wife gives a mortgage on her separate property to secure it, and the husband signs the mortgage to show his assent to it. The wife's liability on the mortgage, in such a case, is not affected by the death of the husband and the failure of the holder of the note to present the claim for allowance to the administrator of his estate: *Sichel v. Carrillo*, 42 Cal. 493, 504. A mortgage is capable of enforcement against the mortgaged property, though the mortgagor be deceased, in a direct suit brought for that purpose against the heirs of the mortgagor, or the person or persons in whom the legal title to the mortgaged property is vested at the time of the foreclosure; and such mortgaged property may be subjected to the payment of the debt it is pledged to secure without a presentation of the debt to the executor or administrator in a probate proceeding; but the statute of limitations runs against such right, and the action must be begun within the statutory period: *Gleason v. Hawkins*, 32 Wash. 464; 73 Pac. Rep. 533, 534; but, notwithstanding the right to fore-

close the mortgage, or to collect the debt out of the real property of the deceased debtor, is barred by the statute, the creditor still has the right to have his claim allowed by the administrator to be paid, as other claims of the estate must be paid, out of the personal property in the hands of the administrator belonging to the estate. The statute destroys the lien of the debt at the end of six years upon the deceased debtor's real property, but keeps it alive, in so far as his personal property is concerned. The debt should for that reason be allowed as a claim against the estate: *Gleason v. Hawkins*, 32 Wash. 464; 73 Pac. Rep. 533, 534.

(5) **Limitation of actions. Death before maturity.** Where a note and mortgage were not mature at the death of the mortgagor, they are not barred by the statute of limitations, although letters of administration were not issued until more than four years after the maturity of the note and mortgage; and the claim thereon, presented to the administrator immediately after the publication of notice to creditors, is properly allowed: *Estate of Bullard*, 116 Cal. 355, 356; 48 Pac. Rep. 219. If a mortgage debt was not due at the time of the mortgagor's death, the statute of limitations would not begin to run against the mortgagee's right to foreclose while there was no administration on the mortgagor's estate: *Heeser v. Taylor*, 1 Cal. App. 619; 82 Pac. Rep. 977. Where a decedent had given a mortgage, but died before its maturity, the statute of limitations does not bar a recovery, although more than four years had elapsed from the maturity of the mortgage before foreclosure, if less than one year had elapsed after the issuing of letters testamentary or of administration, before such foreclosure suit was brought: *Heeser v. Taylor*, 1 Cal. App. 619, 620; 82 Pac. Rep. 977.

(6) **Limitation of actions. Death of defendant pending action.** The rule that if an action is pending against a decedent at the time of his death, the plaintiff must present his claim against the estate in order to recover, does not apply to an action for the foreclosure of a mortgage other than homestead premises, though it was commenced before the death of the mortgagor, and was pending undetermined at his death. Such action may be continued against the executors of the deceased mortgagor without presentation of the claim to them for allowance, where the plaintiff expressly waives recourse against all other property of the decedent: *Hibernia etc. Soc. v. Wackenreuder*, 99 Cal. 503, 507, 508; 34 Pac. Rep. 219. An action is deemed to be pending until its final determination on appeal, unless the judgment is sooner satisfied: *Vermont Marble Co. v. Black*, 123 Cal. 21, 23; 55 Pac. Rep. 599. If an action to foreclose a mortgage does not abate by the death of a mortgagor pending the suit, but survives against his estate, and can be prosecuted against the person who shall thereafter be appointed his personal representative, the plaintiff has the same right to proceed against him as it would have

to proceed against the original defendant had he not died, and the cause of action is not extinguished or affected by the fact that the summons was not personally served upon the mortgagor, and that the action was begun more than one year prior to his death. The power expressly conferred upon the court to continue the proceeding against the mortgagor's personal representative carries with it an implied power to order a new summons to bring in the executrix as a new party, after the lapse of a year: *Union Sav. Bank v. Barrett*, 132 Cal. 453, 455, 456; 64 Pac. Rep. 713, 1071.

(7) **Redemption.** Upon the death of a mortgagor or owner of redemption, his heir at law may redeem. The widow and the administrator may also redeem; but the right of the heirs at law to redeem is independent of that of the widow or administrator, and the exercise of such right by the heirs, in bringing a suit in equity to redeem, is not an interference with the administration of the estate. Such suit may therefore be brought without asking leave of the probate court: *Kahoomana v. Carvalho*, 11 Haw. 516, 517.

14. Mortgages on homesteads.

(1) **In general.** Parties to foreclosure. Where a homestead is mortgaged, or is declared on land subject to a mortgage, it is not the exemption that is mortgaged, but the whole property, and the homestead exemption still exists, and is to be recognized subject only to a reduction in amount to satisfy the just demand of the mortgagee: *White v. Horton*, 36 Cal. Dec. 103, 105 (Aug. 4, 1908). In the case of a mortgage against a probate homestead, the executor or administrator of the estate is not a necessary party to the foreclosure of the mortgage, if no present claim is made against the estate: *Schadt v. Heppe*, 45 Cal. 433. Where a recorded homestead has been set apart to the widow by the court, the executor or administrator is no longer a necessary or proper party to an action of foreclosure. Nothing being claimed against the estate, it is a matter of no concern to him whether the mortgage is foreclosed or not: *Schadt v. Heppe*, 45 Cal. 433, 437. But if recourse is had to property of the estate other than that mortgaged, the executor or administrator is a necessary party to the suit: *Belloc v. Rogers*, 9 Cal. 123, 126. Where the whole estate has been set apart for the use of the family, and the executor or administrator has been discharged, he is not a necessary party defendant to the foreclosure of a mortgage on the real estate set apart to the family as a homestead: *Browne v. Sweet*, 127 Cal. 332, 335; 59 Pac. Rep. 774.

(2) **Presentation of claim.** When necessary. No action to foreclose a mortgage on the homestead of a deceased mortgagor can be maintained, unless the claim secured by the mortgage is first duly presented for allowance to the personal representative of the mortgagor, although the estate has no assets other than the mortgaged

homestead which can be subjected to the payment of the mortgage debt; and, notwithstanding an action of foreclosure had been commenced and a *lis pendens* filed prior to the mortgagor's death, and that the plaintiff has expressly waived all recourse against any other property of the estate: *Bollinger v. Manning*, 79 Cal. 7, 12; 21 Pac. Rep. 375. Liens and encumbrances on the homestead must be presented for allowance against the estate of a decedent of which it forms a part. The purpose in requiring the presentation of liens and encumbrances on the homestead for allowance against the estate is to preserve the homestead, if possible: *Camp v. Grider*, 62 Cal. 20, 26. Where an action to foreclose a mortgage given by a husband and wife upon the homestead has been brought, and all recourse against the property of the estate other than the property mortgaged has been waived, such mortgage must, upon the death of the husband, be presented as a claim against his estate, notwithstanding such waiver: *Wise v. Williams*, 88 Cal. 30, 33; 25 Pac. Rep. 1064. A mortgage given by a husband and wife upon property upon which a homestead is afterwards declared must, upon the death of the husband, be presented as a claim against his estate, although recourse against any other property of the estate than that mortgaged is waived: *Wise v. Williams*, 88 Cal. 30, 33; 25 Pac. Rep. 1064. So a mortgage of a homestead on community property must be presented before an action can be brought for its foreclosure, and a judgment of foreclosure without such presentation is erroneous, even if all recourse against other property has been waived in the complaint; and a presentation of a mortgage note without a presentation of the mortgage is insufficient: *Perkins v. Onyett*, 86 Cal. 348, 350; 24 Pac. Rep. 1024. If the mortgage is upon property which is subject to a claim of homestead, and the statute provides that if there be subsisting liens or encumbrances on the homestead left by a deceased person, the claims secured thereby must be presented and allowed as other claims against the estate, and the plaintiff has failed to present to the executor or administrator of the estate his claim upon the debt set forth in the complaint, he is not only unable to maintain an action for the foreclosure of the mortgage, but is also precluded from maintaining an action on the note independently of the mortgage. The extinguishment of the mortgage lien by reason of his failure to present his claim does not give him the right to bring an action upon the debt without such presentation: *Hibernia Sav. & L. Soc. v. Hinz* (Cal. App.), 88 Pac. Rep. 730.

REFERENCES.

Concerning the presentation of mortgage claims against homesteads, before bringing suit, see note, subd. 19, § 420, ante.

(3) **Presentation of claim.** When not necessary. If the mortgage covers a homestead upon the separate property of the wife, and the creditor waives all claims against the husband's estate, no presenta-

tion of the claim is necessary: *Bull v. Coe*, 77 Cal. 54; 11 Am. St. Rep. 235; 18 Pac. Rep. 808. A mortgage on a homestead, exceeding the statutory limit in value, need not be presented as a claim against the estate of the deceased mortgagor prior to the commencement of an action to enforce the mortgage against the excess. The rule that a mortgage upon the homestead cannot be enforced unless a claim therefor has been duly presented to the executor or administrator does not apply to a probate homestead. Hence, if a part of the mortgaged premises has been apportioned to the widow of a decedent, the mortgagee may, without presenting his claim to the executor or administrator, foreclose as to the other part, where the premises described in the homestead declaration exceed the statutory limit: *Bank of Woodland v. Stephens*, 144 Cal. 659, 664; 79 Pac. Rep. 379.

(4) **Limitation of actions.** A mortgage on an antemortem homestead cannot be foreclosed, unless the claim is presented for allowance against the estate of the decedent within the time limited for the presentation of claims: *Building and Loan Assoc. v. King*, 83 Cal. 440; 23 Pac. Rep. 376. Where a husband and wife have mortgaged the homestead selected from the community property, and the husband dies and the wife conveys her interest, an action to foreclose the mortgage on such homestead cannot be maintained, unless it is brought within four years from the maturity of the mortgage: *Vandall v. Teague*, 142 Cal. 471; 76 Pac. Rep. 35, 37. A statute which provides that claims against the estate of a decedent secured by "subsisting liens or encumbrances on the homestead" "must be presented and allowed as other claims against the estate," and that if the funds of the estate are inadequate to pay all claims, the claims so secured must be first paid, does not forbid the commencement of a proceeding to foreclose a mortgage given by a husband and wife upon a homestead selected from community property; and the statute of limitations will bar such action unless it has been commenced within the statutory period of four years: *Vandall v. Teague*, 142 Cal. 471; 76 Pac. Rep. 35, 37. Where a husband and wife jointly executed a mortgage upon their homestead declared on community property, title to the homestead vests absolutely in the wife upon the husband's death. Hence the allowance of a claim against the estate of the deceased husband has the effect only of suspending the statute of limitations as against the estate. It does not have that effect as against the surviving wife. She and her successor in interest may therefore plead the statute of limitations in bar of a foreclosure against them if not brought within the time prescribed by the general statute of limitations after the maturity of the mortgage: *Vandall v. Teague*, 142 Cal. 471, 474, 476; 76 Pac. Rep. 35.

15. Trusts. Deeds of trust.

(1) **In general.** Equity will enforce a trust against the personal representatives of a deceased trustee, and without the presentation

of the claim against the estate, when the identical trust property, or its product in a new form, can be traced into the estate, and so into the possession of the representatives. But a beneficiary who is unable to do this must rely upon the personal liability of the trustee, and, so relying, has only a claim against the estate that must be duly presented for allowance. Such a claim, however, is still based upon the trust, whatever that may have been. It had its origin in the trust, and depends for its validity upon the legality and sufficiency of the trust. The fact that the beneficiary is obliged to present his claim, and to look, like a general creditor, to the assets of the estate for payment, does not change the nature of his demand, which is still one for property due under a trust account; it merely has changed his remedy: *McGrath v. Carroll*, 110 Cal. 79, 83; 42 Pac. Rep. 466. Where deposits in bank are community property, and were made in the name of the husband, and it is found that these deposits would not pass to the wife, either as donee or beneficiary of a trust, they may be recovered, so far as they can be identified, without the presentation of a claim against the estate of the wife. The right to sue an executor or administrator in cases like this, without the presentation of a claim against his decedent's estate, arises from the fact that the specific thing sued for is not a part of decedent's estate, and the action will lie whenever the thing demanded can be identified in specie as the property of another: *Sprague v. Walton*, 145 Cal. 228, 235; 78 Pac. Rep. 645. In an action to enforce a trust against the executor of a deceased trustee, and the due presentation of a proper claim against the estate is averred in an amended and supplemental complaint, but which shows that such presentation and rejection was after the commencement of the action, the failure to present the claim before suit is a mere matter in abatement of the action, which is not favored, and is waived if not set up in answer either to the original or to the supplemental complaint in proper time: *Bemmerly v. Woodward*, 124 Cal. 568, 570, 575; 57 Pac. Rep. 561.

(2) **Presentation is necessary when.** If one of two executors of the estate of a deceased person dies, having in his hands a portion of the estate, which could not be identified as a trust fund, the other executor must present a claim against his estate, and if the time for such presentation has expired, the amount due from the deceased executor to the estate of the original decedent cannot be deducted from his distributive share of that estate: *Estate of Smith*, 108 Cal. 115, 122; 40 Pac. Rep. 1037. The beneficiary of a trust, who is unable to follow the trust funds through its mutations, is placed, upon the death of the trustee, in the position of a general creditor of the estate: *Byrne v. Byrne*, 133 Cal. 294, 299; 45 Pac. Rep. 536; *Lathrop v. Bampton*, 31 Cal. 17; 89 Am. Dec. 141. Whenever a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held, in its new form, liable to the

cestui que trust. No change of its state and form can divest it of such trust. So long as it can be identified, either as the original property of the cestui que trust, or as the product of it, equity will follow it; and the right of reclamation attaches to it until detached by the superior equity of a bona fide purchaser for a valuable consideration without notice. The substitute for the original thing follows the nature of the thing itself, so long as it can be ascertained to be such. But the right of pursuing it fails when the means of ascertainment fails. This is always the case where the subject-matter is turned into money, and mixed and confounded in a general mass of property of the same description: *Lathrop v. Bampton*, 31 Cal. 17, 22; 89 Am. Dec. 141. Hence where trust moneys held and used by a deceased person were so commingled that they are incapable of identification as a distinct fund, and no fruit or product thereof is susceptible of identification, the only remedy of a beneficiary is to present a claim for the money so held and used against the estate, and to sue thereon if the claim is rejected; and no suit against the executor or administrator can be maintained to enforce the trust without such presentation: *Orcutt v. Gould*, 117 Cal. 315, 316, 317; 49 Pac. Rep. 188; *Bemmerly v. Woodward*, 124 Cal. 568, 573; 57 Pac. Rep. 561; *Estate of Smith*, 108 Cal. 115, 122; 40 Pac. Rep. 1037; *McGrath v. Carroll*, 110 Cal. 79, 83; 42 Pac. Rep. 466; *Roach v. Caraffa*, 85 Cal. 436, 444; 25 Pac. Rep. 22; *Gunter v. Janes*, 9 Cal. 643. Nor can any action against the executor or administrator to recover a trust fund be maintained, unless it is shown that such fund, or some specific property or fund to which it can be traced, has come into the possession of the defendants: *Gillespie v. Winn*, 65 Cal. 429; 4 Pac. Rep. 411; *Rowland v. Madden*, 72 Cal. 17; 12 Pac. Rep. 226, 870.

(3) Recovery of specific property. Where recovery is sought of specific property alleged to have been held in trust by the decedent at the time of his death, a party seeking such recovery is not asking payment of the claim from the assets of the estate, and is therefore not required to present his claim as a creditor of the estate: *Brown v. Town of Sebastopol* (Cal.), 96 Pac. Rep. 363, 364. One who seeks to recover from the representatives of an estate specific property alleged to have been held in trust by the decedent at the time of his death is not a "creditor of the estate." He is not seeking payment of a claim from the assets of the estate, and is not required to present a claim as a creditor. His action is not founded upon a claim or demand against the estate: *Estate of Dutard*, 147 Cal. 253, 256; 81 Pac. Rep. 519. The presentation of a claim against the estate of a decedent is not required in order to maintain an action to recover property held in trust by him. It is only where payment of a claim is sought out of the assets of decedent's estate where such presentation is necessary. Property held by the decedent in trust is not a part of his estate, and cannot be applied in satisfaction of

his debts, or from a portion of his estate to be distributed by his heirs: *Elizalde v. Elizalde*, 137 Cal. 634, 642; 66 Pac. Rep. 369; 70 Pac. Rep. 861. If it appears that a decedent was the sole devisee of an estate that he received on distribution, subject to a parol trust to pay out of the estate a certain sum to the plaintiff, and that a claim against the estate of the decedent was presented by the plaintiff and allowed in part by the executors of the estate, and approved by the judge, a bill in equity will lie against the executors, without a previous demand upon them, to enforce the trust against the estate as to the remainder of the claim: *Walkerly v. Bacon*, 85 Cal. 137, 141; 24 Pac. Rep. 638. So where a trust fund received by a deceased husband in his lifetime, under the will of his deceased wife, was invested by him as directed by the decree of distribution of her estate, and was kept separate by the husband from his other estate, such fund was no part of his estate, and it was not necessary for the trustees of a Masonic lodge appointed to receive such fund to present a claim against the husband's estate, as a condition precedent to the recovery of such fund from his administrator. It is only where payment of a claim is sought out of the assets of decedent's estate that a presentation of a claim against the executor or administrator is necessary: *Kauffman v. Foster*, 3 Cal. App. 741, 743; 86 Pac. Rep. 1108.

(4) **Deeds of trust.** The right to execute powers of sale conferred by a deed of trust, and to apply the proceeds arising therefrom to the payment of debts and charges named in the deed, is not dependent upon a compliance with the statute prescribing the time within which claims must be presented against the estate of a deceased person: *More v. Calkins*, 95 Cal. 435, 438; 29 Am. St. Rep. 128; 30 Pac. Rep. 583. If a husband executes a deed of trust to secure money loaned to him, and empowers the trustees to sell the land for default in payment, and his wife afterwards declares a homestead upon the property, which is community property, and the husband dies before any sale is made by the trustees, and his widow becomes executrix of his estate, it is not necessary that any presentation of the debt as a claim against the estate of the deceased husband be made as a prerequisite to the execution of the power of sale. Such deed of trust is not a lien or encumbrance requiring presentation or allowance. It passed title to the trustees, and a sale by them under the power would extinguish the homestead which was subject thereto. In legal effect, a deed of trust does not create a lien or encumbrance on the land, but conveys the legal title to the trustee, and if the homestead applies only to the title vested in one or both of the spouses, and does not affect titles vested in third persons, it follows that the legal title thus vested in the trustee forms no part of a subsequently declared homestead, and that the deed of trust or the title of the trustee is not a subsisting lien or encumbrance upon

the homestead interest: *Webber v. McCleverty*, 149 Cal. 316, 318, 320; 86 Pac. Rep. 706, 708, 709. See, also, *Athern v. Ryan*, 36 Cal. Dec. 416, 417 (Nov. 20, 1908). In Colorado, where a claim against the estate of a decedent is secured by a deed of trust, it is error for the court, in entering judgment, to prohibit the claimant from proceeding to sell the property covered by his lien. The statute of non-claims does not apply to a claim secured by a deed of trust; and, after the expiration of one year, the only condition precedent of the claimant's right to a foreclosure is the allowance of his claim: *Townsend v. Thompson*, 24 Col. 411; 51 Pac. Rep. 433.

16. Appeal.

(1) **In general.** In the trial of an action appealed by an administrator from the decision of the probate court in allowing a claim against an estate, the district court sits as a court of probate. In such a case it is incumbent upon the plaintiff to establish his demand by competent testimony, the same as would be required of him in the probate court: *Phillips v. Faherty*, 9 Kan. App. 380; 58 Pac. Rep. 801. On appeal to the district court from an order of the probate court allowing a claim against the estate of a deceased person, where the case is tried on the appeal upon the transcript from the probate court, without pleadings being filed, a promissory note purporting to have been given by the deceased in his lifetime does not prove itself, the execution thereof not having been denied under oath, under the provisions of the statute: *Haffamier v. Hund*, 10 Kan. App. 579; 63 Pac. Rep. 659. To give the probate court jurisdiction to hear and determine a claim, it is necessary that such claim be verified. If it is not verified, the claimant cannot, on appeal, supply the defect: *Clancey v. Clancey*, 7 N. M. 405; 37 Pac. Rep. 1105. An administrator's appeal from the order of a county court, allowing a claim against an estate, should be dismissed, where the order recites that the administrator "was present, took part in the examination of witnesses, but stated that he declined to regularly appear in person or by attorney": *In re Carver's Estate*, 10 S. D. 609; 74 N. W. Rep. 1056. Objections to a claim against the estate of a decedent, not raised in the court below, cannot be raised for the first time in the supreme court: *Colman v. Woodsworth*, 28 Cal. 567, 569; *Hentsch v. Porter*, 10 Cal. 555; *Bank of Stockton v. Howland*, 42 Cal. 129, 134. A judgment for defendant in an action on a claim against an estate will not be reversed on appeal, though based on a ground not stated in the pleadings, where the complaint does not state a cause of action, and it is apparent that it cannot be amended to do so: *Brown v. Daly*, 33 Mont. 523; 84 Pac. Rep. 883, 884. If objection is made that a claim against an estate was not properly presented, the objection should be ruled upon by the court at some time during the trial, in order that the required proof may be supplied, if necessary, and a failure to make such ruling is reversible error: *Thurber v.*

Miller, 14 S. D. 352; 85 N. W. Rep. 600, 601. An objection to the recovery on a claim against the estate of a deceased person on the ground that it was not presented to the executor for allowance cannot be made for the first time in the supreme court, nor on motion for a new trial: Clayton v. Dinwoodey (Utah), 93 Pac. Rep. 723, 727. While proof of the presentation of a claim is not a fact essential to the validity of a judgment, where any issue has been made upon that question, failure to make proof is ground for reversal, if an objection is made in the trial court, and an exception is properly preserved: Falkner v. Hendy, 107 Cal. 49; 40 Pac. Rep. 49; Frazier v. Murphy, 133 Cal. 91, 95; 65 Pac. Rep. 91.

(2) **Right of appeal. Jurisdiction.** While an appeal does not lie from a decree establishing due notice to creditors, as such, it is otherwise if such decree is embraced in a decree settling the final account of the executor and making final distribution of the estate, and the appellant, in terms, appeals from such decree: Estate of Wilson, 147 Cal. 108; 81 Pac. Rep. 313, 314. An erroneous judgment against the estate of a decedent may be modified upon appeal: Preston v. Knapp, 85 Cal. 559; 24 Pac. Rep. 811; Moore v. Russell, 133 Cal. 297, 301; 85 Am. St. Rep. 166; 65 Pac. Rep. 624; and the judgment, as modified according to directions, is a final adjudication of the rights of the parties to the action, and the lower court is without jurisdiction to make any further judgment or order: Vance v. Smith, 132 Cal. 510, 511; 64 Pac. Rep. 1078. Where a judgment against executors established a claim against the estate of a decedent, the subsequent affirmance of that judgment in the appellate court would not create a new or different judgment, nor impose upon the plaintiff therein the necessity of "filing among the papers of the estate in court" a certified copy of the transcript of the docket of judgment on the remittitur from the appellate court: Estate of Kennedy, 93 Cal. 16, 28 Pac. Rep. 839. A judgment against the estate of a decedent will not be reversed for a mere informality in the presentation of the claim: Smith v. Furnish, 70 Cal. 424, 427; 12 Pac. Rep. 392. An administrator of the estate of a deceased person, who seeks to appeal from an allowance of a demand against the estate, must give notice of such appeal, either during the term at which the decision is made or within ten days after the date of the allowance: McIntosh v. Wheeler, 58 Kan. 324; 49 Pac. Rep. 77. An order disallowing a claim against the estate of a decedent is not appealable. The remedy of the claimant is exclusively by suit: In re Barker's Estate, 26 Mont. 279; 67 Pac. Rep. 941; Wilkins v. Wilkins, 1 Wash. 87; 23 Pac. Rep. 411. If the claim of an executor or administrator against the estate is disallowed, his only remedy is to resign his trust, and sue like any other creditor: Wilkins v. Wilkins, 1 Wash. 87; 23 Pac. Rep. 411, 412; and a person, in his representative capacity as executor or administrator, cannot appeal from an order disallow-

ing his individual claim against the estate: *In re Barker's Estate*, 26 Mont. 279; 67 Pac. Rep. 941, 943. Where trustees are not named in the will, and claim no rights under it, and have presented no claim against the estate, they are not "aggrieved" persons, and have no right of appeal from a decree distributing the funds of the estate to the heirs: *Estate of Burdick*, 112 Cal. 387, 396; 44 Pac. Rep. 734. Where the statute prohibits the county court from allowing the claim of an executor or administrator, unless it has been presented to the county judge for allowance before it is barred by the statute of limitations, and a claim is not so presented, the court exceeds its jurisdiction in allowing the executor or administrator credit for the claim on final settlement, and its order allowing the claim is reviewable on a writ of review: *Farrow v. Nevin*, 44 Or. 496; 75 Pac. Rep. 711, 713; but matters which were properly within the jurisdiction of the county court will not be disturbed on such writ, although the determination of the county court was erroneous: *Farrow v. Nevin*, 44 Or. 496; 75 Pac. Rep. 711, 713. In New Mexico, the general administration of an estate in the probate court is in the nature of a proceeding in equity, and an appeal from the decision of such court allowing or disallowing a claim is an appeal to the district court sitting as a court of equity, and the action of the latter may be reviewed in the supreme court on appeal: *Clancey v. Clancey*, 7 N. M. 405; 37 Pac. Rep. 1105, 1106. In Nevada, a person whose claim against the estate of a decedent has been rejected may institute a suit thereon in which there are adverse parties, and, under the statutory rules, reserve all questions affecting his rights for review in the appellate court. Hence, where he has made application to the court for leave to amend a defective affidavit to a claim, which application is refused, an appeal from the order refusing permission to amend will be dismissed: *In re Powning's Estate*, 25 Nev. 428; 62 Pac. Rep. 235, 236.

PART VIII.
SALES AND CONVEYANCES OF PROPERTY
OF DECEDENTS.

CHAPTER I.

SALES IN GENERAL.

- § 482. Estate is chargeable with debts. No priority.
- § 483. No sales valid, unless made under order of court.
- § 484. Petitions for orders of sale.
- § 485. But one petition, order, and sale must be had when.
- § 486. Form. Petition for order of sale of all the property of the estate at one sale.
- § 487. Form. Order of sale of all property of estate at one sale.
- § 488. Form. Objections to sale of decedent's property.

§ 482. Estate is chargeable with debts. No priority. All the property of a decedent shall be chargeable with the payment of the debts of the deceased, the expenses of administration, and the allowance to the family, except as otherwise provided in this code and in the Civil Code. And the said property, personal and real, may be sold as the court may direct, in the manner prescribed in this chapter. There shall be no priority as between personal and real property for the above purposes. **Kerr's Cyc. Code Civ. Proc., § 1516.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1763.
- Idaho.** Code Civ. Proc. 1901, sec. 4156.
- Montana.*** Code Civ. Proc., sec. 2640.
- North Dakota.** Rev. Codes 1905, § 8093.
- Oklahoma.** Rev. Stats. 1903, sec. 1641.
- South Dakota.** Probate Code 1904, § 192.
- Wyoming.*** Rev. Stats. 1899, sec. 4768.

(789)

§ 483. **No sales valid, unless made under order of court.** No sale of any property of an estate of a decedent is valid unless made under order of the superior court, except as otherwise provided in this chapter. All sales must be under oath reported to and confirmed by the court before the title to the property sold passes. **Kerr's Cyc. Code Civ. Proc., § 1517.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 830, p. 316.
- Arizona.*** Rev. Stats. 1901, par. 1764.
- Idaho.*** Code Civ. Proc. 1901, sec. 4158.
- Montana.*** Code Civ. Proc., sec. 2642.
- Nevada.** Comp. Laws, sec. 2909.
- North Dakota.** Rev. Codes 1905, § 8127.
- Oklahoma.** Rev. Stats. 1903, sec. 1642.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1168.
- South Dakota.** Probate Code 1904, § 193.
- Utah.*** Rev. Stats. 1898, sec. 3878.
- Washington.** Pierce's Code, § 2557.
- Wyoming.*** Rev. Stats. 1899, sec. 4769.

§ 484. **Petitions for orders of sale.** All petitions for orders of sale must be in writing, setting forth the facts showing the sale to be necessary, and, upon the hearing, any person interested in the estate may file his written objections, which must be heard and determined. A failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing the necessity be stated in the order directing the sale. **Kerr's Cyc. Code Civ. Proc., § 1518.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 830, p. 316.
- Arizona.*** Rev. Stats. 1901, par. 1765.
- Colorado.** 3 Mills's Ann. Stats., sec. 4756.
- Idaho.*** Code Civ. Proc. 1901, sec. 4159.
- Montana.*** Code Civ. Proc., sec. 2643.
- Nevada.** Comp. Laws, sec. 2910.
- North Dakota.** Rev. Codes 1905, § 8127.
- Oklahoma.*** Rev. Stats. 1903, sec. 1643.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1168.

South Dakota.* Probate Code 1904, § 194.

Washington. Pierce's Code, § 2559.

Wyoming.* Rev. Stats. 1899, sec. 4770.

§ 485. But one petition, order, and sale must be had when.

When it appears to the court that the estate is insolvent, or that it will require a sale of all the property of the estate, of every character, to pay the family allowance, expenses of administration, and debts, there need be but one petition filed, but one order of sale made, and but one sale had, except in the case of perishable property, which may be sold as provided in section fifteen hundred and twenty-two. The court, when a petition for the sale of any property for any of the purposes herein named is presented, must inquire fully into the probable amount required to make all such payments, and if there be no more estate than sufficient to pay the same, may require but one proceeding for the sale of the entire estate. In such case the petition must set forth substantially the facts required by section fifteen hundred and thirty-seven. **Kerr's Cyc. Code Civ. Proc., § 1519.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.** Rev. Stats. 1901, par. 1766.
- Idaho.*** Code Civ. Proc. 1901, sec. 4160.
- Montana.** Code Civ. Proc., sec. 2644.
- North Dakota.** Rev. Codes 1905, § 8128.
- Oklahoma.** Rev. Stats. 1903, sec. 1644.
- South Dakota.** Probate Code 1904, § 195.
- Utah.** Rev. Stats. 1898, sec. 3879.
- Wyoming.** Rev. Stats. 1899, sec. 4771.

§ 486. Form. Petition for order of sale of all the property of the estate at one sale.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.] }

To the Honorable the ____² Court of the County³ of ____,
State of ____.

The petition of ____, administrator⁴ of the estate of
____, deceased, respectfully shows:

That said _____ died intestate,⁸ on or about the _____ day of _____, 19____, in the county⁶ of _____, state of _____, being at the time of his death, a resident of the said county⁷ of _____; and that he left estate, consisting of both real and personal property, in said state;

That your petitioner is the duly appointed, qualified, and acting administrator⁸ of the estate of _____, deceased; and

That your petitioner has made and returned to this court a true inventory and appraisement of all the estate of the said deceased which has come to his knowledge, and also published notices to the creditors of said decedent as required by law.

All of which will more fully appear by the papers on file in the clerk's office and the records of said court, in the matter of said estate, to which reference is hereby made.

That the following described personal property has come into the hands of your petitioner: _____;⁹ valued at _____ dollars (\$_____);

That _____¹⁰ of said personal property has been disposed of, as follows, to wit: _____;¹¹

That _____¹² remains to be disposed of;

That the debts outstanding against the said deceased, as far as can be ascertained or estimated, amount, at this date, to the sum of _____ dollars (\$_____), and are fully set forth in Exhibit A, hereunto annexed and made a part of this petition;

That the amount due upon the family allowance is the sum of _____ dollars (\$_____);

That the amount that will be due upon said family allowance, after the same shall have been in force for one year, is the sum of _____ dollars (\$_____);

That the debts, expenses, taxes, and charges of administration already accrued amount to the sum of _____ dollars (\$_____), and are fully set forth in Exhibit B, hereunto annexed and made a part of this petition;

That the debts, expenses, and charges of administration that will or may accrue during the administration are estimated by your petitioner at the sum of _____ dollars (\$_____),

and are set forth in Exhibit C, hereunto annexed and made a part of this petition;

That the total amount of debts outstanding against the deceased, of the amount due and to become due upon the family allowance, of the debts, expenses, and charges of administration already accrued and remaining unpaid, state and county taxes, and of the estimated debts, expenses, and charges of administration that will or may accrue is _____ dollars (\$_____);

That a full description of all the real estate of which the said decedent died seised, or in which he had any interest, or in which the said estate has acquired any interest, and the condition and the value of the _____¹³ said real estate are set forth in Exhibit D, hereunto annexed and made a part of this petition;

That all of said real estate was acquired by said deceased after marriage,¹⁴ and is therefore community¹⁵ property;

That the following are the names and ages of the heirs of the said deceased, to wit, _____ and _____;

That it is necessary¹⁶ to sell all of the property of the estate, of every character, to pay the family allowance, expenses of administration, and the debts of the estate.

Wherefore petitioner prays for an order directing that all of the property of said estate, of every character, be sold at public sale, and that only one sale be had.

Dated _____, 19____.

_____, Administrator¹⁷ and Petitioner.

[Add usual verification.]¹⁸

Exhibit A.

The following is an itemized statement of all claims presented against the estate, whether allowed and approved, and an estimate of debts outstanding:

Name of Claimant.	Nature of Claim.	Amount.
_____	_____	\$_____
_____	_____	_____

Total		\$_____

Exhibit B.

The following is a statement of debts, expenses, taxes, and charges of administration, already accrued:

Paid clerk's fees, as per voucher No. 1.....	\$ _____
Paid appraisers, as per voucher No. 2.....	_____
Paid printer, as per voucher No. 3.....	_____
Paid probate tax, as per voucher No. 4.....	_____
Paid taxes for the year 19—, as per voucher No. 5..	_____
Total	\$ _____

Exhibit C.

The following is an estimate of the debts, expenses, and charges of administration that will or may accrue:

Attorneys' fees for administrator	\$ _____
Collateral inheritance tax	_____
Commissions upon appraised value of estate	_____
Other expenses	_____
Total	\$ _____

Exhibit D.

The following is a description of each parcel of real estate, with a statement of its condition, whether improved or unimproved, amount of rents received, etc., and its value: _____. Total value,¹⁹ \$_____.

Explanatory notes. 1. Give file number. 2. Title of court, or name of judge. 3. Or, City and County. 4. Or, executor of the last will and testament of, etc. 5. Or according to the fact. 6, 7. Or, city and county. 8. Or, executor, etc., as the case may be. 9. Give description and value. 10. A portion, or all. 11. State how. 12. As, part thereof, stating it, with value; or, that none of said property. 13. Respective portions and lots of. 14. Or according to the fact. 15. Or, separate property, as the case may be. 16. To show this necessity, the footings of the exhibits must show that the debts, etc., are equal to or greater than the assets. 17. Or, executor. 18. Although section 1519 of California Code of Civil Procedure does not require a verified petition, yet where real estate is to be sold, the petition should be verified as required by section 1537 of the same code. 19. The value of each parcel should be stated separately and the total given at foot of exhibit.

§ 487. Form. Order of sale of all property of estate at one sale.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

____, the administrator² of the estate of _____, deceased, having presented his petition for the sale of all of the property of said estate, of every character, both real and personal; and it appearing to the court that due notice of the hearing of said petition has been given as required by law, the court thereupon finds that it will require a sale of all the property of the estate, of every character, to pay the family allowance, expenses of administration, and debts.

It is therefore ordered by the court, That said _____, administrator³ as aforesaid, after due notice given, proceed to sell the whole of the personal property⁴ of said estate, and the whole of the real property thereof,⁵ at public auction, to the highest bidder, upon the following terms, to wit, for cash, in gold coin of the United States of America; and that but one sale be had for the entire estate.

The personal property to be sold as aforesaid is described as follows: _____.

The following is a description of the real estate to be sold under said order: _____.

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2, 3. Or, executor of the last will, etc. 4. An order for the sale of perishable property may be made without notice. 5. Real property should not be sold without complying with sections 1537-1544 of the Code of Civil Procedure.

§ 488. Form. Objections to sale of decedent's property.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

A petition for an order of sale of the property of _____, deceased, having been filed by _____, administrator² of the estate of said decedent, _____, one of the heirs at law³ of said deceased, now comes and files his written objections to said petition, and alleges as follows:

That it is not true, as alleged in said petition, that it is for the best interests of said estate that the property described in such application be sold, because ——; *

That the rents and interest, money due the estate, and money on hand, are more than sufficient to pay all debts of the estate and the expenses of administration.

The contestant therefore asks that said petition be denied.

——, Attorney for Contestant.

——, Contestant.

- Explanatory notes.** 1. Give file number. 2. Or, executor, etc.
3. Residuary legatee, creditor, or other person interested in said estate.
4. State the reasons.

CHAPTER II.

SALES OF PERSONAL PROPERTY.

- § 489. Perishable and depreciating property to be sold.
- § 490. Form. Petition for order to sell perishable and other personal property likely to depreciate in value.
- § 491. Form. Order to sell perishable property.
- § 492. Form. Return of sale of perishable property.
- § 493. Form. Exhibit A. Affidavit of posting notice of administrator's sale of perishable property.
- § 494. Form. Order confirming sale of perishable property.
- § 495. Order to sell personal property.
- § 496. Partnership interests and choses in action, how sold.
- § 497. What property to be sold first.
- § 498. Sale of personal property. How to be made.
- § 499. Sale of personal property, for interest of estate, on hearing of application for sale of real property.
- § 500. Form. Petition for order of sale of personal property.
- § 501. Form. Order to show cause on petition for the sale of personal property.
- § 502. Form. Notice of hearing of petition for sale of personal property at private sale.
- § 503. Form. Objections to sale of personal property.
- § 504. Form. Notice of administrator's sale of personal property.
- § 505. Form. Order for sale of personal property.
- § 506. Form. Return of sale of personal property, and petition for confirmation and approval.
- § 507. Form. Exhibit A. Affidavit of posting notices of administrator's sale of personal property.
- § 508. Form. Exhibit B. Affidavit of publication of notice of administrator's sale of personal property.
- § 509. Form. Order approving sales of personal property.
- § 510. Form. Short form of order confirming sale of personal property.

§ 489. Perishable and depreciating property to be sold.

At any time after receiving letters, the executor, administrator, or special administrator may apply to the court or judge and obtain an order to sell perishable and other personal property likely to depreciate in value, or which will incur loss or expense by being kept, and so much other prop-

sonal property as may be necessary to pay the allowance made to the family of the decedent. The order for the sale may be made without notice; but the executor, administrator, or special administrator is responsible for the property, unless, after making a sworn return, and on a proper showing, the court shall approve the sale. **Kerr's Cyc. Code Civ. Proc.**, § 1522.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1767.

Idaho.* Code Civ. Proc. 1901, sec. 4161.

Montana.* Code Civ. Proc., sec. 2650.

Nevada. Comp. Laws, sec. 2911.

North Dakota.* Rev. Codes 1905, § 8129.

Oklahoma.* Rev. Stats. 1903, sec. 1647.

South Dakota.* Probate Code 1904, § 196.

Utah. Rev. Stats. 1898, sec. 3885.

Washington. Pierce's Code, § 2560.

Wyoming.* Rev. Stats. 1899, sec. 4772.

§ 490. **Form. Petition for order to sell perishable and other personal property likely to depreciate in value.**

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.] }

To the Honorable the ____² Court of the County³ of ____, State of ____.

Your petitioner respectfully represents, That he is the duly appointed, qualified, and acting administrator⁴ of the estate of ____, deceased;

That there is belonging to said estate, at ____,⁵ in the county⁶ of ____, one thousand sacks of potatoes and one hundred barrels of apples;⁷ that said property is of a perishable nature;⁸ and that it is necessary, and for the best interest of said estate, that such property be immediately sold;

That there is belonging to said estate, at ____,⁹ in the said county¹⁰ of ____, two thousand sacks of onions and five hundred head of sheep,¹¹ all of which property will be liable to depreciate in value if not sold without delay;¹² and that

it is for the best interest of said estate that such property be sold.

Wherefore your petitioner prays for an order, made without notice being given, authorizing him to sell all of said property hereinbefore described, and that such other or further order may be made as is meet in the premises.

_____, Attorney for Petitioner. _____, Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4. Or, special administrator; or, that on the _____ day of _____, 19____, letters testamentary of the last will and testament of said deceased were issued to your petitioner, and that he is now the duly qualified and acting executor of said will. 5. Give name of place. 6. Or, city and county. 7. Or, other property of a perishable nature. 8. State cause, briefly, of immediate danger of diminution in value. 9. Give location. 10. Or, city and county. 11. Or other personal property likely to depreciate in value. 12. If keeping and care is expensive, state that fact, or any other fact likely to cause the property to depreciate in value.

§ 491. Form. Order to sell perishable property.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Now comes _____, the administrator² of said estate, and presents his application for an order to sell personal property of the estate; and it appearing therefrom, and from proofs taken, that the following described personal property belonging to said estate is by nature perishable; that it is likely soon to depreciate in value; and that the estate will incur loss and expense by said property being kept, —

It is ordered by the court, That the said administrator³ proceed to sell at public auction,⁴ upon _____⁵ days' notice, in the manner required by law, all of the following described personal property, to wit: _____.⁶

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. Or, executor of the last will and testament of _____, deceased. 3. Or, executor. 4. Or, at private sale, without notice, all the following described personal property, to wit (giving description). 5. As prescribed by the court or judge. 6. Give description.

§ 492. Form. Return of sale of perishable property.

[Title of court.]

[Title of proceeding.]

{ No. ____¹ Dept. No. ____
[Title of form.] }To the Honorable the ____ Court of the County² of ____.

The undersigned, ____, administrator³ of the estate of ____, deceased, respectfully makes the following return of his proceedings under the order of this court dated the ____ day of ____, 19__, authorizing said administrator⁴ to sell certain personal property of said estate, and reports as follows:

That, in pursuance of said order of sale, he gave public notice of the time and place of sale, for at least ten days, by posting⁵ notices thereof, as shown by affidavit Exhibit A, hereto annexed and made part hereof;

That, at the time and place specified in said notice, to wit, ____,⁶ he caused to be sold at public auction⁷ the property in said order and hereinafter described, to the persons and for the sums hereinafter shown, to wit: ____;⁸

____, Administrator⁹ of the Estate of ____, Deceased.

Subscribed and sworn to before me this ____ day of ____, 19____. _____, Notary Public, etc.

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Or, executor of the last will. 4. Or, executor. 5. Or, publishing. 6. Give time and place of sale. 7. Or, sold at private sale. 8. Give names and sums. 9. Or, executor.

§ 493. Form. Exhibit A. Affidavit of posting notice of administrator's sale of perishable property.

[Title of court.]

[Title of proceeding.]

{ No. ____¹ Dept. No. ____
[Title of form.] }

State of ____,
County² of ____, } ss.

____, being duly sworn, says, That on the ____ day of ____, 19____, he posted full, true, and correct copies of the annexed notice of the time and place of the sale therein mentioned, in three of the most public places in said county,³ to wit, one copy at ____,⁴ one at ____,⁵ and one at ____.⁶

Subscribed and sworn to before me this ____ day of
____, 19____.

Explanatory notes. 1. Give file number. 2, 3. Or, City and County.
4-6. State place at which each was posted.

**§ 494. Form. Order confirming sale of perishable prop-
erty.**

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Comes now ____, the administrator² of said estate, and presents his sworn report of the sale of perishable property under the order hereinbefore made, showing that in pursuance of said order, and after giving notice as prescribed by law and by the order of the court, he sold said property for the aggregate sum of ____ dollars (\$____), and he asks that said sales be confirmed. And the court, after hearing the evidence, approves said sales.

It is therefore ordered by the court that said sales be confirmed. _____, Judge of the ____ Court.

Dated ____, 19____.

Explanatory notes. 1. Give file number. 2. Or, executor of the last will and testament of ____, deceased.

§ 495. Order to sell personal property. If claims against the estate have been allowed, and a sale of property is necessary for their payment, or for the expenses of administration, or for the payment of legacies, the executor or administrator may apply for an order to sell so much of the personal property as may be necessary therefor. Upon filing his petition, notice of at least five days must be given of the hearing of the application, either by posting notices or by advertising. He may also make a similar application from time to time, so long as any personal property remains in his hands, and sale thereof is necessary. If it appear for the best interests of the estate, he may, at any time after filing the inventory in like manner, and after giving like notice, apply for and obtain an order to sell the whole of the personal property belonging to the estate, whether neces-

sary to pay debts or not. **Kerr's Cyc. Code Civ. Proc.**, § 1523.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 831, p. 317.

Arizona.* Rev. Stats. 1901, par. 1768.

Idaho. Code Civ. Proc. 1901, sec. 4162.

Montana.* Code Civ. Proc., sec. 2651.

Nevada. Comp. Laws, sec. 2911.

North Dakota. Rev. Codes 1905, § 8130.

Oklahoma. Rev. Stats. 1903, sec. 1648.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1169.

South Dakota.* Probate Code 1904, § 197.

Utah. Rev. Stats. 1898, secs. 3877, 3880, 3885.

Washington. Pierce's Code, § 2561.

Wyoming. Rev. Stats. 1899, sec. 4773.

§ 496. **Partnership interests and choses in action, how sold.** Partnership interests or interests belonging to any estate by virtue of any partnership formerly existing, interest in personal property pledged, and choses in action, may be sold in the same manner as other personal property, when it appears to be for the best interest of the estate. Before confirming the sale of any partnership interest, whether made to the surviving partner or to any other person, the court or judge must carefully inquire into the condition of the partnership affairs, and must examine the surviving partner, if in the county and able to be present in court. **Kerr's Cyc. Code Civ. Proc.**, § 1524.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1769.

Idaho.* Code Civ. Proc. 1901, sec. 4163.

Montana.* Code Civ. Proc., sec. 2652.

North Dakota.* Rev. Codes 1905, § 8131.

Oklahoma.* Rev. Stats. 1903, sec. 1649.

South Dakota.* Probate Code 1904, § 198.

Utah. Rev. Stats. 1898, sec. 3885.

Wyoming.* Rev. Stats. 1899, sec. 4774.

§ 497. **What property to be sold first.** If it appear that a sale is necessary for the payment of debts or the family allowance, or for the best interest of the estate and the

persons interested in the property to be sold, whether it is or is not necessary to pay the debts or family allowance, the court or judge must order it to be made. In making orders and sales for the payment of debts or family allowance, such articles as are not necessary for the support and subsistence of the family of the decedent, or are not specially bequeathed, must be first sold, and the court or judge must so direct. **Kerr's Cyc. Code Civ. Proc., § 1525.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, secs. 831, 833, p. 317.

Arizona.* Rev. Stats. 1901, par. 1770.

Idaho. Code Civ. Proc. 1901, sec. 4164.

Montana.* Code Civ. Proc., sec. 2653.

Nevada. Comp. Laws, sec. 2911.

North Dakota.* Rev. Codes 1905, § 8122.

Oklahoma.* Rev. Stats. 1903, sec. 1650.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 1169, 1171.

South Dakota.* Probate Code 1904, § 199.

Utah. Rev. Stats. 1898, secs. 3877, 3885.

Washington. Pierce's Code, § 2562.

§ 498. Sale of personal property. How to be made. The sale of personal property must be made at public auction for such money or currency as the court may direct, and after public notice given for at least ten days by notices posted in three public places in the county, or by publication in a newspaper, or both, containing the time and place of sale, and a brief description of the property to be sold, unless for good reason shown the court, or a judge thereof, orders a private sale, or a shorter notice. Public sales of such property must be made at the court-house door, or at the residence of the decedent, or at some other public place; but no sale shall be made of any personal property which is not present at the time of sale, unless the court otherwise order. **Kerr's Cyc. Code Civ. Proc., § 1526.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, secs. 832, 833, p. 317.

Arizona.* Rev. Stats. 1901, par. 1771.

Idaho. Code Civ. Proc. 1901, sec. 4165.

Kansas. Gen. Stats. 1905, § 2945.

Montana. Code Civ. Proc., sec. 2654.

Nevada. Comp. Laws, secs. 2912, 2913.

North Dakota. Rev. Codes 1905, § 8133.

Oklahoma. Rev. Stats. 1903, sec. 1651.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 1170, 1171.

South Dakota. Probate Code 1904, § 200.

Utah. Rev. Stats. 1898, sec. 3886.

Washington. Pierce's Code, §§ 2563, 2564.

Wyoming. Rev. Stats. 1899, sec. 4775.

§ 499. **Sale of personal property, for interest of estate, on hearing of application for sale of real property.** Whenever it appears to the court on any hearing of an application for a sale of real property, that it would be for the interest of the estate that personal property of the estate, or some part of such property, should first be sold, the court may decree the sale of said personal property, or any part of it, and the sale thereof shall be conducted in the same manner as if the application had been made for the sale of such personal property in the first instance. **Kerr's Cyc. Code Civ. Proc., § 1527.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1873.

Idaho.* Code Civ. Proc. 1901, sec. 4157.

Montana.* Code Civ. Proc., sec. 2797.

North Dakota.* Rev. Codes 1905, § 8201.

Oklahoma.* Rev. Stats. 1903, sec. 1737.

South Dakota.* Probate Code 1904, § 289.

Utah.* Rev. Stats. 1898, sec. 3887.

Wyoming.* Rev. Stats. 1899, sec. 4825.

§ 500. **Form. Petition for order of sale of personal property.**

[Title of court.]

[Title of estate.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

To the Honorable ____, Judge of the ____ Court of the County of ____,² State of ____.

The petition of ____ respectfully shows:

That he is the duly appointed, qualified, and acting administrator of the estate³ of ____, deceased;

That claims against said estate have been allowed,⁴ amounting to _____ dollars (\$_____), and a sale of personal property of said estate is necessary to provide for the payment thereof;

That the following described personal property, belonging to said estate, can be sold for that purpose, to the best advantage for the estate, to wit, _____.⁵

Wherefore petitioner prays that, after due notice given of the hearing hereof, an order be made authorizing and directing your petitioner to sell the above-described property, and for such other or further order as may be meet.

Dated _____, 19____.

_____, Petitioner.

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Or, executor of the last will. 4. Or, expenses of administration have been incurred and are unpaid; or, legacies are provided for in said will, etc. 5. Give description.

§ 501. Form. Order to show cause on petition for the sale of personal property.

[Title of court.]

[Title of estate.]

{ No. _____.¹ Dept. No. _____
[Title of form.]

The petition of _____, administrator² of the estate of _____, deceased, praying for an order to sell so much of the personal property of said estate as may be necessary for the payment of claims against said estate, and for the payment of expenses of administration, and the allowance to the family of said deceased, having been presented to this court, and it appearing that such sale is necessary for said purposes, —

It is ordered, That all persons interested in said estate appear before the judge of the court, at the court-room thereof, at _____,³ in said county⁴ and state, on the _____ day of _____, 19____, at the hour of _____ o'clock in the forenoon⁵ of said day, and then and there show cause, if any they have, why such order should not be made.

And it is further ordered, That a copy of this order be published in the _____, a newspaper printed in said county⁶

and state, for at least five days ⁷ previous to the time set for the hearing of said order.⁸

Dated —, 19—, —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, executor of the last will, etc. 3. State location of court-room. 4. Or, city and county. 5. Or, afternoon. 6. Or, city and county. 7. Or other time prescribed by statute. 8. Or, that notice be given in such other manner as the court may direct.

§ 502. Form. Notice of hearing of petition for sale of personal property at private sale.

[Title of court.]

[Title of estate.] { No. —.¹ Dept. No. —
[Title of form.]

Notice is hereby given, That —, the executor ² of the last will and testament of —, deceased, has filed with the clerk of this court a petition praying that said court grant its order directing the sale, at private sale,³ of certain personal property belonging to the estate of said decedent, and described in said petition; and that —,⁴ the — day of —, 19—, at — o'clock in the forenoon,⁵ at the court-room of said court, at —,⁶ in said county ⁷ of —, state of —, has been set for hearing said petition, when and where any and all persons interested may appear and show cause, if any they have, why the said petition should not be granted.

—, Clerk.
Dated —, 19—. By —, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Or, administrator of the estate, etc. 3. Or, at public auction, according to the fact. 4. Day of week. 5. Or, afternoon. 6. Give location of court-room. 7. Or, city and county.

§ 503. Form. Objections to sale of personal property.

[Title of court.]

[Title of estate.] { No. —.¹ Dept. No. —
[Title of form.]

Now comes —, and alleges that she is the widow of said —, deceased, and that said deceased left surviving him

three minor children, to wit, —, three years of age; —, five years of age; and —, seven years of age;

That she objects to the granting of the petition of —, administrator ² of the estate of —, deceased, filed herein on the — day of —, 19—, praying for an order authorizing him to sell the personal property belonging to said estate, for the following reasons: —;

That a certain portion of said property, which said administrator seeks to sell, which is hereinafter described, and which is mentioned in the inventory made and filed in said estate, is exempt from execution; ³ that the same ought to be set apart by this court for the use of said widow and children; and that said widow has already filed her petition herein, praying that the same be so set apart;

That the property so claimed as exempt, and to the sale of which the undersigned objects, is particularly described as follows, to wit: —.⁴

Wherefore she objects to an order that the property hereinbefore described, or any part thereof, be sold, for any purpose, and asks that it be set apart for the use and benefit of the family. —, Widow of said Deceased.

—, Attorney for Widow.

Explanatory notes. 1. Give file number. 2. Or, executor of the last will and testament, etc. 3. Or, state any other reasons why the sale should not be made. 4. Give description.

§ 504. Form. Notice of administrator's sale of personal property.

[Title of court.]

[Title of estate.]

{ No. —.¹ Dept. No. —.
[Title of form.]

Notice is hereby given, That, pursuant to an order of the above court made and entered on the — day of —, 19—, in the above-entitled proceeding, the undersigned, administrator ² of said estate, will sell at public auction,³ to the highest bidder, for cash, on —,⁴ the — day of —, 19—, at — o'clock in the forenoon ⁵ of that day,

at _____,⁶ the following described personal property, to wit: _____.⁷

Said sale will be made subject to confirmation by the court.

Dated _____, 19____.

_____, Administrator of the Estate of _____, Deceased.

Explanatory notes. 1. Give file number. 2. Or, executor of the last will. 3. Or, private sale; and if at private sale, state time to which and place at which bids will be received. 4. Give day of week. 5. Or, afternoon. 6. Give place of sale. 7. Give description.

§ 505. Form. Order for sale of personal property.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.]

Comes now _____, the administrator² of said estate, and presents his petition for the sale of certain personal property of said estate, and it appearing to the court that due notice of the hearing of said petition has been given by posting notices³ as required by law, and that the said sale is for the best interests of said estate,⁴—

It is ordered by the court, That said _____ proceed to sell at public auction, after the notice and in the manner as provided by law, all the following personal property, to wit: _____.⁵

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Or, by advertising. 4. Or, is necessary for the payment of claims, expenses of administration, or legacies. 5. Describe the property.

§ 506. Form. Return of sale of personal property, and petition for confirmation and approval.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.]

To the Honorable the _____² Court of the County³ of _____, State of _____.

The undersigned, _____, administrator⁴ of the estate of _____, deceased, respectfully returns the following account

of sales made by him under the order of the judge of this court, dated on the _____ day of _____, 19____, and reports as follows, to wit:

That in pursuance of said order of sale he gave public notice for at least ten days, by posting notices in three public places in said county,⁵ in which notices were specified the time and place of sale, as will more fully appear by the affidavit marked "Exhibit A," hereunto annexed and made a part hereof, and also by publication in the _____, a newspaper published in said county,⁶ in which published notice were specified the time and place of sale, as will more fully appear by the affidavit marked "Exhibit B," hereunto annexed and made a part hereof;⁷

That at the time and place specified in said notice, to wit, _____,⁸ he caused to be sold, to the highest bidder for cash, the property described in said notice, and hereinafter mentioned;

That at such sale the persons hereinafter named became the purchasers of the articles, and at the prices set opposite their names, respectively; that all⁹ of the said property was present at the time of selling; that the said sales were fairly conducted and legally made; and that the sums bid were not disproportionate to the value of the property sold.

The following are the names of the articles sold, the names of the purchasers, and the highest bid for each article, to wit:

Article Sold.	Purchaser.	Highest Bid.
_____	_____	_____
_____	_____	_____

Wherefore the said administrator¹⁰ prays that a hearing be had upon this return, and that said sales be confirmed and approved, and declared valid.

_____, Administrator¹¹ of the Estate of _____, Deceased.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4. Or, executor of the last will and testament of, etc. 5, 6. Or, city and county. 7. Notice, either by posting or publication, is sufficient, unless both are ordered by the court. 8. State time and designate location of auction salesrooms. 9. Or as the fact may be. 10, 11. Or, executor.

§ 507. Form. Exhibit A. Affidavit of posting notices of administrator's sale of personal property.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

State of _____,
County² of _____, } ss.

_____, being duly sworn, says: That on the _____ day of _____, 19____, he posted true, full, and correct copies of the annexed³ notice of the time and place of sale mentioned in said notice, in three of the most public places in said county,⁴ to wit, one copy of said notice at _____,⁵ one at _____,⁶ and one at _____.⁷

Subscribed and sworn to before me this _____ day of _____, 19____. _____, Notary Public, etc.⁸

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Or, following; ending the form with the words, "said notice is as follows" (giving a copy thereof). 4. Or, city and county. 5. As, at the auction salesrooms of _____. 6. As, at the United States post-office. 7. As, at the sheriff's office of said county, or city and county. 8. Or other officer taking the oath.

§ 508. Form. Exhibit B. Affidavit of publication of notice of administrator's sale of personal property.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

State of _____,
County² of _____, } ss.

_____, being duly sworn, says: That he is the principal clerk³ of the _____, a newspaper published in the said county⁴ of _____; that a notice, of which the annexed⁵ is a true copy, was published in said newspaper for at least ten days next before the sale mentioned therein, and as often during the period of said ten days as said newspaper was regularly issued, to wit, daily, commencing on the _____ day of _____, 19____, and ending on the _____ day of _____, 19____.

Subscribed and sworn to before me this ____ day of
____, 19____, _____, Notary Public, etc.^o

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Or, printer, or foreman. 4. Or, city and county. 5. Or, following is a true copy, to wit (inserting such copy). 6. Or other officer taking the oath.

§ 509. Form. Order approving sales of personal property.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

____, administrator ² of the estate of _____, deceased, having duly returned to this court an account and report, verified by his affidavit, of sales made by him under the order of this court dated on the ____ day of _____, 19____, and having also filed a petition praying that said sale be confirmed and approved;

And it appearing from said account and report, to the satisfaction of the judge of said court, that, in pursuance of said order of sale, said administrator ³ gave public notice for at least ten days,⁴ by posting notices,⁵ in which notices were specified the time and place of sale; that at the time and place mentioned in said public notice he sold to the highest bidders, for cash, the property described in said notice, and mentioned in said account of sales; that the said place of sale was a public place; that all of the said property was present at the time of selling; that the said sales were legally made and fairly conducted; that the sums bid were not disproportionate to the value of the property sold; and that said account and report are in all respects true; and no exceptions or objections being made or filed by any person interested in the said estate, or otherwise, to the granting of the said order prayed for, —

It is ordered, That the said sales be, and the same are hereby, confirmed and approved, and declared valid.

Dated _____, 19____. _____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2, 3. Or, executor. 4. Or, as directed by the court. 5. Or, by publication, etc.

§ 510. Form. Short form of order confirming sale of personal property.

[Title of court.]

[Title of estate.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

The administrator ² of said estate now presents his sworn report of sales of personal property under the order hereinbefore made,³ showing that he has made sales thereof amounting to ____ dollars (\$____); and, after hearing the evidence, —

It is ordered by the court, That said sales be approved and confirmed.

Dated ____, 19__. ____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Or, under the terms of the will.

CHAPTER III.

SUMMARY SALES OF MINES AND MINING INTERESTS.

- § 511. Mines may be sold how.
- § 512. Petition for sale, who may file, and what to contain.
- § 513. Order to show cause, how made, and on what notice.
- § 514. Order of sale, when and how made.
- § 515. Further proceedings to conform with what provisions.
- § 516. Form. Petition for sale of mining property.
- § 517. Form. Order to show cause. Sale of mines.
- § 518. Form. Order for sale of mining property.

§ 511. **Mines may be sold how.** When it appears from the inventory of the estate of any decedent that his estate consists in whole or in part of mines, or interests in mines, such mines or interests may be sold under the order of the court having jurisdiction of the estate, as hereinafter provided. **Kerr's Cyc. Code Civ. Proc., § 1529.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1772.

Idaho. Code Civ. Proc. 1901, sec. 4166.

Montana. Code Civ. Proc., sec. 2660.

Wyoming.* Rev. Stats. 1899, sec. 4776.

§ 512. **Petition for sale, who may file, and what to contain.** The executor or administrator, or any heir at law, or creditor of the estate, or any partner or member of any mining company, in which interests or shares are held or owned by the estate, may file in the court a petition, in writing, setting forth the general facts of the estate being then in due course of administration, and particularly describing the mine, interest, or shares which it is desired to sell, and particularly the condition and situation of the mines or mining interests, or of the mining company in which such interests or shares are held, and the grounds upon which the sale is asked to be made. **Kerr's Cyc. Code Civ. Proc., § 1530.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1773.

Idaho. Code Civ. Proc. 1901, sec. 4167.

Montana.* Code Civ. Proc., sec. 2661.

Wyoming.* Rev. Stats. 1899, sec. 4777.

§ 513. **Order to show cause, how made, and on what notice.** Upon the presentation of such petition, the court, or a judge thereof, must make an order directing all persons interested to appear before such court, at a time and place specified, not less than four or more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell such mine, mining interests, shares, or stocks, as are set forth in the petition and belonging to the estate. A copy of the order to show cause must be personally served on all persons interested in the estate, at least ten days before the time appointed for hearing the petition, or published at least four successive weeks in such newspaper as such court or judge shall specify. If all persons interested in the estate signify in writing their assent to such sale, the notice may be dispensed with. **Kerr's Cyc. Code Civ. Proc., § 1531.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1774.

Idaho. Code Civ. Proc. 1901, sec. 4168.

Montana.* Code Civ. Proc., sec. 2662.

Wyoming.* Rev. Stats. 1899, sec. 4778.

§ 514. **Order of sale, when and how made.** If, upon hearing the petition, it appears to the satisfaction of the court that it is to the interest of the estate that such mining property or interests of the estate should be sold, or that an immediate sale is necessary in order to secure the just rights or interests of the mining partners, or tenants in common, such court must make an order authorizing the executor or administrator to sell such mining interests, mines, or shares, as hereinafter provided. **Kerr's Cyc. Code Civ. Proc., § 1532.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1775.**Idaho.** Code Civ. Proc. 1901, sec. 4169.**Montana.*** Code Civ. Proc., sec. 2663.**Wyoming.*** Rev. Stats. 1899, sec. 4779.

§ 515. Further proceedings to conform with what provisions. After the order of sale is made, all further proceedings for the sale of such mining property, and for the notice, report, and confirmation thereof, must be in conformity with the provisions of article four of this chapter. **Kerr's Cyc. Code Civ. Proc., § 1533.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1776.**Idaho.** Code Civ. Proc. 1901, sec. 4170.**Montana.** Code Civ. Proc., sec. 2664.**§ 516. Form. Petition for sale of mining property.**

[Title of court.]

[Title of estate.]

{	No. ____ ¹	Dept. No. ____
	[Title of form.]	

Now comes your petitioner, —, and alleges:

That he is —; ²

That the said — died intestate, in the county ³ of —, state of —, on the —, day of —, 19—, and was, at the time of his death, a resident of said county; ⁴

That — is the duly appointed, qualified, and acting administrator ⁵ of said estate;

That a true inventory and appraisement of all of the estate of the said deceased was returned by said administrator, and filed herein on the — day of —, 19—;

That due and legal notice to the creditors of said decedent has been published as required by law; ⁶

That it appears from said inventory that the whole ⁷ of decedent's estate consists of mines ⁸ hereinafter particularly described in Schedule A, annexed hereto, hereby referred to, and made a part of this petition, the same as if incorporated herein;

That the said mine ⁹ is appraised in said inventory at the sum of _____ dollars (\$____), and that said amount is now the value of said mine; ¹⁰

That the condition of said mine is as follows, to wit: _____; ¹¹

That it is for the advantage, benefit, and best interests of the said estate, and of those interested therein, that a summary sale of such mine ¹² be made, for the following reasons, namely: _____. ¹³

Your petitioner therefore prays that this court issue an order authorizing the said administrator to sell such mine at public auction, ¹⁴ after the making and service of an order to show cause, as prescribed by statute.

_____, Attorney for Petitioner. _____, Petitioner.

[Add ordinary verification.]

Exhibit A.

[Give a full and particular description of the mine, or mining interests.]

Explanatory notes. 1. Give file number. 2. A partner or member of the _____ Mining Company, in which said estate owns or holds interests or shares. 3, 4. Or, city and county. 5. Or, executor. 6. State any further facts, so far as administration has progressed. 7. Or, part. 8. Or, mining shares or other interests, as the case may be. 9. Or, mining interest. 10. Or as the case may be. 11. State whether the mine is being worked or is lying idle; whether it is a source of profit or loss to the estate; whether the property is improved or unimproved, etc., so as to enable the court intelligently to exercise its judgment in the selection of the property of the estate which can be most advantageously sold. 12. Or, mining shares or interests. 13. Specify reasons; as, that a sale is necessary to secure the just rights or interests of the mining partners, or tenants in common of the property; or, that, by reason of remoteness of the mine from lines of transportation, it is difficult of access, and cannot be worked without great expense, etc. 14. Or as the case may be.

§ 517. Form. Order to show cause. Sale of mines.

[Title of court.]

[Title of estate.]	{ No. _____ ¹ Dept. No. _____
	{ [Title of form.]

It is ordered by the court, That all persons interested in said estate appear before the _____² court of the county³

of —, state of —, in department — thereof, at the court-house ⁴ in said county ⁵ and state, on the — day of —, 19—, at — o'clock in the forenoon ⁶ of said day, then and there to show cause, if any they have, why an order should not be granted to —, as administrator ⁷ of the estate of —, deceased, authorizing him to sell the mine, mining interests, shares, and stocks belonging to said estate, and set forth in the petition of — for the sale thereof, filed herein on the — day of —, 19—.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, city and county. 4. Designate its location. 5. Or, city and county. 6. Or, afternoon. 7. Or, executor.

§ 518. Form. Order for sale of mining property.

[Title of court.]

[Title of estate.]

{ No. —¹ Dept. No. —
[Title of form.]

It being shown to the court, from the verified petition of —, now on file herein, that the estate of —, deceased, consists wholly ² of mines; and it appearing to the satisfaction of the court that it is to the interest of said estate that such mining property be sold; ³ and that the order to show cause herein made has been personally served by copy, and as required by law, ⁴ —

It is hereby ordered, adjudged, and decreed, That —, the administrator ⁵ of said estate, be, and he is hereby, authorized to sell, at public auction, ⁶ to the highest bidder, the following described mining property, to wit: —; ⁷ the said sale to be made for cash, gold coin of the United States; ten per cent of the bid to be paid at the time of the sale, and the balance upon confirmation of such sale.

—, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, in part. 3. Or, that an immediate sale of said property is necessary to secure the just rights or interests of the mining partners, or tenants in common of said property. 4. Or, published, etc. 5. Or, executor. 6. Or, private sale; or, either at public or private sale, as said administrator shall deem most beneficial. 7. Describe it.

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CHAPTER IV.

SALES OF REAL ESTATE, INTERESTS THEREIN, AND
CONFIRMATION THEREOF.

- § 519. Executor or administrator may sell property when.
- § 520. Verified petition for sale must contain what.
- § 521. Form. Petition for order of sale of real estate for best interests of estate, including application for the sale of personal property.
- § 522. Order to persons interested to appear.
- § 523. Form. Order to show cause why order of sale of both real estate and personal property should not be made.
- § 524. Form. Order to show cause why order of sale of real estate should not be made.
- § 525. Service of order to show cause. Assent. Publication.
- § 526. Hearing after proof of service. Presentation of claims.
- § 527. Form. Objections to order of sale of real estate.
- § 528. Administrator, executor, and witnesses may be examined.
- § 529. To sell real estate or any part when.
- § 530. Order of sale, when to be made.
- § 531. Order of sale must contain what. Public auction or private sale.
- § 532. Form. Petition for order of sale of real estate where personal property is insufficient.
- § 533. Form. Verification of petition.
- § 534. Form. Order for sale of real estate.
- § 535. Form. Order for sale of real estate, in one parcel, or in subdivisions, and at either private or public sale.
- § 536. Interested persons may apply for order of sale. Form of petition.
- § 537. Notice of sale of land.
- § 538. Time and place.
- § 539. Form. Notice of administrator's or executor's sale of real estate at public auction.
- § 540. Private sale of real estate, how made, and notice. Bids, when and how received.
- § 541. Form. Order for sale of real estate. Private sale. Short notice.
- § 542. Form. Notice of administrator's or executor's sale of real estate at private sale.
- § 543. Ninety per cent of appraised value must be offered.
- § 544. Purchase-money of sale on credit, how secured.
- § 545. Return of proceedings. Notice of hearing. Setting aside sale. Resale.

- § 546. Form. Return and account of sale of real estate, and petition for order confirming sale.
- § 547. Form. Verification of return, and account of sale.
- § 548. Form. Exhibit A to return of sale. Affidavit of posting notices of sale of real estate.
- § 549. Form. Exhibit B to return of sale. Affidavit of publication of notice of time and place of sale of real estate.
- § 550. Form. Fixing time for hearing on return of sale.
- § 551. Form. Order appointing day of hearing return of sale of real estate.
- § 552. Form. Notice of hearing return of sale of real estate.
- § 553. Form. Offer of ten per cent advance on sale of real estate.
- § 554. Form. Order vacating sale of real estate.
- § 555. Objections to confirmation of sale. Hearing.
- § 556. Order of confirmation to be made when.
- § 557. Form. Objections to confirmation of sale of real estate.
- § 558. Form. Order confirming sale of real estate.
- § 559. Form. Order confirming sale of real estate on bid in open court.
- § 560. Form. Notice of motion to vacate sale of real estate, and for a resale thereof.
- § 561. Form. Order for resale of real estate.
- § 562. Conveyances.
- § 563. Form. Administrator's deed.
- § 564. Form. Acknowledgment of administrator's deed.
- § 565. Form. Administrator's deed to one offering ten per cent advance.
- § 566. Form. Executor's deed.
- § 567. Order of confirmation, what to state.
- § 568. Sale may be postponed.
- § 569. Notice of postponement.
- § 570. Payment of debts, etc., according to provisions of will.
- § 571. Sales without order, under provisions of will.
- § 572. Form. Order confirming sale of real estate under will.
- § 573. Where provision by will insufficient.
- § 574. Liability of estate for debts.
- § 575. Contribution among legatees.
- § 576. Contract for purchase of land may be sold how.
- § 577. Form. Order confirming sale of contract to purchase land.
- § 578. Same. Conditions of sale.
- § 579. Same. Purchaser to give bond.
- § 580. Form. Bond on sale of contract for purchase of land.
- § 581. Same. Executor to assign contract.
- § 582. Sales of land under mortgage or lien.
- § 583. Same. Holder of mortgage or lien may purchase land. Receipt as payment.
- § 584. Misconduct in sale. Liability.
- § 585. Fraudulent sales.

- § 586. Limitation of actions for vacating sale, etc.
- § 587. To what cases preceding section not to apply.
- § 588. Account of sale to be returned.
- § 589. Form. Order to show cause why letters should not be revoked for failure to return account of sales.
- § 590. Form. Order to show cause why attachment should not issue for failure to return account of sales.
- § 591. Form. Order for attachment for neglecting to return account of sales.
- § 592. Executor, etc., not to be purchaser.

PROBATE SALES.

I. Nature of Jurisdiction. Law Governing.

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| <ul style="list-style-type: none"> 1. Nature of proceedings. <ul style="list-style-type: none"> (1) In general. (2) Proceedings are statutory. (3) Policy of law as to titles. 2. Jurisdiction. <ul style="list-style-type: none"> (1) When acquired. (2) Nature and extent. | <ul style="list-style-type: none"> (3) Basis of jurisdiction. (4) Not dependent on truth of petition. 3. Law governing probate sales. <ul style="list-style-type: none"> (1) In general. (2) Statute of frauds. (3) Statute of limitations. |
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II. Sales of Real and Personal Property in General.

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|---|---|
| <ul style="list-style-type: none"> 1. Property capable of sale in general. <ul style="list-style-type: none"> (1) Rule at common law. (2) Rule under codes and statutes. (3) Rule where personalty is insufficient. 2. Particular interests in property. <ul style="list-style-type: none"> (1) Sales of mines and mining interests. (2) Sale of property subject to lease. (3) Sale of partnership interests. (4) Sale of community interests. (5) Homestead under United States land laws. (6) Sale of contracts for purchase of realty. (7) Property under mortgage or other lien. (8) Same. Application of purchase-money. (9) Choses in action. 3. When sale is not authorized. 4. Petition for order. <ul style="list-style-type: none"> (1) In general. (2) Defects. Mistakes. Omissions. (3) May be made when. Laches in filing. (4) Parties to the proceeding. (5) Necessity for sale. (6) Condition of property. (7) Description of property. (8) Reference to other papers. | <ul style="list-style-type: none"> (9) Verifying the petition. (10) Amending the petition. (11) Defects cured by the order of sale. (12) Defects not cured by the order. (13) Creditor's petition. 5. Opposing the application. <ul style="list-style-type: none"> (1) In general. (2) Demurrer to the petition. 6. Sale for payment of debts. <ul style="list-style-type: none"> (1) In general. (2) Contesting debts on the hearing. (3) "Demand." When not a debt or claim. (4) Expenses of administration. 7. Sale to pay funeral expenses. 8. Specific devises to contribute to payment of debts. 9. Sale to pay legacies. 10. Sale for best interests of the estate. 11. Order to show cause. Notice of hearing. <ul style="list-style-type: none"> (1) In general. (2) Service of notice. 12. Hearing. <ul style="list-style-type: none"> (1) Demand for jury trial of issues. (2) Questions not considered. (3) Findings. |
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13. Notice after appeal.
14. Order of sale.
 - (1) In general.
 - (2) Validity of.
15. Notice of sale.
 - (1) In general.
 - (2) Publication.
16. Ordering resale.
17. Nunc pro tunc order of sale.
18. Public sale.
19. Private sale.
20. Return of sales.
21. Irregularities in sales. Mutual mistake.
22. Fraudulent sales.
23. Executor purchasing at his own sale.
 - (1) Generally prohibited.
 - (2) Invalidity of such purchase. Remedy.
 - (3) Such purchase is not void when.
24. Substitution of purchasers.
25. Illegal contracts with executor or administrator.
26. Irregularities cured by retroactive acts.
27. Sales by guardian.
28. Sales by foreign executor.
29. Exchange is not a sale.
30. Sales without order.
31. Title conveyed by sale.
32. Bona fide purchasers.
 - (1) Rights of.
 - (2) How affected by adverse possession.
33. Necessary sale is valid when.
34. Voidable sales.
35. Void sales.
36. Vacating sales.
37. Rights of heirs.
 - (1) In general.
 - (2) Heirs under guardianship.
 - (3) Actions by heirs in general to set aside sales.
 - (4) Actions by minor heirs to set aside sales.
38. Sales under power in the will.
 - (1) In general.
 - (2) No implied power when.
 - (3) Discretion of executor.
 - (4) For best interests of estate.
 - (5) Devesting estate.
 - (6) Agent to sell. Compensation.
 - (7) Purchasers. Estoppel.
 - (8) Validity of sale.
 - (9) Equitable conversion. Election for reconversion.
 - (10) Devise in trust with power to sell.
 - (11) Directions coupled with the trust. Effect of.
 - (12) Power passes to administrator with will annexed.
 - (13) Particular sales under power in the will.
 - (14) Purchase by executor failing to qualify.
 - (15) Return of sales under power in will. Confirmation.
39. Sale of pretermitted child's interest.
40. Limitation of actions for vacating sale.

III. Confirmation of Sales and Conveyances.

1. Discretion of court as to confirmation.
2. Authority to confirm, when presumed.
3. When required.
4. When not required.
5. No power to confirm when.
6. Objections to confirmation.
7. Effect of the order.
8. Refusing confirmation. Effect of the order.
9. Refusal to report sale for confirmation. Effect of.
10. Action to set aside confirmation.
11. Conveyance.
 - (1) In general.
 - (2) May be ordered when.
 - (3) Is individual deed when.
 - (4) Conditions not to be imposed.
 - (5) Title carried by.
 - (6) Is void when.
 - (7) Mandate to compel.

IV. Direct and Collateral Attack upon Sales.

1. Direct attack in general.
2. Distinction between direct and collateral attack.
3. Collateral attack.
 - (1) In general.
 - (2) What cannot be questioned.
 - (3) Presumptions on.
 - (4) What is good on collateral attack.

V. Appeal.

- | | |
|---|---|
| 1. In general. | 6. Affirming the order of sale on appeal. |
| 2. Non-appealable orders. | 7. Record on appeal. |
| 3. Appealable orders. | 8. Decree. Effect of, on appeal. |
| 4. Parties interested or aggrieved. | 9. Res judicata. Law of the case. |
| 5. Parties not interested or aggrieved. | |

§ 519. Executor or administrator may sell property when.

When a sale of property of the estate is necessary to pay the allowance of the family, or the debts outstanding against the decedent, or the debts, expenses, or charges of administration, or legacies; or when it appears to the satisfaction of the court that it is for the advantage, benefit, and best interests of the estate, and those interested therein, that the real estate, or some part thereof, be sold, the executor or administrator may sell any real as well as personal property of the estate, upon the order of the court; and an application for the sale of real property may also embrace the sale of personal property. **Kerr's Cyc. Code Civ. Proc., § 1536.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 834, p. 317.
Arizona. Rev. Stats. 1901, par. 1777.
Colorado. 3 Mills's Ann. Stats., secs. 4749, 4750, 4795.
Idaho. Code Civ. Proc. 1901, sec. 4171.
Kansas. Gen. Stats. 1905, §§ 2988, 3021.
Montana. Code Civ. Proc., sec. 2670.
Nevada. Comp. Laws, sec. 2914.
New Mexico. Comp. Laws 1897, sec. 2065.
North Dakota. Rev. Codes 1905, § 8134.
Oklahoma. Rev. Stats. 1903, sec. 1652.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1172.
South Dakota. Probate Code 1904, § 201.
Utah. Rev. Stats. 1898, sec. 3877.
Washington. Pierce's Code, § 2565.
Wyoming. Rev. Stats. 1899, sec. 4781.

§ 520. Verified petition for sale must contain what. To obtain such order for the sale of real property, he must present a verified petition to the superior court, or a judge thereof, setting forth the amount of the personal estate that has come to his hands, and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or estimated; the amount due

upon the family allowance, or that will be due after the same has been in force for one year; the debts, expenses, and charges of administration already accrued, and an estimate of what will or may accrue during the administration; a general description of all the real property of which the decedent died seised, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value thereof, and whether the same be community or separate property; the names of the legatees and devisees, if any, and the heirs of the deceased, so far as known to the petitioner; and if said order for sale of real estate is petitioned for on the ground that it is for the advantage, benefit, and best interests of the estate, and those interested therein, that a sale be made, the petition, in addition to the foregoing facts, must set forth in what way an advantage or benefit would accrue to the estate, and those interested therein, by such sale. If any of the matters here enumerated cannot be ascertained, it must be so stated in the petition; but a failure to set forth facts hereinbefore enumerated will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts, showing that such sale is necessary, or that such sale is for the advantage, benefit, and best interests of the estate, and those interested therein, be stated in the decree. **Kerr's Cyc. Code Civ. Proc.**, § 1537.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 835, p. 317.

Arizona. Rev. Stats. 1901, par. 1778.

Colorado. 3 Mills's Ann. Stats., sec. 4751.

Idaho. Code Civ. Proc. 1901, sec. 4172.

Kansas. Gen. Stats. 1905, §§ 2989, 2991.

Montana. Code Civ. Proc., sec. 2671.

Nevada. Comp. Laws, sec. 2915.

New Mexico. Comp. Laws 1897, sec. 2066.

North Dakota. Rev. Codes 1905, § 8134.

Oklahoma. Rev. Stats. 1903, sec. 1653.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1173.

South Dakota. Probate Code 1904, § 202.

Utah. Rev. Stats. 1898, sec. 3888.

Washington. Pierce's Code, § 2565.

Wyoming. Rev. Stats. 1899, sec. 4782.

§ 521. Form. Petition for order of sale of real estate for best interests of estate, including application for the sale of personal property.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To the Honorable the ____² Court of the County³ of ____,
State of ____.

The petition of the undersigned, ____, administrator⁴ of the estate of ____, deceased, respectfully shows:

That said ____ died intestate,⁵ on or about the ____ day of ____, 19____, in the county⁶ of ____, state of ____, being at the time of his death a resident of the said county⁷ of ____; and that he left estate, consisting of both real and personal property, in said state;

That your petitioner is the duly appointed, qualified, and acting administrator⁸ of said estate;

That your petitioner has made and returned to this court a true inventory and appraisement of all the estate of the said deceased, which has come to his possession or knowledge, and also published notices to the creditors of said decedent as required by law;

That the following is a general description of all the real property of which the decedent died seised, or in which he had any interest, or in which his estate has acquired any interest, and the condition and value thereof, to wit: ____;⁹ and that all of said real property is the separate property of decedent;¹⁰

That the names, ages, and places of residence of the heirs of said deceased, so far as known to your petitioner, are as follows, to wit: ____;¹¹

That said real estate is expensive to maintain and manage properly; that a portion of the same is planted to vines, which need the constant care and attention of some person qualified to attend to the same; that circumstances require the remainder of said real estate to be cultivated, and the fruit-trees growing thereon to be attended to; that the fences and buildings on said premises will become dilapidated unless properly attended to; that said real estate, by

reason of its not being occupied by some person interested therein, will deteriorate and depreciate in value; that said real estate can be sold at the present time for a better price than if sold later; that it will be difficult to lease said premises for a fair compensation, by reason of there being no dwelling-house thereon; that the expense of maintaining and caring for said premises by said administrator, if he is compelled to employ labor and help therefor, will largely exceed the revenues derived therefrom, and, coupled with the taxes to be annually collected on said premises, will be a source of expense, which will be a disadvantage to the parties entitled to said estate; and that it will be for the advantage, benefit, and best interests of the estate, and of those interested therein, that said real estate, and the whole thereof, be sold, for the reasons aforesaid, and the proceeds distributed among the said heirs in accordance with their respective interests;¹²

That the following is the amount of the personal estate of said deceased which has come to the hands of your petitioner, to wit: —, of the value of — dollars* (\$—);

That a portion of said personal property has been disposed of as follows, —, and the proceeds paid out as follows, —, leaving in the hands of your petitioner the sum of — dollars (\$—), and the remainder of said personal property;

That the debts outstanding against the said deceased, as far as can be ascertained or estimated, amount, at this date, to the sum of — dollars (\$—);¹³

That the debts, expenses, and charges of administration already accrued are the following: —;¹⁴

That an estimate, by your petitioner, of the debts, expenses, and charges of administration which will or may accrue during the administration of the said estate is the following: —;¹⁵

That there is now due upon the family allowance the sum of — dollars (\$—);

That the said debts outstanding against the deceased, the said debts, expenses, and charges of administration already

accrued and remaining unpaid, and the estimated debts, expenses, and charges of administration that will or may accrue, amount to the sum of _____ dollars (\$_____).¹⁶

Your petitioner therefore alleges that the personal estate in his hands is not sufficient to pay the debts outstanding against the said _____, deceased, and the debts, expenses, and charges of administration.

Wherefore your petitioner prays for an order of this court directing that all persons interested in said estate appear before this court, at a time and place specified, not less than four nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to sell the real estate of deceased for the benefit of all persons interested therein, and to sell the whole of the personal property of said estate to pay the debts outstanding against the deceased, and the debts, expenses, and charges of administration; that, after a full hearing of this petition, and an examination of the allegations and proofs of the parties interested, and due proof of the publication of the said order to show cause, an order be made by this court, authorizing and directing your petitioner to sell the whole of said real and personal property, either at public or private sale, as your petitioner shall judge to be the most beneficial for the said estate; and that such other or further order as may be proper be made in the premises. _____, Petitioner.

_____, Attorney for Petitioner.

[Add usual verification.]

Explanatory notes. 1. Give file number. 2. Title of court, or name of judge. 3. Or, City and County. 4. Or, executor of the last will and testament of, etc. 5. Or according to the fact. 6, 7. Or, city and county. 8. Or, executor, etc. 9. Insert description, condition, and value. 10. Or, community property; or as the fact may be. 11. Insert names, etc. 12. Or other reasons. 13. Give list of claims allowed, approved, and filed. 14-16. Give detailed statement. That the statute authorizing a sale of the property of an estate, whether real or personal, when it is for the advantage, benefit, and best interest to do so, is valid, see *Estate of Porter*, 129 Cal. 86; 79 Am. St. Rep. 78; 61 Pac. Rep. 659.

§ 522. Order to persons interested to appear. If it appears to the court or judge, from such petition, that it is necessary, or that it would be for the advantage, benefit, and best interests of the estate, and those interested therein, to sell the whole or some portion of the real estate, for the purposes and reasons mentioned in the preceding section, or any of them, such petition must be filed, and an order thereupon made, directing all persons interested in the estate to appear before the court, at a time and place specified, not less than four nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator for the sale of such estate. **Kerr's Oyc. Code Civ. Proc., § 1538.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 836, p. 317.

Arizona. Rev. Stats. 1901, par. 1779.

Colorado. 3 Mills's Ann. Stats., sec. 4752.

Idaho. Code Civ. Proc. 1901, sec. 4173.

Kansas. Gen. Stats. 1905, § 2992.

Montana. Code Civ. Proc., sec. 2672.

Nevada. Comp. Laws, sec. 2916.

New Mexico. Comp. Laws 1897, secs. 2067, 2068.

North Dakota. Rev. Codes 1905, § 8134.

Oklahoma. Rev. Stats. 1903, sec. 1654.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1174.

South Dakota. Probate Code 1904, § 203.

Utah. Rev. Stats. 1898, sec. 3889.

Washington. Pierce's Code, § 2566.

Wyoming. Rev. Stats. 1899, sec. 4783.

§ 523. Form. Order to show cause why order of sale of both real estate and personal property should not be made.

[Title of court.]

{Title of estate.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

____, the administrator ² of the estate of _____, deceased, having presented to this court and filed herein his verified petition, in due form of law, praying for an order for the sale of all the real property and all the personal property of said _____, deceased, for the purposes therein set forth, and

it appearing to this court, by said petition, that it would be for the advantage, benefit, and best interests of the estate, and those interested therein, to sell the whole of the real estate, and that it is necessary to sell the whole of the personal property to pay the debts outstanding against said —, deceased, and the debts, expenses, and charges of administration, —

It is therefore hereby ordered by this court, That all persons interested in the estate of said deceased appear before said court on —,³ the — day of —, 19—, at — o'clock in the forenoon⁴ of said day, at the court-room of said court, in the said county⁵ of —, to show cause why an order should not be granted to said administrator⁶ to sell the whole of the real estate and the whole of the personal estate of said deceased, at either private or public sale, as said administrator⁷ shall judge to be most beneficial for the estate, and that a copy of this order be published once a week for four successive weeks,⁸ in a daily newspaper of general circulation printed and published in said county⁹ of —.

The following is a description of the real estate and personal property hereinbefore referred to, and which is sought to be sold under said petition: —.¹⁰

Dated the — day of —, 19—.

—, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, executor, etc. 3. Day of week. 4. Or, afternoon. 5. Or, city and county. 6, 7. Or, executor, etc. 8. Or as prescribed by statute. 9. Or, city and county. 10. Insert description.

§ 524. Form. Order to show cause why order of sale of real estate should not be made.

[Title of court.]

[Title of estate.]

{ No. —.¹ Dept. No. —
[Title of form.]

It appearing to the satisfaction of the court from the verified petition of —, administrator² of the estate of —,³ on file herein, that it is necessary⁴ to sell the whole⁵ of the estate of said deceased, —

It is ordered by the court, That all persons interested in the estate of said _____,⁶ deceased, appear before the _____⁷ court of the county⁸ of _____, state of _____, at the court-room thereof,⁹ in said county¹⁰ and state, on the _____ day of _____, 19____, at _____ o'clock in the forenoon¹¹ of said day, then and there to show cause, if any they have, why an order, as prayed for in the petition, should not be granted to the said administrator¹² to sell the real estate¹³ of said deceased, at either public or private sale, for the purposes mentioned in the petition, as he shall judge to be for the best interests of said estate and of the parties interested therein;

It is further ordered, That a copy of this order be published at least once a week for four (4) successive weeks,¹⁴ in the _____, a newspaper printed and published in said county.¹⁵

Dated this _____ day of _____, 19____.

_____, Judge of said _____ Court.

Explanatory notes. 1. Give file number. 2. Or, administratrix; or, administrator or administratrix with the will annexed; or, executor or executrix of the last will and testament of _____, deceased; or the plural of any of these, as the case may be. 3. Also known as _____, also known as _____, if known by different names. 4. To pay the debts, expenses, and charges of administration of the estate of said deceased, which have already accrued, and which will or may accrue hereafter during the administration of said estate; or, for the payment of legacies in said estate; or, would be for the advantage, benefit, and best interests of said estate, and those interested therein. 5. Or, some portion. 6. Also known as _____, where known by more than one name. 7. Giving title of court, and number of department, in which matter will be heard, and location of the court. 8. Or, city and county. 9. Designate its location. 10. Or, city and county. 11. Or, afternoon. 12. Or, administratrix. 13. Or, some portion of the said real estate. 14. Must be not less than four (4) nor more than ten (10) weeks, or as otherwise provided by the statute. 15. Or, city and county.

§ 525. Service of order to show cause. Assent. Publication. A copy of the order to show cause must be personally served on all persons interested in the estate, any general guardian of a minor so interested, and any legatee, or devisee, or heir of the decedent, provided they are residents of the county, at least ten days before the time appointed for hearing the petition, or be published four successive weeks in

such newspaper in the county as the court or judge shall direct. If all persons interested in the estate join in the petition for the sale, or signify in writing their assent thereto, the notice may be dispensed with, and the hearing may be had at any time. **Kerr's Cyc. Code Civ. Proc.**, § 1539.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 837, p. 317.
- Arizona.** Rev. Stats. 1901, par. 1780.
- Colorado.** 3 Mills's Ann. Stats., sec. 4753.
- Idaho.** Code Civ. Proc. 1901, sec. 4174.
- Montana.*** Code Civ. Proc., sec. 2673.
- Nevada.** Comp. Laws, sec. 2917.
- New Mexico.** Comp. Laws 1897, secs. 2070, 2071.
- North Dakota.** Rev. Codes 1905, § 8135.
- Oklahoma.*** Rev. Stats. 1903, sec. 1655.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1175.
- South Dakota.*** Probate Code 1904, § 204.
- Utah.** Rev. Stats. 1898, sec. 3889.
- Washington.** Pierce's Code, §§ 2567, 2569.
- Wyoming.*** Rev. Stats. 1899, sec. 4784.

§ 526. **Hearing after proof of service. Presentation of claims.** The court, at the time and place appointed in such order, or at such other time to which the hearing may be postponed, upon satisfactory proof of personal service or publication of a copy of the order, by affidavit or otherwise, if the consent in writing to such sale of all parties interested is not filed, must proceed to hear the petition, and hear and examine the allegations and proofs of the petitioners, and of all persons interested in the estate who may oppose the application. All claims against the decedent not before presented, if the period of presentation has not elapsed, may be presented and passed upon at the hearing. **Kerr's Cyc. Code Civ. Proc.**, § 1540.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1781.
- Colorado.** 3 Mills's Ann. Stats., sec. 4758.
- Idaho.** Code Civ. Proc. 1901, sec. 4175.
- Montana.** Code Civ. Proc., sec. 2674.
- Nevada.** Comp. Laws, sec. 2918.
- New Mexico.** Comp. Laws 1897, sec. 2073.

North Dakota. Rev. Codes 1905, § 8135.

Oklahoma.* Rev. Stats. 1903, sec. 1656.

South Dakota.* Probate Code 1904, § 205.

Washington. Pierce's Code, § 2568.

Wyoming.* Rev. Stats. 1899, sec. 4785.

§ 527. Form. Objections to order of sale of real estate.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.]

Now comes —, one of the devisees² of said decedent, and opposes the application herein made by the administrator³ of the estate of said deceased, for an order of sale of real estate as prayed for in his petition, on the following grounds:

That the order to show cause made herein was not published as required by law, and as directed by this court; nor was it personally served, as required by law, on any of the persons interested in said estate;

That said estate is not indebted to —, as set forth in said application, because his claim was, at the time of its allowance by the administrator, barred by the statute limiting the time within which claims against the estate must be presented.⁴

The contestant therefore asks that said application be denied. —, Contestant.

—, Attorney for Contestant.

Explanatory notes. 1. Give file number. 2. Or, heir at law, or other party interested, according to the fact. 3. Or, executor, etc., as the case may be. 4. Make other objections, if any exist.

§ 528. Administrator, executor, and witnesses may be examined. The executor, administrator, and witnesses may be examined on oath by either party, and process to compel them to attend and testify may be issued by the court or judge, in the same manner and with like effect as in other cases. **Kerr's Cyc. Code Civ. Proc.**, §1541.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1782.

Idaho.* Code Civ. Proc. 1901, sec. 4176.

- Montana.*** Code Civ. Proc., sec. 2675.
Nevada.* Comp. Laws, sec. 2920.
North Dakota. Rev. Codes 1905, § 8135.
Oklahoma.* Rev. Stats. 1903, sec. 1657.
South Dakota.* Probate Code 1904, § 206.
Washington. Pierce's Code, § 2570.
Wyoming.* Rev. Stats. 1899, sec. 4786.

§ 529. **To sell real estate or any part when.** If it appears to the satisfaction of the court, or a judge thereof, that it is necessary, or that it is for the advantage, benefit, and best interests of the estate, and those interested therein, to sell a part of the real estate, and that by a sale thereof, the residue of the estate, real or personal, or some specific part thereof, would be greatly injured or diminished in value, or subjected to expense, or rendered unprofitable, or that after any such sale the residue would be so small in quantity or value, or would be of such a character with reference to its future disposition among the heirs or devisees, as clearly to render it for the best interests of all concerned that the same should be sold, the court may authorize the sale of the whole estate, or any part thereof, as in the judgment of the court is necessary, or for the advantage, benefit, and best interests of the estate, and those interested therein. **Kerr's Cyc. Code Civ. Proc., § 1542.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 838, p. 318.
Arizona. Rev. Stats. 1901, par. 1783.
Colorado. 3 Mills's Ann. Stats., sec. 4759.
Idaho. Code Civ. Proc. 1901, sec. 4177.
Kansas. Gen. Stats. 1905, § 2995.
Montana. Code Civ. Proc., sec. 2676.
Nevada. Comp. Laws, sec. 2921.
North Dakota. Rev. Codes 1905, § 8135.
Oklahoma. Rev. Stats. 1903, sec. 1658.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1176.
South Dakota. Probate Code 1904, § 207.
Utah. Rev. Stats. 1898, sec. 3880.
Washington. Pierce's Code, § 2571.
Wyoming. Rev. Stats. 1899, sec. 4787.

§ 530. Order of sale, when to be made. If it appears to the satisfaction of the court, after a full hearing upon the petition and an examination of the proofs and allegations of the parties interested, that a sale of the whole or some portion of the real estate is necessary for any of the causes mentioned in this article, or that a sale of the whole or some portion of the real estate is for the advantage, benefit, and best interests of the estate and those interested therein, or if such sale be assented to by all the persons interested, an order must be made to sell the whole, or so much and such parts of the real estate described in the petition as the court shall judge necessary, or for the advantage, benefit, and best interests of the estate and those interested therein. **Kerr's Cyc. Code Civ. Proc., § 1543.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 838, p. 318.

Arizona. Rev. Stats. 1901, par. 1784.

Colorado. 3 Mills's Ann. Stats., sec. 4759.

Idaho. Code Civ. Proc. 1901, sec. 4178.

Kansas. Gen. Stats. 1905, § 2994.

Montana. Code Civ. Proc., sec. 2677.

New Mexico. Comp. Laws 1897, sec. 2076.

North Dakota. Rev. Codes 1905, § 8135.

Oklahoma. Rev. Stats. 1903, sec. 1659.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1176.

South Dakota. Probate Code 1904, § 208.

Utah. Rev. Stats. 1898, sec. 3890.

Washington. Pierce's Code, §§ 2572, 2602.

Wyoming. Rev. Stats. 1899, sec. 4788.

§ 531. Order of sale must contain what. Public auction or private sale. The order of sale must describe the lands to be sold and the terms of sale, which may be for cash, or on a credit not exceeding one year, payable in gross or in instalments, and in such kind of money, with interest, as the court may direct. The land may be sold in one parcel or in subdivisions, as the executor or administrator shall judge most beneficial to the estate, unless the court otherwise specially directs. If it appears that any part of such real estate has been devised and not charged in such devise

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with the payment of debts or legacies, the court must order the remainder to be sold before that so devised. Every such sale must be ordered to be made at public auction, unless, in the opinion of the court, it would benefit the estate to sell the whole or some part of such real estate at private sale; the court may, if the same is asked for in the petition, order or direct such real estate or any part thereof to be sold at either public or private sale, as the executor or administrator shall judge to be most beneficial for the estate. If the executor or administrator neglects or refuses to make a sale under the order and as directed therein, he may be compelled to sell, by order of the court, made on motion, after due notice, by any party interested. **Kerr's Cyc. Code Civ. Proc., § 1544.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 838, p. 318.

Arizona.* Rev. Stats. 1901, par. 1785.

Colorado. 3 Mills's Ann. Stats., secs. 4760, 4763.

Idaho.* Code Civ. Proc. 1901, sec. 4179.

Kansas. Gen. Stats. 1905, § 2994.

Montana.* Code Civ. Proc., sec. 2678.

Nevada. Comp. Laws, sec. 2922.

New Mexico. Comp. Laws 1897, secs. 2077, 2081.

North Dakota. Rev. Codes 1905, § 8135.

Oklahoma. Rev. Stats. 1903, sec. 1660.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 1176, 1177.

South Dakota. Probate Code 1904, § 209.

Utah.* Rev. Stats. 1898, sec. 3891.

Washington. Pierce's Code, §§ 2573, 2603.

Wyoming. Rev. Stats. 1899, sec. 4789.

§ 532. Form. Petition for order of sale of real estate where personal property is insufficient.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To the Honorable the ____² Court of the County³ of ____,
State of ____.

The petition of ____, the administrator⁴ of the estate of deceased, respectfully shows:

That said _____ died intestate,⁸ on or about the _____ day of _____, 19____, in the county ⁶ of _____, state of _____, being at the time of his death a resident of the said county ⁷ of _____; and that he left estate, consisting of both real and personal property, in the said state of _____;

That on the _____ day of _____, 19____, your petitioner was duly appointed administrator of said estate; that on the same day he qualified as such administrator; that letters of administration, signed by the clerk, and under the seal of said court, were thereupon issued to your petitioner, a competent person; that said letters have not been revoked; and that your petitioner is now the duly appointed, qualified, and acting administrator ⁹ of said estate; and

That your petitioner duly made and returned to this court, within _____ days after his appointment, to wit, on the _____ day of _____, 19____, a true inventory and appraisement of all the estate of the said deceased, which has come to his possession or knowledge, and also published notices to the creditors of said decedent, as required by law.

All of which will more fully appear by the papers on file in the clerk's office and the records of said court, in the matter of said estate, to which reference is hereby made.

That the following described personal property has come into the hands of your petitioner: _____;⁹

Valued at _____ dollars (\$_____);

That _____¹⁰ of said personal property has been disposed of, as follows, to wit: _____;¹¹

That _____¹² remains to be disposed of;

That the debts outstanding against the said deceased, as far as can be ascertained or estimated, amount, at this date, to the sum of _____ dollars (\$_____), and are fully set forth in Exhibit A, hereunto annexed and made a part of this petition;

That the amount due upon the family allowance is the sum of _____ dollars (\$_____);

That the amount that will be due upon said family allowance, after the same shall have been in force for one year, is the sum of _____ dollars (\$_____);

That the debts, expenses, taxes, and charges of administration already accrued amount to the sum of ____ dollars (\$____), and are fully set forth in Exhibit B, hereunto annexed and made a part of this petition;

That the debts, expenses, and charges of administration that will or may accrue during the administration are estimated by your petitioner at the sum of ____ dollars (\$____), and are set forth in Exhibit C, hereunto annexed and made a part of this petition;

That the whole amount of debts outstanding against the deceased, of the amount due and to become due upon the family allowance, of the debts, expenses, and charges of administration already accrued and remaining unpaid, state and county taxes, and of the estimated debts, expenses, and charges of administration that will or may accrue, is ____ dollars (\$____);

That a full description of all the real estate of which the said decedent died seised, or in which he had any interest, or in which the said estate has acquired any interest, and the condition and the value of the ____¹³ said real estate, are set forth in Exhibit D, hereunto annexed and made a part of this petition;

That the whole of said real estate was acquired by said deceased after marriage,¹⁴ and is therefore community¹⁵ property;

That the following are the names and ages of the ____ heirs of the said deceased, to wit, ____ and ____.

Your petitioner therefore alleges that the personal estate in the hands of your petitioner is insufficient¹⁶ to pay the allowance of the family, the debts outstanding against the deceased, and the debts, expenses, and charges of the administration; and that it is necessary to sell the whole¹⁷ of the said real estate for such purposes.

Wherefore your petitioner prays that an order be made by this court, directing all persons interested in said estate to appear before said court, at a time and place specified,¹⁸ to show cause why an order should not be granted to your petitioner to sell so much of the real estate of the deceased as may be necessary for the purpose aforesaid;

And that after a full hearing of this petition, examination of the proofs and allegations of the parties interested, and due proof of the publication of a copy of said order to show cause, etc., an order of sale be made, authorizing your petitioner to sell all, or so much, and such parts of the said real estate as said court shall judge necessary or beneficial, at public or private sale, as petitioner shall judge most beneficial for the estate, and that such other or further order may be made as is meet in the premises.

Dated _____, 19____.

_____, Petitioner.

Exhibit A.

The following is an itemized statement of all claims presented against the estate, whether allowed and approved, and an estimate of debts outstanding:

Name of Claimant.	Nature of Claim.	Amount.
_____	_____	\$ _____
_____	_____	_____

Total		\$ _____

Exhibit B.

The following is a statement of debts, expenses, taxes, and charges of administration already accrued:

Paid clerk's fees, as per Voucher No. 1.....	\$ _____
Paid appraisers, as per Voucher No. 2.....	_____
Paid printer, as per Voucher No. 3.....	_____
Paid probate tax, as per Voucher No. 4.....	_____
Paid taxes for the year 19____, as per Voucher No. 5..	_____
Total	\$ _____

Exhibit C.

The following is an estimate of the debts, expenses, and charges of administration that will or may accrue:

Attorneys' fees for administrator.....	\$ _____
Collateral inheritance tax	_____
Commissions upon appraised value of estate.....	_____
Other expenses	_____
Total	\$ _____

Exhibit D.

The following is a description of each parcel of real estate, with a statement of its condition, whether improved or unimproved, amount of rents received, etc., and its value: _____. Total value,¹⁹ \$_____.

Explanatory notes. 1. Give file number. 2. Title of court, or name of judge. 3. Or, city and county. 4. Or, executor of the last will and testament of, etc. 5. Or according to the fact. 6, 7. Or, city and county. 8. Or, executor, etc., as the case may be. 9. Give description. 10. A portion, or all. 11. State how. 12. Part thereof, stating it, and giving value; or, that none of said property. 13. Respective portions and lots of. 14. Or according to the fact. 15. Or, separate property, as the case may be. 16. Real estate may be sold without the personal property being exhausted, and the allegations of a petition for the sale of realty before the personal property is exhausted should, of course, conform to the statute authorizing such a sale. See §§ 519, 520, 521, ante. 17. Or, part thereof. 18. Not less than four (4) nor more than ten (10) weeks from the making of such order. 19. The value of each parcel should be separately stated, and the total given at bottom of exhibit.

§ 533. Form. Verification of petition.

State of _____,
County¹ of _____, } ss.

_____, the petitioner above named, being duly sworn, says: That he has read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes them to be true.

Subscribed and sworn to before me this _____ day of _____, 19____. _____, Notary Public, etc.²

Explanatory notes. 1. Or, city and county. 2. Or other officer taking the oath.

§ 534. Form. Order for sale of real estate.

[Title of court.]

[Title of estate.] { No. _____¹ Dept. No. _____
[Title of form.]

Comes now, _____, the administrator² of said estate, by Mr. _____, his attorney, and presents his verified petition for

authority to sell the real estate of said decedent, at public or private sale; and it being proved to the satisfaction of the court that due publication of the order to show cause has been made as required by law and by the order of the court,³ the court proceeds to the hearing of said petition, and from the proofs offered the court finds that a sale of the real property of said estate, as prayed for in said petition, is necessary, in order to raise funds to pay the debts, family allowance, and expenses of administration of said estate;⁴ that said real estate is of the value of _____ dollars (\$____), and is unimproved and unproductive;⁵ and that all the allegations of said petition are true; —

It is therefore ordered by the court, That said _____, as administrator⁶ of said estate, be, and he is hereby, authorized to sell, in manner and form required by law, all of the real estate hereinafter described, at private sale,⁷ to the highest bidder, upon the following terms, to wit: _____;⁸

It is further ordered, That before making the sale the said administrator⁹ shall give a bond in the form required by law, in the penal sum of _____ dollars (\$____).

The real estate hereby authorized to be sold is described as follows, to wit: _____.¹⁰ _____, County Clerk.

Entered _____, 19____.

By _____, Deputy.¹¹

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Or, that all persons interested in said estate have filed their written consent to said sale. If the matter has been continued, say, "and the hearing having been regularly postponed to this day." 4. Or, to pay the lien thereon, if any, described in the petition; or, will be for the advantage, benefit, and best interests of the estate and of those interested therein. 5. Or, is in need of repairs, and produces no income; or other brief statement of condition. 6. Or, executor. 7. Or, public auction, according to the fact. 8. Name the terms. 9. Or, executor. 10. Describe the land. 11. See § 77, ante.

§ 535. Form. Order for sale of real estate, in one parcel, or in subdivisions, and at either private or public sale.

[Title of court.]

[Title of estate.]

{ No. _____.¹ Dept. No. _____
[Title of form.]

_____, administrator² of the estate of _____, deceased, having on the _____ day of _____, 19____, presented to the judge

of said _____² court, and filed herein his petition in due form, verified by his oath, praying for an order authorizing him to sell so much and such parts of the real estate belonging to the estate of said deceased, for purposes therein stated, as this court shall deem necessary or beneficial; and said matter coming on regularly to be heard this _____ day of _____, 19____, it is, upon proof to the satisfaction of the court of the due publication of a copy of the order to show cause, as required by law and the order of this court, and after a full examination, —

Ordered, adjudged, and decreed, That said _____, the administrator⁴ of the estate of said _____, deceased, be, and he is hereby, authorized to sell, either in one parcel or in subdivisions, as the said administrator⁵ shall judge most beneficial to said estate, the real estate belonging to said estate, hereinafter described, at public auction,⁶ to the highest bidder, upon the following terms, to wit: _____.⁷

And it is further ordered, That, before making such sale, the said _____, administrator,⁸ as aforesaid, execute an additional bond to the state of _____, with two or more sufficient sureties, in the penal sum of _____ dollars (\$_____), conditioned that the said administrator⁹ shall faithfully execute the duties of his trust according to law.

The following is the real estate hereby authorized to be sold, being situate in the said county¹⁰ of _____, state of _____, and bounded and described as follows, to wit: _____.¹¹

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Title of court. 4, 5. Or, executor. 6. Or, private sale, the same having been asked for in the petition. 7. State the terms. 8, 9. Or, executor. 10. Or, city and county. 11. Describe the land.

§ 536. Interested persons may apply for order of sale.
Form of petition. If the executor or administrator neglects or refuses to apply for an order of sale when it is necessary, or when it is for the advantage, benefit, and best interests of the estate, and those interested therein, that the real estate, or some portion thereof, be sold, any person interested may make application therefor in the same manner

as the executor or administrator, and notice thereof must be given to the executor or administrator before the hearing. The petition of such applicant must contain as many of the matters set forth in section one thousand five hundred and thirty-seven as he can ascertain, and the decree of sale must fix the period of time within which the executor or administrator must make the sale. **Kerr's Cyc. Code Civ. Proc.**, § 1545.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1786.
- Idaho.** Code Civ. Proc. 1901, sec. 4180.
- Montana.** Code Civ. Proc., sec. 2679.
- Nevada.** Comp. Laws, sec. 2923.
- New Mexico.** Comp. Laws 1897, sec. 2094.
- North Dakota.** Rev. Codes 1905, § 8136.
- Oklahoma.** Rev. Stats. 1903, sec. 1661.
- South Dakota.** Probate Code 1904, § 210.
- Utah.** Rev. Stats. 1898, sec. 3888.
- Washington.** Pierce's Code, § 2574.
- Wyoming.** Rev. Stats. 1899, sec. 4790.

§ 537. **Notice of sale of land.** When a sale is ordered, and is to be made at public auction, notice of the time and place of sale must be posted in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county, but if none, then in such paper as the court may direct, for three weeks successively next before the sale. The lands and tenements to be sold must be described with common certainty in the notice. **Kerr's Cyc. Code Civ. Proc.**, § 1547.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 839, p. 318.
- Arizona.*** Rev. Stats. 1901, par. 1787.
- Colorado.** 3 Mills's Ann. Stats., sec. 4763.
- Idaho.*** Code Civ. Proc. 1901, sec. 4182.
- Kansas.** Gen. Stats. 1905, § 3003.
- Montana.** Code Civ. Proc., sec. 2680.
- Nevada.** Comp. Laws, sec. 2925.
- New Mexico.** Comp. Laws 1897, sec. 2081.
- North Dakota.** Rev. Codes 1905, § 8137.

Oklahoma.* Rev. Stats. 1903, sec. 1662.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1177.

South Dakota.* Probate Code 1904, § 211.

Utah. Rev. Stats. 1898, secs. 3892, 4030.

Washington. Pierce's Code, § 2576.

§ 538. **Time and place.** Sales at public auction must be made in the county where the land is situated; but when the land is situated in two or more counties, it may be sold in either. The sale must be made between the hours of nine o'clock in the morning and the setting of the sun on the same day, and must be made on the day named in the notice of sale, unless the same is postponed. **Kerr's Cyc. Code Civ. Proc.**, § 1548.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 839, p. 318.

Arizona.* Rev. Stats. 1901, par. 1788.

Colorado. 3 Mills's Ann. Stats., sec. 4763.

Idaho. Code Civ. Proc. 1901, sec. 4183.

Kansas. Gen. Stats. 1905, § 3005.

Montana.* Code Civ. Proc., sec. 2681.

Nevada. Comp. Laws, sec. 2926.

New Mexico. Comp. Laws 1897, sec. 2081.

North Dakota. Rev. Codes 1905, § 8137.

Oklahoma.* Rev. Stats. 1903, sec. 1663.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1177.

South Dakota.* Probate Code 1904, § 212.

Utah.* Rev. Stats. 1898, sec. 3893.

Washington. Pierce's Code, § 2577.

Wyoming.* Rev. Stats. 1899, sec. 4791.

§ 539. **Form. Notice of administrator's or executor's sale of real estate at public auction.**

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Notice is hereby given, That, in pursuance of an order duly made by said court on the ____ day of ____, 19____, in the matter of the estate of ____, deceased, the undersigned, administrator² of said estate, will sell at public auction, to the highest bidder, for cash, in gold coin of the United States, and subject to the confirmation of said court, on ____³, the ____ day of ____, at the hour of twelve o'clock,

noon,⁴ at the auction salesrooms of ———,⁵ in said county⁶ of ———, all the right, title, interest, and estate of said ———, at the time of his death, being an undivided ———⁷ interest in and to the property hereinafter described, and all the right, title, and interest that the said estate has acquired, by operation of law or otherwise, other than or in addition to that of said deceased at the time of his death, in and to all that certain lot, piece, or parcel of land situate in said county⁸ of ———, and bounded and described as follows, to wit: ———.⁹

Terms and conditions of sale: Cash, in gold coin of the United States; ten (10) per cent of the purchase price to be paid to the auctioneer on the day of sale, and the balance upon confirmation of sale by said ———¹⁰ court and the delivery of a conveyance.¹¹

Dated ———, 19——.

———, Administrator¹² of the said Estate.

———, Attorney for Administrator.¹³

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Day of week. 4. Or according to the fact. 5. State where. 6. Or, city and county. 7. State fractional part. 8. Or, city and county. 9. Describe the land. 10. Title of court. 11. Or as the terms may be. 12, 13. Or, executor.

§ 540. Private sale of real estate, how made, and notice. Bids, when and how received. When a sale of real estate is ordered to be made at private sale, notice of the same must be posted up in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county, if none, then in such paper as the court or a judge thereof may direct, for two weeks successively next before the day on or after which the sale is to be made, in which the lands and tenements to be sold must be described with common certainty. The notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least fifteen days from the first publication of notice; and the sale must not be made before that day, but must be made within six months thereafter. The bids

or offers must be in writing and may be left at the place designated in the notice, or delivered to the executor or administrator personally, or may be filed in the office of the clerk of the court to which the return of sale must be made, at any time after the first publication of the notice and before the making of the sale. If it be shown that it will be for the best interest of the estate the court or judge may, by an order, shorten the time of notice, which shall not, however, be less than one week, and may provide that the sale may be made on or after a day less than fifteen but not less than eight days from the first publication of the notice, in which case the notice of sale and the sale may be made to correspond with such order. **Kerr's Cyc. Code Civ. Proc.**, § 1549.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 839, p. 318.

Arizona.* Rev. Stats. 1901, par. 1789.

Colorado. 3 Mills's Ann. Stats., sec. 4763.

Idaho.* Code Civ. Proc. 1901, sec. 4184.

Montana.* Code Civ. Proc., sec. 2682.

Nevada. Comp. Laws, sec. 2925.

New Mexico. Comp. Laws 1897, sec. 2081.

North Dakota. Rev. Codes 1905, § 8137.

Oklahoma.* Rev. Stats. 1903, sec. 1664.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1177.

South Dakota.* Probate Code 1904, § 213.

Utah. Rev. Stats. 1898, secs. 3894, 4031.

Washington. Pierce's Code, § 2604.

§ 541. **Form. Order for sale of real estate. Private sale.**
(Short notice.)

[Title of court.]

[Title of estate.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

Comes now —, the administrator² of said estate, by Mr. —, his attorney, and presents his verified petition for authority to sell the real estate of said decedent at public or private sale. And it being proved to the satisfaction of the court that due publication of the order to show cause has been made as required by law and by the order of the court,³ the court proceeds to the hearing of said petition, and from

proofs offered the court finds that a sale of the real property of said estate, as prayed for in said petition, is necessary in order to raise funds to pay the debts, family allowance, and expenses of administration of said estate;⁴ that said real estate is of the value of _____ dollars (\$_____), and is unimproved and unproductive;⁵ and that all the allegations of said petition are true, —

It is therefore ordered by the court, That said _____, as administrator⁶ of said estate, be, and he is hereby, authorized to sell in manner and form required by law all of the real estate hereinafter described, at private sale,⁷ to the highest bidder, upon the following terms, to wit: _____.⁸

It is further ordered, That before making the sale the said administrator⁹ shall give a bond in the form required by law, in the penal sum of _____ dollars (\$_____).

It is also ordered, That the time of notice of said sale be shortened so that a sale may be made on or after a day not less than eight¹⁰ days from the first publication of the notice of sale.

The real estate hereby authorized to be sold is described as follows, to wit: _____.¹¹ _____, County Clerk.

Entered _____, 19____.

By _____, Deputy.¹²

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Or, that all persons interested in said estate have filed their written consent to said sale. If the matter has been continued, say, "and the hearing having been regularly postponed to this day." 4. Or, to pay the lien thereon, if any, described in the petition; or, will be for the advantage, benefit, and best interests of the estate and of those interested therein. 5. Or, is in need of repairs, and produces no income; or other brief statement of condition. 6. Or, executor. 7. Or, public auction, according to the fact. 8. Name the terms. 9. Or, executor. 10. Or, as limited by statute. 11. Describe the land. 12. Orders need not be signed: See note, § 77, ante.

§ 542. Form. Notice of administrator's or executor's sale of real estate at private sale.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.] }

Notice is hereby given, That, in pursuance of an order of the _____² court of the county³ of _____, state of _____,

made on the ____ day of ____, 19__, in the matter of the estate of ____,⁴ deceased, the undersigned, the administrator⁵ of the estate of ____,⁶ deceased, will sell at private sale, in one parcel, to the highest bidder, upon the terms and conditions hereinafter mentioned, and subject to confirmation by said ____⁷ court, on or after ____,⁸ the ____ day of ____, 19__, all the right, title, interest, and estate of the said ____, also known as ____, deceased, at the time of his death, which was an undivided one-half⁹ interest in and to the real property hereinafter described, and all the right, title, and interest that the said estate has, by operation of law, or otherwise, acquired, other than or in addition to that of said deceased, at the time of his death, of, in, and to that certain lot, piece, or parcel of land situate, lying, and being in the county¹⁰ of ____, state of ____, and more particularly described as follows, to wit: ____.¹¹

Terms and conditions of sale: Cash, in gold coin of the United States; ten (10) per cent of the purchase-money to be paid at the time of sale; balance on confirmation of sale. Deeds and abstract at the expense of the purchaser. The purchaser to assume the payment of, and take the property purchased by him subject to, all the state and county taxes, and all assessments of whatsoever name or nature, which are now or may become hereafter chargeable to or a lien against the property purchased by him.¹²

All bids or offers must be in writing, and may be left at the office of ____, attorney for said administrator,¹³ at ____,¹⁴ or may be delivered to said administrator¹⁵ personally, in said county¹⁶ of ____, or may be filed in the office of the clerk of this court, at any time after the first publication of this notice and before the making of the sale.¹⁷

Dated ____, 19__.

____, Administrator¹⁸ of the Estate of ____, also known as ____, Deceased.

____, Attorney for Administrator.¹⁹

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, city and county. 4. Also known as ____; also known as ____ 5. Or, administratrix; or, administrator or administratrix with the will annexed; or, executor or executrix of the last will and testament of ____; or the plural of any of these, as the case may be. If more

than one person is acting as administrator or executor, etc., use appropriate verbs and pronouns; and if the administrator or executor, etc., is a woman, change pronouns to correspond. 6. Also known as _____. 7. Title of court. 8. Day of week. 9. Or whatever the interest may be. 10. Or, city and county. 11. Give description. 12. Or whatever the terms and conditions may be. 13. Or, executor. 14. Give definite location of place. 15. Or, executor. 16. Or, city and county. 17. If the land is to be sold either as a whole or in parcels, say here, "The above described property will be sold as a whole or in subdivisions, and bids must be made and will be received and considered accordingly." 18, 19. Or, executor (giving specific address).

§ 543. Ninety per cent of appraised value must be offered.

No sale of real estate at private sale shall be confirmed by the court, unless the sum offered is at least ninety per cent of the appraised value thereof, nor unless such real estate has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court is satisfied that the appraisal is too high or too low, appraisers must be appointed, and they must make an appraisal thereof in the same manner as in case of an original appraisal of an estate. This may be done at any time before the sale or the confirmation thereof. **Kerr's Cyc. Code Civ. Proc., § 1550.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 839, p. 318.
- Arizona.*** Rev. Stats. 1901, par. 1790.
- Colorado.** 3 Mills's Ann. Stats., sec. 4763.
- Idaho.*** Code Civ. Proc. 1901, sec. 4185.
- Kansas.** Gen. Stats. 1905, § 3004.
- Montana.*** Code Civ. Proc., sec. 2683.
- Nevada.** Comp. Laws, sec. 2926.
- North Dakota.** Rev. Codes 1905, § 8138.
- Oklahoma.*** Rev. Stats. 1903, sec. 1665.
- South Dakota.*** Probate Code 1904, § 214.
- Utah.*** Rev. Stats. 1898, sec. 3895.
- Washington.** Pierce's Code, § 2605.
- Wyoming.** Rev. Stats. 1899, sec. 4792.

§ 544. Purchase-money of sale on credit, how secured.

The executor or administrator must, when the sale is made

upon a credit, take the notes of the purchaser for the purchase-money, with a mortgage on the property to secure their payment. **Kerr's Cyc. Code Civ. Proc.**, § 1551.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 839, p. 318.
- Arizona.*** Rev. Stats. 1901, par. 1791.
- Colorado.** 3 Mills's Ann. Stats., sec. 4760.
- Idaho.*** Code Civ. Proc. 1901, sec. 4186.
- Montana.*** Code Civ. Proc., sec. 2684.
- Nevada.** Comp. Laws, sec. 2922.
- New Mexico.** Comp. Laws 1897, sec. 2077.
- North Dakota.** Rev. Codes 1905, § 8138.
- Oklahoma.*** Rev. Stats. 1903, sec. 1666.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1177.
- South Dakota.*** Probate Code 1904, § 215.
- Utah.** Rev. Stats. 1898, sec. 3896.
- Washington.** Pierce's Code, §§ 2579, 2606.
- Wyoming.*** Rev. Stats. 1899, sec. 4793.

§ 545. **Return of proceedings. Notice of hearing. Setting aside sale. Resale.** The executor or administrator, after making any sale of real estate, must make a return of his proceedings to the court, which must be filed in the office of the clerk at any time subsequent to the sale. A hearing upon the return of the proceedings may be asked for in the return or by petition subsequently, and thereupon the clerk must fix the day for the hearing, of which notice of at least ten days must be given by the clerk, by notices posted in three public places in the county, or by publication in a newspaper, and must briefly indicate the land sold, the sum for which it was sold, and must refer to the return for further particulars. Upon the hearing, the court must examine the return and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appears that a sum exceeding such bid at least ten per cent exclusive of a new sale may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place. If an offer of ten per cent more in amount than that named in the

return be made to the court, in writing, by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale. **Kerr's Cyc. Code Civ. Proc., § 1552.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 840, p. 318.

Arizona. Rev. Stats. 1901, par. 1792.

Colorado. 3 Mills's Ann. Stats., secs. 4764, 4765.

Idaho. Code Civ. Proc. 1901, sec. 4189.

Kansas. Gen. Stats. 1905, § 3006.

Montana. Code Civ. Proc., sec. 2685.

Nevada. Comp. Laws, sec. 2927.

New Mexico. Comp. Laws 1897, sec. 2083.

North Dakota. Rev. Codes 1905, § 8138.

Oklahoma. Rev. Stats. 1903, sec. 1667.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1178.

South Dakota. Probate Code 1904, § 216.

Utah. Rev. Stats. 1898, secs. 3898, 3899.

Washington. Pierce's Code, §§ 2580, 2607, 2751.

Wyoming. Rev. Stats. 1899, sec. 4794.

§ 546. **Form. Return and account of sale of real estate, and petition for order confirming sale.**

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To the Honorable the ____² Court of the County³ of ____,
State of ____.

____, the administrator of the estate of ____, deceased, respectfully makes the following return of his proceedings, under the order of this court dated on the ____ day of ____, 19____, authorizing said administrator to sell certain real estate, and reports as follows, to wit:

That, in pursuance of said order of sale, he caused notice of the time and place of holding such sale to be posted up in three of the most public places in the county⁴ of ____, in which the land ordered to be sold is situated, and to be published in the ____, a newspaper printed and published in the same county,⁵ for three weeks successively next before such

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sale, in which notice the lands and tenements to be sold were described with common certainty, all of which will also and more fully appear by the affidavits⁶ marked respectively "Exhibit A" and "Exhibit B," hereunto annexed and made a part of this return;

That, at the time and place of holding such sale specified in such notice, to wit, on —, the — day of —, 19—, between the hour of nine o'clock in the morning and the setting of the sun on the same day, to wit, at — o'clock in the forenoon⁷ of said day, and at —,⁸ in said county,⁹ —, he caused to be sold in solido, judging it most beneficial to said estate, at public auction, to the highest bidder, upon the following terms, to wit, —,¹⁰ and subject to confirmation by this court, the real estate described in said order of sale and in said notice;

That, at such sale, — became the purchaser of the whole of said estate, for the sum of — dollars (\$—), he being the highest and best bidder, and said sum being the highest and best sum bid;

That the said sale was legally made and fairly conducted; that, as said — believes, the sum bid is not disproportionate to the value of the property sold, and that a sum exceeding such bid by at least ten per cent, exclusive of the expenses of a new sale, cannot be obtained.

The real estate so sold is situated in the county¹¹ of —, state of —, and is described as follows: —.¹²

That, before making such sale, to wit, on the — day of —, 19—, said —, as required in and by said order of sale, duly executed an additional bond to the state of —, with sufficient sureties, duly approved, on the day last aforesaid, by the judge of this court, in the penal sum of — dollars (\$—), conditioned that the said — faithfully execute the duties of his trust according to law.

Wherefore the said — prays that a hearing be had upon this return; that this honorable court make an order confirming the said sale, and directing conveyances to be executed to the said purchaser, conveying all the right, title, interest, and estate of said intestate in the said premises at the time of his death, and all the right, title, and interest of

said estate in the same; and that such other or further order may be made as is meet in the premises.

And your petitioner will ever pray, etc.

Dated _____, 19____.

_____, Administrator of the Estate of _____, Deceased.

Explanatory notes. 1. Give file number. 2. Title of court. 3-5. Or, City and County. 6. Or, if the affidavits are filed separately from the return, say, "by the affidavits of _____ and _____, to that effect, this day filed"; or, "filed herein on the _____ day of _____, 19____." 7. Or, afternoon. 8. State place. 9. Or, city and county. 10. State the terms. 11. Or, city and county. 12. Give description.

§ 547. Form. Verification of return, and account of sale.

[Title of court.]

[Title of estate.] { No. _____ Dept. No. _____
[Title of form.]

State of _____, }
County ¹ of _____, } ss.

_____, who, as the administrator of the estate of _____, deceased, has subscribed the foregoing return and account of sales, being duly sworn, says that he has read the said return and account, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes the same to be true.

Subscribed and sworn to before me this _____ day of _____, 19____.

_____, Clerk of the _____ Court.

By _____, Deputy.

Explanatory note. 1. Or, City and County.

§ 548. Form. Exhibit A to return of sale.¹ Affidavit of posting notices of sale of real estate.

[Title of court.]

[Title of estate.] { No. _____² Dept. No. _____
[Title of form.]

State of _____, }
County ³ of _____, } ss.

_____, being duly sworn, says: That he is, and at all times hereinafter named was, a male citizen of the United States,

of the age of twenty-one years and upwards, not interested in the estate of —, deceased, and is competent to be a witness in the matter of said estate; that on the — day of —, 19—, he posted correct and true copies of the annexed notice of time and place of sale of real estate in three of the most public places in said county,⁴ to wit: one of said copies at the place at which the court is held,⁵ one at —,⁶ and one at —,⁷ in said county.⁸

Subscribed and sworn to before me this — day of —, 19—. —, Notary Public, etc.

Explanatory notes. 1. This may be used as a separate form, or as an exhibit with the return. 2. Give file number. 3, 4. Or, City and County. 5. State place. 6, 7. United States post-office, city hall, land-office, or sheriff's office, etc. 8. Or, city and county.

§ 549. Form. Exhibit B to return of sale.¹ Affidavit of publication of notice of time and place of sale of real estate.

[Title of court.]

[Title of estate.]

{ No. —² Dept. No. —
[Title of form.]

State of —, }
County ^s of —, } ss.

—, of said county,⁴ being duly sworn, says: That he is a white male citizen of the United States of America, of the age of twenty-one years and upwards, not interested in the estate of —, deceased, and is competent to testify in the matter of said estate;

That he is the principal clerk of the printer and publisher⁵ of the —, a newspaper printed and published in said county,⁶ and, as such principal clerk,⁷ has charge of all advertisements in said newspaper;

That a true, full, and correct copy of the annexed notice of the time and place of holding the sale of real estate ordered by the —⁸ court of the county⁹ of —, in the matter of said estate, on the — day of —, 19—, was published in said newspaper, for three weeks successively¹⁰ next before the day of sale mentioned in said notice, and as often during the period of said three successive weeks as the said paper was regularly issued, to wit: —.¹¹

Subscribed and sworn to before me this ____ day of
____, 19____, Notary Public, etc.¹²

Explanatory notes. 1. This may be used as a separate form, or as an exhibit with the return. 2. Give file number. 3, 4. Or, City and County. 5. Or, printer, or foreman. 6. Or, city and county. 7. Or, printer, or foreman. 8. Title of court. 9. Or, city and county. 10. Or as prescribed by statute. 11. Give dates of publication. 12. Or other officer taking the oath.

§ 550. Form. Fixing time for hearing on return of sale.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.]

____, the administrator² of the estate of ____ , deceased, having this day filed with the clerk of this court his return of sale of real estate, under the previous order of this court;³ and a hearing thereon having been asked for in said return, —

Now, I, ____ , clerk of said ____ court, do hereby fix and appoint ____ ,⁴ the ____ day of ____ , 19____ , at ____ o'clock in the forenoon of said day, and the court-room of said court, at the court-house⁵ in said county⁶ of ____ , as the time and place for the hearing upon said return.

Dated ____ , 19____ . ____ , Clerk of the ____ Court.

By ____ , Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Or, executor, etc. 3. Or, under a power, contained in the will of said deceased. 4. Give day of week. 5. Give location. 6. Or, city and county.

§ 551. Form. Order appointing day of hearing return of sale of real estate.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.]

____ , administrator² of the estate of ____ , deceased, having this day made a return to this court of his proceedings under the order of sale of real estate heretofore made herein, and filed the said return, —

It is ordered, That the hearing of said return be had before this court on —, the — day of —, 19—, at — o'clock in the forenoon³ of said day, in the court-room of said court, at —,⁴ in the said county⁵ of —, state of —; and that notice of at least ten days⁶ be given thereof, by the clerk, by publication⁷ in the —, a newspaper printed in said county⁸ and state.

The said return is referred to for further particulars.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, executor of the last will, etc. 3. Or, afternoon. 4. Give location of court-room. 5. Or, city and county. 6. Or other time prescribed by statute. 7. Or, by posting notices thereof according to law. 8. Or, city and county. By the present statute of California the clerk is required to fix the day of hearing.

§ 552. Form. Notice of hearing return of sale of real estate.

[Title of court.]

[Title of estate.]

{ No. —¹ Dept. No. —
[Title of form.] }

Notice is hereby given, That —, administrator² of the estate of —, deceased, has made to the said court, and filed in the office of the clerk thereof, a return of sale of real estate of the said deceased, made by him on the — day of —, 19—, under a previous order of said court;³ and that —,⁴ the — day of —, 19—, at — o'clock in the forenoon of said day, and the court-room of said court, at —,⁵ in said county⁶ and state, have been fixed by the clerk of said court as the time and place for hearing the said return, when and where any person interested in the said estate may appear and file written objections to the confirmation of said sale, and may be heard and may produce witnesses in support of such objections.

The following is a description of the land sold and the sum for which it was sold: Said land is situated in the county⁷ of —, state of —, and described as follows: —.⁸

For further particulars, reference is hereby made to the return on file herein. _____, Clerk of the _____ Court.

By _____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Or, executor, etc. 3. Or, under a power contained in the will of said deceased. 4. Give day of week. 5. Give location. 6, 7. Or, city and county. 8. Give description, and state price for which each parcel sold.

§ 553. Form. Offer of ten per cent advance on sale of real estate.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

The matter of the confirmation of the sale of real estate, made by _____, administrator² of the estate of _____, coming on this day for hearing, the undersigned, a responsible person, now comes and offers for the property hereinafter described the sum of _____ dollars (\$____), which is an offer of ten per cent advance upon the price named in said administrator's³ return of sale.

The property sold, and for which such advance is offered, is particularly described as follows, to wit: ____.⁴ _____

Dated _____, 19____.

Explanatory notes. 1. Give file number. 2, 3. Or, executor, etc. 4. Insert description.

§ 554. Form. Order vacating sale of real estate.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

_____, administrator² of the estate of _____, deceased, having made a return of his proceedings on the sale of real property belonging to said estate, and the matter coming on regularly this day³ to be heard, the court proceeds to hear the same, and finds, upon the allegations made and testimony offered, that the sum bid at the sale returned as aforesaid was disproportionate to the value of the property offered for sale; and that a sum exceeding the sum bid and reported,

by at least ten per cent, exclusive of the expenses of a new sale, can be obtained, —

It is therefore ordered, That said sale be, and the same is hereby, vacated, and it is directed that another sale be had, after proper notice given, to be conducted in all respects as if no previous sale had ever been made.

The property sold, as appears by the return aforesaid, and the sale of which is hereby vacated, is particularly described as follows, to wit: —.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, executor of the last will and testament of —, etc. 3. Or, having been regularly continued by the court to the present time.

§ 555. Objections to confirmation of sale. Hearing. When return of the sale is made and filed any person interested in the estate may file written objections to the confirmation thereof, and may be heard thereon, when the return is heard by the court or judge, and may produce witnesses in support of his objections. **Kerr's Cyc. Code Civ. Proc., § 1553.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1793.

Idaho.* Code Civ. Proc. 1901, sec. 4190.

Montana. Code Civ. Proc., sec. 2686.

North Dakota.* Rev. Codes 1905, § 8139.

Oklahoma.* Rev. Stats. 1903, sec. 1668.

South Dakota.* Probate Code 1904, § 217.

Washington. Pierce's Code, §§ 2581, 2608.

Wyoming.* Rev. Stats. 1899, sec. 4795.

§ 556. Order of confirmation to be made when. If it appears to the court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that a greater sum, as above specified, cannot be obtained, or if the increased bid mentioned in section fifteen hundred and fifty-two be made and accepted by the court, the court must make an order confirming the sale; and directing conveyances to be executed. The sale, from that time, is confirmed

and valid, and a certified copy of the order confirming it and directing conveyances to be executed must be recorded in the office of the recorder of the county within which the land sold is situated. If, after the confirmation, the purchaser neglects or refuses to comply with the terms of sale, the court may, on motion of the executor or administrator, and after notice to the purchaser, order a resale to be made of the property. If the amount realized on such resale does not cover the bid and the expenses of the previous sale, such purchaser is liable for the deficiency to the estate. **Kerr's Cyc. Code Civ. Proc., § 1554.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 841, p. 318.
Arizona. Rev. Stats. 1901, par. 1794.
Colorado. 3 Mills's Ann. Stats., sec. 4766.
Idaho.* Code Civ. Proc. 1901, sec. 4191.
Kansas. Gen. Stats. 1905, § 3006.
Montana.* Code Civ. Proc., sec. 2687.
Nevada. Comp. Laws, sec. 2928.
New Mexico. Comp. Laws 1897, secs. 2084, 2085.
North Dakota. Rev. Codes 1905, §§ 8140, 8141.
Oklahoma. Rev. Stats. 1903, sec. 1669.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1179.
South Dakota.* Probate Code 1904, § 218.
Utah. Rev. Stats. 1898, sec. 3900.
Washington. Pierce's Code, §§ 2582, 2609.
Wyoming. Rev. Stats. 1899, sec. 4796.

§ 557. Form. Objections to confirmation of sale of real estate.

[Title of court.]

[Title of estate.] { No. ____.¹ Dept. No. ____
 [Title of form.] }

A return of sale of certain real estate belonging to the estate of said deceased having been made and filed by _____, administrator ² of the said estate, _____, one of the creditors ³ of said estate, now comes and opposes the confirmation of said sale on the grounds:

That no notice of said sale was posted or published, as required by law;

It is ordered by the court, That the sale of the real estate, hereinafter described, to _____ for the sum of _____ dollars (\$____), in cash,⁴ be, and the same is hereby, confirmed; and upon payment of the price aforesaid,⁵ said _____, executor is directed to execute to said purchaser a deed of conveyance thereof.

Said land is described as follows, to wit: _____.⁶

Entered _____, 19____.

_____, County Clerk.

By _____, Deputy.

Explanatory notes. 1. Give file number. 2. If continued, add, "and the hearing having been regularly postponed to this day." 3. If sale was private, add, "that said property was appraised within one year of said sale, and that the price obtained at such sale is at least ninety per cent of said appraised value." 4. Or, payable as follows (stating terms). 5. Or, upon compliance with the terms of said sale. 6. Give description.

559. Form. Order confirming sale of real estate on bid in open court.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Now comes _____, the administrator² of said estate, by _____, his attorney, and proves to the satisfaction of the court that his return of sale of real estate, under the order of sale heretofore made, was duly filed in the office of the clerk of this court on the _____ day of _____, 19____; that thereupon the clerk fixed the _____ day of _____, 19____, as the day for hearing thereof, and gave due notice of said hearing by posting notices in form and manner as required by law, and the matter having come regularly on for hearing,³ the court, after examining the return and hearing the evidence, finds that notice of the time, place, and terms of said sale was duly given in manner and form as prescribed by law and by the order of this court; that said notices described said land as the same is hereinafter described; and that said sale was legally made and fairly conducted; and thereupon, in open court, _____, in writing, offered the sum of _____ dollars (\$____) for said land, upon the terms pre-

scribed in the order of sale, and he being a responsible person, the court accepted said offer and confirmed said sale to him accordingly.

It is therefore ordered by the court, That the sale of said land, so made in open court, to said —, for the sum of — dollars (\$—), in cash,⁵ be, and the same is hereby, confirmed, and upon payment of the price⁶ as aforesaid by said purchaser, the said —, as administrator⁷ of said estate, is directed to execute to said purchaser a deed of conveyance of said land, which is described as follows, to wit: —.⁸ —, Judge of the — Court.

Dated —, 19—.

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Or, the hearing having been regularly postponed to this day. 4. If the property was sold at private sale, say, "that said property was appraised within one year of the time of such sale, and that the price obtained at such sale is at least ninety (90) per cent of said appraised value." 5. Or, payable as follows (stating terms). 6. Or, compliance with the terms of sale. 7. Or, executor. 8. Describe the land.

§ 560. Form. Notice of motion to vacate sale of real estate, and for a resale thereof.

[Title of court.]

[Title of estate.]

{ No. —.¹ Dept. No. —
[Title of form.]

To —.²

You are hereby notified, That the administrator³ of the above-entitled estate will move the court, at the time and place hereinafter stated, to vacate, annul, and set aside the sale of certain real property of said estate hereinafter described, heretofore made to you by said administrator,⁴ as well as the order confirming the sale of said property, on the ground that you have neglected and refused, and still neglect and refuse, to comply with the terms of sale, in that you have not paid to said administrator⁵ the balance of the purchase price due from you to him for said property.

You are further notified, That said administrator⁶ will move the court, at said time and place, to order a resale of said property.

The real property sold as aforesaid, the sale of which is sought to be vacated, annulled, and set aside, is particularly described as follows, to wit: ____.⁷

Said motion will be made on the ____ day of ____, 19____, at the hour of ____ o'clock in the forenoon⁸ of said day, at the court-room of said court, at ____,⁹ in said county¹⁰ and state; and will be based upon the papers on file herein,¹¹ the orders of court in the matter of the said estate, and upon oral and documentary proofs to be made on the hearing of said motions. ____, Attorney for Administrator.¹²

Dated ____, 19____.

Explanatory notes. 1. Give file number. 2. Name of purchaser. 3-6. Or, executor, etc. 7. Give description. 8. Or, afternoon. 9. Give location of court-room. 10. Or, city and county. 11. The California statute requires that "if any such paper has not previously been served upon the party to be notified, and was not filed by him, a copy of such paper must accompany the notice." See *Kerr's Cal. Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts.. p. 473), § 1010*. 12. Or, executor.

§ 561. Form. Order for resale of real estate.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

____, administrator² of the estate of ____, deceased, having filed a motion in this court to vacate, annul, and set aside the sale of certain real property of said estate, herein-after described, and it being shown to the court that due notice of said motion has been given as required by law, and served upon ____, the person to whom said sale was made, and to whom it was thereafter confirmed; and that said ____ has neglected and refused, and still neglects and refuses, to comply with the terms of said sale, —

It is ordered, That the sale of said property made by said administrator³ to ____ on ____, the ____ day of ____, 19____, as well as the order made on ____, the ____ day of ____, 19____, confirming said sale, be, and the same are hereby, vacated, annulled, and set aside; and that said administrator⁴ proceed as if said sale and order of confirmation had never been made.

The real property aforesaid, the sale of which is by this order vacated, annulled, and set aside, is particularly described as follows, to wit: —.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2-4. Or, executor, etc.

§ 562. **Conveyances.** Conveyances must thereupon be executed to the purchaser by the executor or administrator, and they must refer to the orders of the court authorizing and confirming the sale of the property of the estate, and directing conveyances thereof to be executed, and to the record of the order of confirmation in the office of the county recorder, either by the date of such recording, or by the date, volume, and page of the record, and such reference shall have the same effect as if the orders were at large inserted in the conveyance. Conveyances so made convey all the right, title, interest, and estate of the decedent, in the premises, at the time of his death; if prior to the sale, by operation of law or otherwise, the estate has acquired any right, title, or interest in the premises, other than or in addition to that of the decedent at the time of his death, such right, title, or interest also passes by such conveyances. **Kerr's Cyc. Code Civ. Proc., § 1555.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 842, p. 318.

Arizona.* Rev. Stats. 1901, par. 1795.

Colorado. 3 Mills's Ann. Stats., sec. 4767.

Idaho.* Code Civ. Proc. 1901, sec. 4192.

Kansas. Gen. Stats. 1905, § 3007.

Montana.* Code Civ. Proc., sec. 2688.

Nevada. Comp. Laws, sec. 2929.

New Mexico. Comp. Laws 1897, sec. 2082.

North Dakota. Rev. Codes 1905, § 8142.

Oklahoma. Rev. Stats. 1903, sec. 1670.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1180.

South Dakota.* Probate Code 1904, § 219.

Utah. Rev. Stats. 1898, sec. 3901.

Washington. Pierce's Code, § 2583.

Wyoming. Rev. Stats. 1899, sec. 4797.

§ 563. Form. Administrator's deed.

This indenture, Made on the ____ day of ____, 19__, by and between ____ as the duly appointed, qualified, and acting administrator ¹ of the estate of ____, deceased, late of ____, the party of the first part, and ____, of ____, the party of the second part, —

Witnesseth, That, whereas, on the ____ day of ____, 19__, the ____ court of the county ² of ____, state of ____, made an order of sale authorizing the said party of the first part to sell certain real estate of the said ____, deceased, situate in the county ³ of ____, state of ____, and particularly described in said order of sale, which said order is now on file and of record in the said ____ court, and is hereby referred to for greater certainty;

And whereas, under and by virtue of said order of sale, and pursuant to legal notices given thereof, the said party of the first part, on the ____ day of ____, 19__, at the time and place and in the manner specified in said notices, did offer for sale and sell, subject to confirmation by said court, to the party of the second part, the said real estate hereinafter particularly described for the sum of ____ dollars (\$____), he being the highest and best bidder, and that being the highest and best sum bid;

And whereas the said ____ court, upon the due and legal return of the proceedings under the said order of sale, made by the said party of the first part on the ____ day of ____, 19__, and after due notice of hearing on said return given, did, on the ____ day of ____, 19__, make an order decreeing said sale to be valid and confirming said sale, and directing a conveyance to be executed to the said party of the second part, a certified copy of which order of confirmation was recorded in the office of the county recorder of the county ⁴ of ____, within which the said land sold is situate, on the ____ day of ____, 19__, which said order of confirmation is now on file and of record in said ____ court, which said record thereof in said recorder's office is hereby referred to for greater certainty; —

Now, therefore, the said ____, as administrator ⁵ of the estate of ____, deceased, as aforesaid, the party of the first

part, pursuant to the order last aforesaid of the said — court, for and in consideration of the sum of — dollars (\$—) to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, and convey, unto the said party of the second part, his heirs and assigns forever, all the right, title, interest, and estate of the said —, deceased, at the time of his death, and also all the right, title, and interest that the said estate, by operation of law or otherwise, may have acquired, other than or in addition to that of said intestate at the time of his death, in and to all that certain lot, piece, or parcel of land lying and being in said county ⁶ of —, state of —, and bounded and particularly described as follows, to wit: —; ⁷ together with all the tenements, hereditaments, and appurtenances whatsoever to the same belonging, or in any wise appertaining.

To have and to hold, all and singular, the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, The said party of the first part, as administrator ⁸ of the estate of said deceased, as aforesaid, has executed these presents the day and year first above written. —, Administrator,⁹ etc. [Seal]

Signed, sealed, and delivered in the presence of — and —.

Explanatory notes. 1. Or, executor of the last will, etc. 2-4. Or, city and county. 5. Or, executor, etc. 6. Or, city and county. 7. Describe the land. 8, 9. Or, executor, etc.

§ 564. Form. Acknowledgment of administrator's deed.

State of —, }
County ¹ of —, } ss.

On this — day of —, in the year one thousand nine hundred and — (19—), before me, —, a notary public ² in and for the said county ³ of —, state of —, appeared —, personally known ⁴ to me to be the person whose name is subscribed to the foregoing instrument as the adminis-

trator ⁵ of the estate of —, deceased, and acknowledged to me that he, as such administrator, ⁶ executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at the said county ⁷ of —, the day and year in this certificate first above written.

—, Notary Public, etc.⁸

Explanatory notes. 1. Or, City and County. 2. Or other officer authorized to take the proof of instruments. 3. Or, city and county. 4. Or, satisfactorily proved to me, by the oath of —, a competent and credible witness upon the question of identity, to be the person, etc. 5, 6. Or, executor of the last will, etc. 7. Or, city and county. 8. Or other officer taking the oath.

§ 565. Form. Administrator's deed to one offering ten per cent advance.

This indenture, Made on the — day of —, 19—, by and between —, the duly appointed, qualified, and acting administrator ¹ of the estate of —, deceased, and —, both parties of the county ² of —, state of —, —

Witnesseth: That the — court of the county ³ of —, state of —, having, on the — day of —, 19—, made an order of sale, authorizing the said administrator ⁴ to sell certain real estate belonging to said estate, being the same as ⁵ that hereinafter described, which order is now on file and of record in said court and is hereby referred to; that said administrator, ⁶ under and by virtue of said order of sale, did, on the — day of —, 19—, and pursuant to legal notices given therefor, sell said real estate, ⁷ subject to confirmation by said — court, to —, for the sum of twenty thousand dollars (\$20,000); that upon the hearing of the return of said sale, which came on regularly for hearing in this court, on the — day of —, 19—, the said —, the grantee herein, made his written offer in due form, of the sum of twenty-two thousand dollars (\$22,000) for said realty, and that no further or greater sum was offered; that on the — day of —, 19—, said court made an order accepting said written offer, and confirming the sale of said property to said —, and directing a conveyance to be executed to him; that a certified copy of said order of con-

firmation of sale was recorded in the office of the county recorder of said county ⁸ of —, state of —, on the — day of —, 19—; ⁹ and that said order of confirmation of sale is now on file and of record in said court, and which said record thereof in said recorder's office is hereby referred to and made a part hereof, the same as if incorporated herein.

The said —, administrator ¹⁰ of said estate, in pursuance of said order confirming the sale and directing a conveyance to be executed to the said —, and for and in consideration of the sum of twenty-two thousand dollars (\$22,000), gold coin of the United States of America, to him in hand paid by the said —, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and conveyed, etc.¹¹

—, Administrator of the Estate of —, Deceased.

Explanatory notes. 1. Or, executor. 2, 3. Or, city and county. 4. Or, executor. 5. Or, including. 6. Or, executor. 7. Or, hereinafter described. 8. Or, city and county. 9. Give date, volume, and page of record. 10. Or, executor of the last will, etc. 11. As in § 563.

§ 566. Form. Executor's deed.

This indenture, Made on the — day of —, 19—, between —, the duly appointed, qualified, and acting executor of the last will and testament of —, deceased, and —, both of the county ¹ of —, state of —, —

Witnesseth: That the said — court of the county ² of —, state of —, having, on the — day of —, 19—, made an order admitting a certain instrument, in writing, to probate as the last will and testament of said —, deceased, which said order is hereby referred to and made a part hereof, the same as if incorporated herein; that, by the terms of said last will and testament, to which reference is hereby made, the real estate hereinafter described was directed to be sold; that, under and by virtue of said authority contained in said last will and testament, the said executor, on the — day of —, 19—, sold said real estate, subject to confirmation by said court, to the said —, for the sum of — dollars (\$—); and that ³ said court, on the — day of —, 19—, made an order confirming said sale, and

directing a conveyance to be executed to the said —, a certified copy of which order of confirmation was recorded in the office of the county recorder of the county ⁴ of —, state of —, on the — day of —, at —,⁵ and which said order of confirmation is now on file and of record in said — court, and which said record thereof in said recorder's office is hereby referred to for greater certainty;—

Now, therefore, the said —, executor of the last will and testament of —, deceased, pursuant to said order confirming said sale and directing a conveyance to be executed to the said —, and for and in consideration of the sum of — dollars (\$—), gold coin of the United States of America, to him in hand paid by the said —, the receipt whereof is hereby acknowledged, has granted, etc.⁶

—, Executor of the Estate of —, Deceased.

Explanatory notes. 1. 2. Or, city and county. 3. In case it is desired to refer to the return, insert: "on the — day of —, 19—, said executor filed, in said court, his verified return of said sale, and, after due notice given of the hearing on said return." 4. Or, city and county. 5. Give exact time, and volume and page of record. 6. Continue as in § 563, substituting "executor," etc., for "administrator."

§ 567. Order of confirmation, what to state. Before any order is entered confirming the sale, it must be proved to the satisfaction of the court that notice was given of the sale as prescribed, and the order of confirmation must show that such proof was made. **Kerr's Cyc. Code Civ. Proc., § 1556.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1796.
- Colorado.** 3 Mills's Ann. Stats., sec. 4764.
- Idaho.*** Code Civ. Proc. 1901, sec. 4193.
- Montana.*** Code Civ. Proc., sec. 2689.
- Nevada.*** Comp. Laws, sec. 2930.
- North Dakota.*** Rev. Codes 1905, § 8143.
- Oklahoma.*** Rev. Stats. 1903, sec. 1671.
- South Dakota.*** Probate Code 1904, § 220.
- Washington.*** Pierce's Code, § 2584.

§ 568. **Sale may be postponed.** If at the time appointed for the sale, the executor or administrator deems it for the interest of all persons concerned therein that the same be postponed, he may postpone it from time to time, not exceeding in all three months. **Kerr's Cyc. Code Civ. Proc., § 1557.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1797.
- Colorado.** 3 Mills's Ann. Stats., sec. 4763.
- Idaho.*** Code Civ. Proc. 1901, sec. 4187.
- Montana.*** Code Civ. Proc., sec. 2690.
- Nevada.** Comp. Laws, sec. 2931.
- North Dakota.** Rev. Codes 1905, § 8137.
- Oklahoma.** Rev. Stats. 1903, sec. 1672.
- South Dakota.** Probate Code 1904, § 221.
- Utah.** Rev. Stats. 1898, sec. 3897.
- Washington.** Pierce's Code, § 2577.
- Wyoming.*** Rev. Stats. 1899, sec. 4798.

§ 569. **Notice of postponement.** In case of a postponement, notice thereof must be given, by a public declaration, at the time and place first appointed for the sale, and if the postponement be for more than one day, further notice must be given, by posting notices in three or more public places in the county where the land is situated, or publishing the same, or both, as the time and circumstances will admit. **Kerr's Cyc. Code Civ. Proc., § 1558.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1798.
- Idaho.*** Code Civ. Proc. 1901, sec. 4188.
- Montana.*** Code Civ. Proc., sec. 2691.
- Nevada.*** Comp. Laws, sec. 2932.
- North Dakota.** Rev. Codes 1905, § 8137.
- Oklahoma.*** Rev. Stats. 1903, sec. 1673.
- South Dakota.*** Probate Code 1904, § 222.
- Utah.** Rev. Stats. 1898, sec. 3897.
- Washington.** Pierce's Code, § 2578.
- Wyoming.** Rev. Stats. 1899, sec. 4799.

§ 570. **Payment of debts, etc., according to provisions of will.** If the testator makes provision by his will, or desig-

nates the estate to be appropriated for the payment of his debts, the expenses of administration, or family expenses, they must be paid according to such provision or designation, out of the estate thus appropriated, so far as the same is sufficient. **Kerr's Cyc. Code Civ. Proc.**, § 1560.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 844, p. 319.
- Arizona.*** Rev. Stats. 1901, par. 1799.
- Idaho.*** Code Civ. Proc. 1901, sec. 4194.
- Kansas.** Gen. Stats. 1905, §§ 2997, 8726, 8728.
- Montana.*** Code Civ. Proc., sec. 2692.
- Nevada.*** Comp. Laws, sec. 2934.
- North Dakota.*** Rev. Codes 1905, § 8094.
- Oklahoma.*** Rev. Stats. 1903, sec. 1674.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1182.
- South Dakota.*** Probate Code 1904, § 223.
- Washington.*** Pierce's Code, § 2586.
- Wyoming.*** Rev. Stats. 1899, sec. 4800.

§ 571. **Sales without order, under provisions of will.** When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without order of the court, and at either public or private sale, and with or without notice, as the executor may determine; but the executor must make return of such sales as in other cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case no title passes unless the sale be confirmed by the court. **Kerr's Cyc. Code Civ. Proc.**, § 1561.

ANALOGOUS AND IDENTICAL STATUTES

The * indicates identity.

- Alaska.** Carter's Code, sec. 844, p. 319.
- Arizona.*** Rev. Stats. 1901, par. 1800.
- Colorado.** 3 Mills's Ann. Stats., sec. 4747.
- Idaho.*** Code Civ. Proc. 1901, sec. 4195.
- Kansas.** Gen. Stats. 1905, § 3011.
- Montana.*** Code Civ. Proc., sec. 2693.
- Nevada.** Comp. Laws, sec. 2935.
- New Mexico.** Comp. Laws 1897, secs. 1960, 2063.

North Dakota.* Rev. Codes 1905, § 8144.

Oklahoma.* Rev. Stats. 1903, sec. 1675.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1182.

South Dakota.* Probate Code 1904, § 224.

Utah.* Rev. Stats. 1898, sec. 3881.

Washington.* Pierce's Code, § 2600.

Wyoming.* Rev. Stats. 1899, sec. 4801.

§ 572. Form. Order confirming sale of real estate under will.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Now comes —, the executor of said estate, by Mr. —, his attorney, and proves to the satisfaction of the court that his return of sale of real estate, made under the authority given in the will of said deceased filed in the office of the clerk of this court on —, 19—; that the clerk thereupon fixed the — day of —, 19—, as the day for the hearing thereof, and gave due notice of said hearing by posting notices in form and manner as required by law; and the matter having come regularly on for hearing,² the court, after examining the return and hearing the evidence, finds therefrom that said sale was legally made and fairly conducted, and in all respects according to the directions given in the said will as to the mode of selling the same;³ that notice of the time, place, and terms of said sale was duly given in manner and form as prescribed by law and by the order of this court, and that said notices described said land as the same is hereinafter described; that the price obtained thereat was the reasonable value of the property sold; and that no greater sum can be obtained, and no person objecting thereto or offering a higher price; —

It is ordered by the court, That the sale, so made, of the real estate hereinafter described to — for the sum of — dollars (\$—) in cash,⁴ be, and the same is hereby, confirmed; and upon payment of the price⁵ aforesaid, the said executor is directed to execute forthwith to said purchaser a deed of conveyance thereof.

Said land is described as follows, to wit: ____.⁶

Entered _____, 19____

_____, County Clerk.

By _____, Deputy.⁷

Explanatory notes. 1. Give file number. 2. If the matter has been continued, say, "the hearing having been regularly postponed to this day." 3. If the property was sold at private sale, say, "that said property was appraised within one year of the time of such sale, and that the price obtained at such sale is at least ninety (90) per cent of said appraised value." 4. Or, payable as follows (stating the terms). 5. Or, compliance with the terms of sale. 6. Describe land sold. 7. Orders need not be signed: See note, § 77, ante.

§ 573. Where provision by will insufficient. If the provision made by the will, or the estate appropriated therefor, is insufficient to pay the debts, expenses of administration, and family expenses, that portion of the estate not devised or disposed of by the will, if any, must be appropriated and disposed of for that purpose, according to the provisions of this chapter. **Kerr's Cyc. Code Civ. Proc.**, § 1562.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 845, p. 319.

Arizona.* Rev. Stats. 1901, par. 1801.

Idaho.* Code Civ. Proc. 1901, sec. 4196.

Kansas. Gen. Stats. 1905, § 8726.

Montana.* Code Civ. Proc., sec. 2694.

Nevada.* Comp. Laws, sec. 2936.

North Dakota. Rev. Codes 1905, § 8095.

Oklahoma.* Rev. Stats. 1903, sec. 1676.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1183.

South Dakota.* Probate Code 1904, § 225.

Washington. Pierce's Code, § 2588.

Wyoming.* Rev. Stats. 1899, sec. 4802.

§ 574. Liability of estate for debts. The estate, real and personal, given by will to legatees or devisees, is liable for the debts, expenses of administration, and family expenses, in proportion to the value or amount of the several devises or legacies, but specific devises or legacies are exempt from such liability if it appears to the court necessary to carry

into effect the intention of the testator, and there is other sufficient estate. **Kerr's Cyc. Code Civ. Proc.**, § 1563.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 846, p. 319.
- Arizona.** Rev. Stats. 1901, par. 1802.
- Idaho.*** Code Civ. Proc. 1901, sec. 4197.
- Kansas.** Gen. Stats. 1905, § 8728.
- Montana.*** Code Civ. Proc., sec. 2695.
- Nevada.*** Comp. Laws, sec. 2937.
- North Dakota.*** Rev. Codes 1905, § 8096.
- Oklahoma.*** Rev. Stats. 1903, sec. 1677.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1184.
- South Dakota.*** Probate Code 1904, § 226.
- Washington.** Pierce's Code, § 2589.
- Wyoming.*** Rev. Stats. 1899, sec. 4803.

§ 575. **Contribution among legatees.** When an estate given by will has been sold for the payment of debts or expenses, all the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been taken therefor, and the court, when distribution is made, must, by decree for that purpose, settle the amount of the several liabilities, and decree the amount each person shall contribute, and reserve the same from their distributive shares, respectively, for the purpose of paying such contribution. **Kerr's Cyc. Code Civ. Proc.**, § 1564.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 162, p. 384.
- Arizona.*** Rev. Stats. 1901, par. 1803.
- Idaho.*** Code Civ. Proc. 1901, sec. 4198.
- Kansas.** Gen. Stats. 1905, § 8727.
- Montana.*** Code Civ. Proc., sec. 2696.
- Nevada.** Comp. Laws, sec. 2938.
- North Dakota.*** Rev. Codes 1905, § 8145.
- Oklahoma.*** Rev. Stats. 1903, sec. 1678.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5574.
- South Dakota.*** Probate Code 1904, § 227.
- Utah.** Rev. Stats. 1898, sec. 2805.
- Washington.** Pierce's Code, §§ 2357, 2358, 2590.
- Wyoming.*** Rev. Stats. 1899, sec. 4804.

§ 576. Contract for purchase of land may be sold how.
 If a decedent, at the time of his death, was possessed of a contract for the purchase of lands, his interest in such land and under such contracts may be sold on the application of his executor or administrator, in the same manner as if he had died seised of such land, and the same proceedings may be had for that purpose as are prescribed in this chapter for the sale of lands of which he died seised, except as hereinafter provided. **Kerr's Cyc. Code Civ. Proc., § 1565.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 847, p. 319.
Arizona.* Rev. Stats. 1901, par. 1804.
Idaho.* Code Civ. Proc. 1901, sec. 4199.
Montana.* Code Civ. Proc., sec. 2697.
Nevada.* Comp. Laws, sec. 2939.
North Dakota.* Rev. Codes 1905, § 8146.
Oklahoma.* Rev. Stats. 1903, sec. 1679.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1185.
South Dakota.* Probate Code 1904, § 228.
Utah. Rev. Stats. 1898, sec. 3902.
Washington.* Pierce's Code, § 2591.
Wyoming.* Rev. Stats. 1899, sec. 4805.

§ 577. Form. Order confirming sale of contract to purchase land.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
 { [Title of form.]

Now comes _____, the administrator² of said estate, by Mr. _____, his attorney, and proves to the satisfaction of the court that his return of sale of the contract to purchase land, under the order of sale hereinbefore made, was duly filed in the office of the clerk of the court on _____, the _____ day of _____, 19____; that the clerk thereupon fixed the _____ day of _____, 19____, as the day for the hearing thereof, and gave due notice of said hearing by posting notices in form and manner as required by law; * and the court thereupon, after examining the return and hearing the evidence, finds therefrom that said sale was legally made and fairly conducted; that notice of the time, place, and terms of said sale was duly

given in manner and form as prescribed by law and by the order of this court; and that said notices described said contract to purchase land as the same is hereinafter described; ⁴ that the price obtained thereat was the reasonable value of the property sold; and that no greater sum can be obtained; and no person objecting thereto or offering a higher price; ⁵

And the said purchaser having executed a bond to the said —, as administrator ⁶ of said estate for the benefit and indemnity of said administrator, ⁷ and of the persons entitled to the interest of the decedent in the land so contracted for, in the sum of — dollars (\$—), the same being double the whole amount of payments hereafter to become due on said contract, and conditioned as required by law, and the court having approved said bond and the sureties thereon, the said sale is now confirmed; —

It is therefore ordered by the court, That said sale, so made to — for the sum of — dollars (\$—), of the contract of purchase possessed by said decedent hereinafter described, be in all things confirmed, and that upon payment of said price the said administrator ⁸ shall execute to said purchaser an assignment of said contract, the same being described as follows, to wit: —. ⁹

—, County Clerk.

Entered —, 19—.

By —, Deputy. ¹⁰

Explanatory notes. 1. Give file number. 2. Or, executor. 3. If the matter has been continued, say, "and the hearing having been regularly postponed by the court to this day." 4. If sold at private sale, say, "that said property was appraised within one year of the time of such sale, and that the price obtained at such sale is at least ninety (90) per cent of said appraised value." 5. If any payments are to become due, insert, "that said sale was made subject to all payments that may thereafter become due on said contract." 6-8. Or, executor. 9. Describe the contract, according to its legal effect, giving times of payment, amounts of each, etc., with a description of the land. 10. Orders need not be signed: See note, § 77, ante.

§ 578. Same. Conditions of sale. The sale must be made subject to all payments that may thereafter become due on such contracts, and if there are any such, the sale must not be confirmed by the court until the purchasers execute a

bond to the executor or administrator for the benefit and indemnity of himself and of the persons entitled to the interest of the decedent in the lands so contracted for, in double the whole amount of payments thereafter to become due on such contract, with such sureties as the court or judge shall approve. **Kerr's Cyc. Code Civ. Proc., § 1566.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 848, p. 319.
- Arizona.*** Rev. Stats. 1901, par. 1805.
- Idaho.*** Code Civ. Proc. 1901, sec. 4200.
- Montana.*** Code Civ. Proc., sec. 2698.
- Nevada.*** Comp. Laws, sec. 2940.
- North Dakota.** Rev. Codes 1905, § 8147.
- Oklahoma.*** Rev. Stats. 1903, sec. 1680.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1186.
- South Dakota.*** Probate Code 1904, § 229.
- Utah.** Rev. Stats. 1898, sec. 3903.
- Washington.*** Pierce's Code, § 2592.
- Wyoming.*** Rev. Stats. 1899, sec. 4806.

§ 579. **Same. Purchaser to give bond.** The bond must be conditioned that the purchaser will make all payments for such land that become due after the date of the sale, and will fully indemnify the executor or administrator and the persons so entitled against all demands, costs, charges, and expenses, by reason of any covenant or agreement contained in such contract. **Kerr's Cyc. Code Civ. Proc., § 1567.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 848, p. 319.
- Arizona.*** Rev. Stats. 1901, par. 1806.
- Idaho.*** Code Civ. Proc. 1901, sec. 4201.
- Montana.*** Code Civ. Proc., sec. 2699.
- Nevada.** Comp. Laws, sec. 2941.
- North Dakota.** Rev. Codes 1905, § 8147.
- Oklahoma.*** Rev. Stats. 1903, sec. 1681.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1186.
- South Dakota.*** Probate Code 1904, § 230.
- Utah.** Rev. Stats. 1898, sec. 3903.
- Washington.** Pierce's Code, § 2593.
- Wyoming.*** Rev. Stats. 1899, sec. 4807.

§ 580. Form. Bond on sale of contract for purchase of land.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Know all men by these presents, That ____ as principal, and ____ and ____ as sureties, are held and firmly bound in the sum of ____ dollars (\$____) unto ____, administrator² of the estate of ____, deceased, for the benefit and indemnity of himself and of the persons entitled to the interest of said decedent in the lands contracted for as hereinafter stated, to be paid to the said ____, or his successors, heirs, or such persons interested, or their heirs or assigns, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that, whereas the said ____, deceased, was at the time of his death possessed of a contract for the purchase of certain lands, particularly described as follows, to wit: ____; and whereas the said contract has, by order of said court, been sold to ____; and whereas the said purchaser has agreed to perform all of the covenants in said contract agreed to be performed by the said ____, deceased, and to make all payments now due, or which shall become due thereon;—

Now, therefore, if the said ____³ will well and truly make all payments for such lands that become due after the date of such sale, namely, the ____ day of ____, 19____, and will fully indemnify the administrator,⁴ and the persons entitled to the interest of the decedent in the lands so contracted for, against all demands, costs, charges, and expenses, by reason of any covenant or agreement contained in such contract, then this obligation is to be void; otherwise to remain in full force and effect.

Dated, signed, and sealed with our seals this ____ day of ____, 19____.

____ [Seal]

____ [Seal]

____ [Seal]

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Purchaser. 4. Or, executor.

§ 581. Same. Executor to assign contract. Upon the confirmation of the sale, the executor or administrator must execute to the purchaser an assignment of the contract, which vests in the purchaser, his heirs and assigns, all the right, title, and interest of the estate, or of the persons entitled to the interest of the decedent, in the lands sold at the time of the sale, and the purchaser has the same rights and remedies against the vendor of such land as the decedent would have had if he were living. **Kerr's Cyc. Code Civ. Proc.**, § 1568.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 849, p. 320.

Arizona.* Rev. Stats. 1901, par. 1807.

Idaho.* Code Civ. Proc. 1901, sec. 4202.

Montana.* Code Civ. Proc., sec. 2700.

Nevada. Comp. Laws, sec. 2942.

North Dakota.* Rev. Codes 1905, § 8148.

Oklahoma.* Rev. Stats. 1903, sec. 1682.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1187.

South Dakota.* Probate Code 1904, § 231.

Utah.* Rev. Stats. 1898, sec. 3904.

Washington. Pierce's Code, § 2594.

Wyoming.* Rev. Stats. 1899, sec. 4808.

§ 582. Sales of land under mortgage or lien. When any sale is made by an executor or administrator, pursuant to provisions of this chapter, of lands subject to any mortgage or other lien, which is a valid claim against the estate of the decedent, and has been presented and allowed, the purchase-money must be applied, after paying the necessary expenses of the sale, first, to the payment and satisfaction of the mortgage or lien, and the residue, if any, in due course of administration. The application of the purchase-money to the satisfaction of the mortgage or lien must be made without delay; and the land is subject to such mortgage or lien until the purchase-money has been actually so applied. No claim against any estate, which has been presented and allowed, is affected by the statute of limitations, pending the proceedings for the settlement of the estate. The purchase-money, or so much thereof as may be sufficient

to pay such mortgage or lien, with interest, and any lawful costs and charges thereon, may be paid into the court, to be received by the clerk thereof, whereupon the mortgage or lien upon the land must cease, and the purchase-money must be paid over by the clerk of the court without delay, in payment of the expenses of the sale, and in satisfaction of the debt to secure which the mortgage or other lien was taken, and the surplus, if any, at once returned to the executor or administrator, unless for good cause shown, after notice to the executor or administrator, the court otherwise directs. **Kerr's Cyc. Code Civ. Proc.**, § 1569.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 852, p. 320.
- Arizona.*** Rev. Stats. 1901, par. 1808.
- Idaho.*** Code Civ. Proc. 1901, sec. 4203.
- Kansas.** Gen. Stats. 1905, § 3009.
- Montana.*** Code Civ. Proc., sec. 2701.
- Nevada.** Comp. Laws, sec. 2943.
- North Dakota.** Rev. Codes 1905, §§ 8120, 8149.
- Oklahoma.** Rev. Stats. 1903, sec. 1683.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1190.
- South Dakota.*** Probate Code 1904, § 232.
- Utah.** Rev. Stats. 1898, secs. 3859, 3905.
- Washington.** Pierce's Code, § 2597.
- Wyoming.*** Rev. Stats. 1899, sec. 4809.

§ 583. **Same. Holder of mortgage or lien may purchase land. Receipt as payment.** At any sale, under order of the court, of lands upon which there is a mortgage or lien, the holder thereof may become the purchaser, and his receipt for the amount due him from the proceeds of the sale is a payment pro tanto. If the amount for which he purchased the property is insufficient to defray the expenses and discharge his mortgage or lien, he must pay to the court, or the clerk thereof, an amount sufficient to pay such expenses. **Kerr's Cyc. Code Civ. Proc.**, § 1570.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1809.
- Idaho.*** Code Civ. Proc. 1901, sec. 4204.

Montana.* Code Civ. Proc., sec. 2702.
North Dakota. Rev. Codes 1905, § 8150.
Oklahoma. Rev. Stats. 1903, sec. 1684.
South Dakota.* Probate Code 1904, § 233.
Utah.* Rev. Stats. 1898, sec. 3906.
Wyoming.* Rev. Stats. 1899, sec. 4810.

§ 584. **Misconduct in sale. Liability.** If there is any neglect or misconduct in the proceedings of the executor in relation to any sale, by which any person interested in the estate suffers damage, the party aggrieved may recover the same in an action upon the bond of the executor or administrator, or otherwise. **Kerr's Cyc. Code Civ. Proc., § 1571.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1810.
Idaho.* Code Civ. Proc. 1901, sec. 4207.
Montana.* Code Civ. Proc., sec. 2703.
Nevada.* Comp. Laws, sec. 2945.
North Dakota. Rev. Codes 1905, § 8150.
Oklahoma.* Rev. Stats. 1903, sec. 1685,
South Dakota.* Probate Code 1904, § 234.
Utah.* Rev. Stats. 1898, sec. 3882.
Washington. Pierce's Code, § 2598.
Wyoming.* Rev. Stats. 1899, sec. 4811.

§ 585. **Fraudulent sales.** Any executor or administrator who fraudulently sells any real estate of a decedent contrary to or otherwise than under the provisions of this chapter, is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein. **Kerr's Cyc. Code Civ. Proc., § 1572.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1811.
Colorado. 3 Mills's Ann. Stats., sec. 4769.
Idaho. Code Civ. Proc. 1901, sec. 4208.
Montana.* Code Civ. Proc., sec. 2704.
Nevada. Comp. Laws, sec. 2946.
North Dakota.* Rev. Codes 1905, § 8166.
Oklahoma.* Rev. Stats. 1903, sec. 1686.
South Dakota.* Probate Code 1904, § 235.

Utah.* Rev. Stats. 1898, sec. 3907.

Washington. Pierce's Code, § 2599.

Wyoming.* Rev. Stats. 1899, sec. 4812.

§ 586. **Limitation of actions for vacating sale, etc.** No action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after the settlement of the final account of the executor or administrator. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud, or other grounds upon which the action is based. **Kerr's Cyc. Code Civ. Proc., § 1573.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 1812.

Colorado. 3 Mills's Ann. Stats., sec. 4770.

Idaho. Code Civ. Proc. 1901, sec. 4205.

Montana.* Code Civ. Proc., sec. 2705.

Nevada. Comp. Laws, sec. 2947.

North Dakota. Rev. Codes 1905, §§ 8151, 8171.

Oklahoma. Rev. Stats. 1903, sec. 1687.

South Dakota. Probate Code 1904, § 236.

Wyoming.* Rev. Stats. 1899, sec. 4813.

§ 587. **To what cases preceding section not to apply.** The preceding section shall not apply to minors or others under any legal disability, to sue at the time when the right of action first accrues; but all such persons may commence an action at any time within three years after the removal of the disability. **Kerr's Cyc. Code Civ. Proc., § 1574.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1813.

Colorado. 3 Mills's Ann. Stats., sec. 4770.

Idaho.* Code Civ. Proc. 1901, sec. 4206.

Montana.* Code Civ. Proc., sec. 2706.

Nevada. Comp. Laws, sec. 2947.

North Dakota.* Rev. Codes 1905, § 8172.

Oklahoma.* Rev. Stats. 1903, sec. 1688.

South Dakota.* Probate Code 1904, § 237.

Wyoming.* Rev. Stats. 1899, sec. 4814.

§ 588. **Account of sale to be returned.** When a sale has been made by an executor or administrator of any property of the estate, real or personal, he must return to the court, within thirty days thereafter, an account of sales, verified by his affidavit, or in case of his absence from the county, or other inability, by the affidavit of his attorney. If he neglects to make such return, he may be punished by attachment, or his letters may be revoked, one day's notice having been first given him to appear and show cause why such attachment should not issue, or such revocation should not be made. **Kerr's Cyc. Code Civ. Proc.**, § 1575.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 840, p. 318.

Arizona. Rev. Stats. 1901, par. 1814.

Colorado. 3 Mills's Ann. Stats., sec. 4764.

Idaho. Code Civ. Proc. 1901, sec. 4209.

Montana. Code Civ. Proc., sec. 2707.

Nevada. Comp. Laws, secs. 2927, 2948.

New Mexico. Comp. Laws 1897, sec. 2083.

North Dakota. Rev. Codes 1905, § 8152.

Oklahoma. Rev. Stats. 1903, sec. 1689.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1178.

South Dakota. Probate Code 1904, § 238.

Utah. Rev. Stats. 1898, secs. 3883, 3898.

Washington. Pierce's Code, §§ 2580, 2607, 2751.

Wyoming. Rev. Stats. 1899, sec. 4815.

§ 589. **Form. Order to show cause why letters should not be revoked for failure to return account of sales.**

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

It being shown to the court² that the administrator³ of the above-entitled estate has sold property of such estate, and has neglected, for more than thirty (30) days⁴ after the making of such sale, to return an account thereof,—

It is ordered, That the clerk of this court give the said _____, administrator⁵ as aforesaid, notice⁶ to appear before this court on _____,⁷ the _____ day of _____, 19____, and show

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cause, if any he can, why his letters^s should not be revoked for such failure. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. By the affidavit of _____. 3. Or, executor, etc., according to the fact. 4. Or other time prescribed by statute. 5. Or as the case may be. 6. One day's notice, at least, is required. 7. Day of week. 8. Of administration, or letters testamentary, according to the fact.

§ 590. Form. Order to show cause why attachment should not issue for failure to return account of sales.

[Title of court.]

[Title of estate.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

It being shown to the court² that the administrator³ of the above-entitled estate has sold property of such estate, and has neglected for more than thirty (30) days⁴ after the making of such sale to return an account thereof, —

It is ordered, That the clerk of this court give the said _____, administrator,⁵ as aforesaid, notice⁶ to appear before this court, at the court-room thereof,⁷ on _____,⁸ the _____ day of _____, 19____, at _____ o'clock in the forenoon⁹ of that day, and show cause, if any he can, why an attachment should not issue to compel him to make such return.

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. By the affidavit of _____. 3. Or, executor, etc., according to the fact. 4. Or other time prescribed by statute. 5. According to the fact. 6. One day's notice, at least, is required. 7. Give number of department, if any, and location of court-room. 8. Day of week. 9. Or, afternoon.

§ 591. Form. Order for attachment for neglecting to return account of sales.

[Title of court.]

[Title of estate.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

It appearing to the court that _____, the administrator² of the estate of _____, deceased, has neglected for thirty (30) days³ to make a return of sale of property of said estate

sold by him on the — day of —, 19—; that a citation has been issued requiring the said — to appear and show cause why an attachment should not issue as directed in said citation, and it further appearing that said citation has been served and returned in the manner and form provided by law, and the direction of this court;—

It is ordered, That a warrant of attachment issue, and that the said — be arrested and brought before this court to show cause, if any he can, why he should not be committed for contempt of court in disobeying said citation.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, executor, etc., according to the fact. 3. Or other time prescribed by the statute.

§ 592. Executor, etc., not to be purchaser. No executor or administrator must, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale. **Kerr's Cyc. Code Civ. Proc., § 1576.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 855, p. 321.

Arizona. Rev. Stats. 1901, par. 1815.

Colorado. 3 Mills's Ann. Stats., sec. 4763.

Idaho. Code Civ. Proc. 1901, sec. 4210.

Kansas. Gen. Stats. 1905, § 3004.

Montana.* Code Civ. Proc., sec. 2708.

Nevada. Comp. Laws, sec. 2949.

New Mexico. Comp. Laws 1897, secs. 1960, 2081.

North Dakota. Rev. Codes 1905, § 8152.

Oklahoma.* Rev. Stats. 1903, sec. 1690.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1193.

South Dakota.* Probate Code 1904, § 239.

Utah.* Rev. Stats. 1898, sec. 3884.

Wyoming.* Rev. Stats. 1899, sec. 4816.

PROBATE SALES.**I. Nature of Jurisdiction. Law Governing.**

- | | |
|---------------------------------|---|
| 1. Nature of proceedings. | (3) Basis of jurisdiction. |
| (1) In general. | (4) Not dependent on truth of petition. |
| (2) Proceedings are statutory. | |
| (3) Policy of law as to titles. | 3. Law governing probate sales. |
| 2. Jurisdiction. | (1) In general. |
| (1) When acquired. | (2) Statute of frauds. |
| (2) Nature and extent. | (3) Statute of limitations. |

II. Sales of Real and Personal Property in General.

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|---|--|
| 1. Property capable of sale in general. | (12) Defects not cured by the order. |
| (1) Rule at common law. | (13) Creditor's petition. |
| (2) Rule under codes and statutes. | 5. Opposing the application. |
| (3) Rule where personalty is insufficient. | (1) In general. |
| 2. Particular interests in property. | (2) Demurrer to the petition. |
| (1) Sales of mines and mining interests. | 6. Sale for payment of debts. |
| (2) Sale of property subject to lease. | (1) In general. |
| (3) Sale of partnership interests. | (2) Contesting debts on the hearing. |
| (4) Sale of community interests. | (3) "Demand." When not a debt or claim. |
| (5) Homestead under United States land laws. | (4) Expenses of administration. |
| (6) Sale of contracts for purchase of realty. | 7. Sale to pay funeral expenses. |
| (7) Property under mortgage or other lien. | 8. Specific devises to contribute to payment of debts. |
| (8) Same. Application of purchase-money. | 9. Sale to pay legacies. |
| (9) Choses in action. | 10. Sale for best interests of the estate. |
| 3. When sale is not authorized. | 11. Order to show cause. Notice of hearing. |
| 4. Petition for order. | (1) In general. |
| (1) In general. | (2) Service of notice. |
| (2) Defects. Mistakes. Omissions. | 12. Hearing. |
| (3) May be made when. Laches in filing. | (1) Demand for jury trial of issues. |
| (4) Parties to the proceeding. | (2) Questions not considered. |
| (5) Necessity for sale. | (3) Findings. |
| (6) Condition of property. | 13. Notice after appeal. |
| (7) Description of property. | 14. Order of sale. |
| (8) Reference to other papers. | (1) In general. |
| (9) Verifying the petition. | (2) Validity of. |
| (10) Amending the petition. | 15. Notice of sale. |
| (11) Defects cured by the order of sale. | (1) In general. |
| | (2) Publication. |
| | 16. Ordering resale. |
| | 17. Nunc pro tunc order of sale. |

18. Public sale.
19. Private sale.
20. Return of sales.
21. Irregularities in sales. Mutual mistake.
22. Fraudulent sales.
23. Executor purchasing at his own sale.
 - (1) Generally prohibited.
 - (2) Invalidity of such purchase. Remedy.
 - (3) Such purchase is not void when.
24. Substitution of purchasers.
25. Illegal contracts with executor or administrator.
26. Irregularities cured by retroactive acts.
27. Sales by guardian.
28. Sales by foreign executor.
29. Exchange is not a sale.
30. Sales without order.
31. Title conveyed by sale.
32. Bona fide purchasers.
 - (1) Rights of.
 - (2) How affected by adverse possession.
33. Necessary sale is valid when.
34. Voidable sales.
35. Void sales.
36. Vacating sales.
37. Rights of heirs.
 - (1) In general.
- (2) Heirs under guardianship.
- (3) Actions by heirs in general to set aside sales.
- (4) Actions by minor heirs to set aside sales.
38. Sales under power in the will.
 - (1) In general.
 - (2) No implied power when.
 - (3) Discretion of executor.
 - (4) For best interests of estate.
 - (5) Devesting estate.
 - (6) Agent to sell. Compensation.
 - (7) Purchasers. Estoppel.
 - (8) Validity of sale.
 - (9) Equitable conversion. Election for reconveyance.
 - (10) Devise in trust with power to sell.
 - (11) Directions coupled with the trust. Effect of.
 - (12) Power passes to administrator with will annexed.
 - (13) Particular sales under power in the will.
 - (14) Purchase by executor failing to qualify.
 - (15) Return of sales under power in will. Confirmation.
39. Sale of pretermitted child's interest.
40. Limitation of actions for vacating sale.

III. Confirmation of Sales and Conveyances.

1. Discretion of court as to confirmation.
2. Authority to confirm, when presumed.
3. When required.
4. When not required.
5. No power to confirm when.
6. Objections to confirmation.
7. Effect of the order.
8. Refusing confirmation. Effect of the order.
9. Refusal to report sale for confirmation. Effect of.
10. Action to set aside confirmation.
11. Conveyance.
 - (1) In general.
 - (2) May be ordered when.
 - (3) Is individual deed when.
 - (4) Conditions not to be imposed.
 - (5) Title carried by.
 - (6) Is void when.
 - (7) Mandate to compel.

IV. Direct and Collateral Attack upon Sales.

- | | |
|--|--|
| 1. Direct attack in general. | (2) What cannot be questioned. |
| 2. Distinction between direct and collateral attack. | (3) Presumptions on. |
| 3. Collateral attack. | (4) What is good on collateral attack. |
| (1) In general. | |

V. Appeal.

- | | |
|---|---|
| 1. In general. | 6. Affirming the order of sale on appeal. |
| 2. Non-appealable orders. | 7. Record on appeal. |
| 3. Appealable orders. | 8. Decree. Effect of, on appeal. |
| 4. Parties interested or aggrieved. | 9. Res judicata. Law of the case. |
| 5. Parties not interested or aggrieved. | |

I. NATURE OF JURISDICTION. LAW GOVERNING.

1. Nature of proceedings.

(1) *In general.* One prominent purpose of administration is to pay the debts of the estate from the real and personal property of the deceased. The administrator is, by law, charged with this duty. To sell real estate of the decedent to pay the debts is as plainly a step in the administration as is the sale of personal property for the same purpose. But, although it is within the scope of the administration to sell either real or personal property, the legislature has power to direct how this shall be done: *Burris v. Kennedy*, 108 Cal. 331, 338; 41 Pac. Rep. 458. The application of the executor or of an administrator for the sale of lands belonging to the estate is a special and independent proceeding. The jurisdiction of the probate court depends absolutely on the sufficiency of the petition; in other words, on its substantial compliance with the requirements of the statute. Though the proceeding for a sale occurs in the general course of administration, it is a distinct proceeding in the nature of an action in which the petition is the commencement and the order of sale is the judgment: *Pryor v. Downey*, 50 Cal. 388, 398; 19 Am. St. Rep. 656. What is meant when it is said that an application to sell real estate of a decedent is an independent proceeding is, simply, that it is essential that the application should be made substantially as provided by statute; otherwise the court has no power to order the sale, or the administrator to sell: *Burris v. Kennedy*, 108 Cal. 331, 338; 41 Pac. Rep. 458. While an application to sell real estate of a deceased person does partake somewhat of the nature of an action, it is not, in any sense of the term, an action to recover real estate, or the possession of it. Nor is it an action arising out of the title thereto, or the rents and profits thereof: *In re Tuohy's Estate*, 33 Mont. 230; 83 Pac. Rep. 486. In Colorado, the proceeding to sell real estate of a decedent is separate and distinct from the administration of the estate proper, and is a special proceeding recognized by the statute: *Ryan v. Geigel* (Col.), 89 Pac. Rep. 775. The rule that the applica-

tion of the administrator for the sale of lands belonging to the estate of a decedent is an independent proceeding; that the jurisdiction of the probate court over such sale does not come from its general jurisdiction over the administration of the estate, but from the petition for the sale; and that the petition must comply with the requirements of the code,—is not changed by the provisions of the present constitution, which give jurisdiction of probate business to a court of general jurisdiction, or by the fact that the code no longer requires a deficiency of personal property to be shown before there can be any valid sale of real property: *Richardson v. Butler*, 82 Cal. 174, 176; 23 Pac. Rep. 9; 16 Am. St. Rep. 101. So long as the administration of the estate is pending, the executors are at all times subject to the control and direction of the superior court, and that court may at any time order a sale of the lands, if necessary for the payment of creditors, or when it will be for the advantage of those interested in the estate, or when they assent to its sale. There is therefore no point of time at which the beneficiaries under a will may not unite in a conveyance made at a sale under the order of the court, and thus give to the grantee an absolute interest in possession of the estate of the testator in the property conveyed: *Estate of Pforr*, 144 Cal. 121, 127; 77 Pac. Rep. 825. Upon the death of the wife, the husband, in succeeding to the estate, takes the same subject to the claims against it; and the only interest in the estate, therefore, that can be taken at a sale under execution upon a judgment recovered against the husband is the distributive share of the husband in the estate of the wife after the payment of all debts: *Nichols v. Lee*, 16 Col. 147; 26 Pac. Rep. 157.

REFERENCES.

Additional bond, when required to be given on sale of real estate: See §§ 281, 282, ante.

(2) **Proceedings are statutory.** Proceedings for the sale of real property of a decedent are statutory, and such sale will be void, unless the requirements of the statute are complied with: *Hellman v. Merz*, 112 Cal. 661, 666; 44 Pac. Rep. 1079. The provision of the statute declaring that no sale of any property of an estate shall be valid unless made upon an order of the probate court applies only to sales made by executors or administrators. It has no reference to judicial sales under the decrees of the district courts (superseded by the superior courts, in California), or to sales in pursuance of testamentary authority: *Fallon v. Butler*, 21 Cal. 24, 31. The administration of an estate is a proceeding in rem: See *Dooly v. Russell*, 10 Wash. 195; 38 Pac. Rep. 1000.

(3) **Policy of law as to titles.** The policy of the statute is to quiet titles to real estate sold by order of the probate courts: *Harlan v. Peck*, 33 Cal. 521; 91 Am. Dec. 653.

2. Jurisdiction.

(1) **When acquired.** There are three methods, under the California statute, by which jurisdiction of an application for leave to sell may be acquired: 1. By a personal service on all persons interested in the estate; 2. By publication for four successive weeks; 3. By the assent, in writing, to the order of sale by all persons interested in the estate: *Pearson v. Pearson*, 46 Cal. 610, 636. Where the court acquires jurisdiction, all parties interested in the estate are bound by its action as fully by default, for not appearing, as if they had appeared and contested the sufficiency of the petition: *Estate of Coutts*, 100 Cal. 400, 402; 34 Pac. Rep. 865. When the record discloses what was done to acquire jurisdiction, it will not be presumed that something different was done: *Hahn v. Kelly*, 34 Cal. 407; *Pearson v. Mitchell*, 43 Cal. 610, 636. The authority of a court to order the sale of real property of a decedent's estate is not general, but limited, is derived from the statute conferring the right, and can be exercised only in the manner prescribed: *Haynes v. Meeks*, 20 Cal. 288, 312; *In re Noon's Estate (Or.)*, 88 Pac. Rep. 673, 675. The legislature has prescribed, as a prerequisite to the sale of the property of a decedent, that a petition shall be filed; that notice shall be given; and that an opportunity for a hearing shall be afforded. These acts, therefore, are essential to power on the part of the court to order the sale, and in that sense the petition and the order are jurisdictional: *Burris v. Kennedy*, 108 Cal. 331, 339; 41 Pac. Rep. 458.

(2) **Nature and extent.** In proceedings to sell real estate to pay the debts of a deceased person, the decedent's title or interests in the land described in the petition shall not be put in issue, but, otherwise, the jurisdiction of the court extends to the adjudication of all questions, in such proceedings, involving the rights of those before the court, interested in the real estate sought to be sold, whose rights therein will be injuriously affected by a decree of sale. As to such proceedings, the constitutional prohibition that county courts shall not exercise jurisdiction where the value of the property involved exceeds two thousand dollars does not apply: *New York Life Ins. Co. v. Brown*, 32 Cal. 365; 76 Pac. Rep. 799.

(3) **Basis of jurisdiction.** The legislature has prescribed that a petition shall be filed, that notice shall be given, and that an opportunity for a hearing shall be afforded. Since the procedure is one in which there are no adversary parties present at all times in court, it is reasonable to hold, as has always been held, that these acts are essential to the power on the part of the court to order the sale. In that sense the petition and notice are jurisdictional: *Burris v. Kennedy*, 108 Cal. 331, 338; 41 Pac. Rep. 458. In acting upon the petition for an order of sale, the superior court of the state of California is still a court of general jurisdiction, etc.: *Estate of Cook*, 137

Cal. 184, 186; 69 Pac. Rep. 968. The petition for a sale is a necessary prerequisite to the jurisdiction of the court to order a sale: *Burris v. Kennedy*, 108 Cal. 331, 345; 41 Pac. Rep. 458; *Gager v. Henry*, 5 Saw. 244; *Wright v. Edwards*, 10 Or. 298, 306. Without jurisdiction, the probate court has no power to confirm the sale or to impart any validity to it: *Gregory v. Taber*, 19 Cal. 397, 410. See *Gregory v. McPherson*, 13 Cal. 562, 573.

(4) **Not dependent on truth of petition.** It is immaterial, so far as the question of jurisdiction is concerned, whether the statements of the petition are true or not; the jurisdiction rests upon the averments of the petition, not upon proof of them: *Pryor v. Downey*, 50 Cal. 388, 398; *Richardson v. Butler*, 82 Cal. 174, 178; 16 Am. St. Rep. 101; 23 Pac. Rep. 9. The truth of averments respecting personal property, so far as they affect the validity of the order, is to be determined at the hearing of the petition: *Haynes v. Meeks*, 20 Cal. 288, 316.

3. Law governing probate sales.

(1) **In general.** A statute in force at the time of the death of an intestate, concerning authority to sell his property, governs the rights of the heirs: *Estate of Porter*, 129 Cal. 86, 88; 79 Am. St. Rep. 78; 61 Pac. Rep. 659. Upon an application for an order of sale, the court must be governed by the statute in force at the death of the testator, at which time the estate vests in the devisees: *Estate of Roach*, 139 Cal. 17, 19; 72 Pac. Rep. 393. See *Halleck v. Moss*, 22 Cal. 266, 276. Such proceedings must be in accordance with local laws in force at the time, in the state or territory where suit is commenced, and this principle applies, though the United States itself is a suitor: *United States v. Hailey*, 2 Ida. 26; 3 Pac. Rep. 263. It is undoubtedly within the scope of legislative authority to direct that the debts of an estate be paid from the realty instead of the personal property; or (as is done in some states) that the heir need not be made a party to the proceeding to obtain a sale of the real estate; or that the administrator may sell without any order of the court whatever. But all these acts must be for the satisfaction of liens of creditors, or for the support of the family of the deceased, which matters are held to be paramount to the claim of the heirs or devisees: *Brenham v. Story*, 39 Cal. 179, 185. The limitation placed upon actions for the recovery of real estate sold by an executor or administrator, under the provisions of the probate law, are not applicable, where the premises in controversy were not subject to sale, and were not sold under the provisions of such law: *McNeil v. Congregational Soc.*, 66 Cal. 105, 111; 4 Pac. Rep. 1096. An order of the probate court, made after the passage of the act of April 22, 1850, authorizing a person, appointed by an alcalde's court as administrator of the estate of a decedent, to sell the real estate of the intestate, was void for want of jurisdiction, because there was no provision for the transfer of

such proceeding from the alcalde's court to the probate court: *McNeil v. Congregational Soc.*, 66 Cal. 105, 108; 4 Pac. Rep. 1096.

(2) **Statute of frauds.** The statute of frauds does not apply to sales made by executors or administrators under our probate system, inasmuch as such sales are judicial and not ministerial. The administrator is under the control of the court, and the contract for the sale in probate, therefore, need not be in writing, nor is it required to be subscribed by the parties: *Halleck v. Guy*, 9 Cal. 181, 195; 70 Am. Dec. 643.

(3) **Statute of limitations.** The statute of limitations does not run against an allowed claim of a creditor while the administration is pending and unsettled, and he is not, for that reason, precluded from petitioning for an order of sale: *Estate of Arguello*, 85 Cal. 151, 153; 24 Pac. Rep. 641; *Estate of Schroeder*, 46 Cal. 305, 316.

II. SALES OF REAL AND PERSONAL PROPERTY IN GENERAL.

1. Property capable of sale in general.

(1) **Rule at common law.** At common law, the representative could sell personal property without restraint, so long as his acts were not fraudulent; but under the code his power to sell is dependent upon the assent of the court: *Wickersham v. Johnson*, 104 Cal. 407, 412; 38 Pac. Rep. 89; 43 Am. St. Rep. 118; *Rankin v. Newman*, 114 Cal. 635, 660; 46 Pac. Rep. 742; 34 L. R. A. 265; *Bovard v. Dickenson*, 131 Cal. 162, 164; 63 Pac. Rep. 162. The rule at common law with reference to the application of lands and personalty for the payment of debts has been modified by the code provisions. Under our statute, both lands and personalty, as assets in the hands of the executor, are liable for all the debts, and both, if generally devised, are therefore, like specific legacies and devises, chargeable with the same debts, and stand upon precisely the same footing, so far as the reasons for charging them pro rata are concerned: *Estate of Woodworth*, 31 Cal. 595, 614. Rule of the common law relating to vesting of legal title: See *Weider v. Osborn*, 20 Or. 307; 25 Pac. Rep. 715.

(2) **Rule under codes and statutes.** There is no priority, under the code, between real and personal property, where a sale of property is necessary for the payment of debts: *Estate of Montgomery*, 60 Cal. 645, 647. Under the Washington statute providing for the order of payment of the debts of an estate, including funeral expenses, and further providing that "no real estate of a deceased person shall be liable for his debts unless letters testamentary or of administration be granted within six years from the date of the death of such decedent," the real estate is stamped with the charges and expenses of administration only within the limitation provided, but, after the lapse of that time, purchasers who have taken possession of the real

property in good faith, and who have paid taxes thereon, shall not be disturbed in their possession: *In re Smith's Estate*, 25 Wash. 539; 66 Pac. Rep. 93. It is competent for the legislature to change the rule of inheritance, or to restrict the testamentary power. It may provide that the heir or devisee shall take, subject to certain burdens as the payment of the debts, etc.; but this is far from saying that the legislature may, after the title has vested in the heir, empower the administrator to sell the inheritance for purposes not authorized at the time the title vested, and to which it was not subject when it vested: *Estate of Freud*, 131 Cal. 667, 670; 63 Pac. Rep. 1080; 82 Am. St. Rep. 407. Upon the death of the ancestor, the heir at once becomes vested with the full property, subject only to liens then existing or created by the statute then in force: *Brenham v. Story*, 38 Cal. 177; *Smith v. Olmstead*, 88 Cal. 582, 586; 26 Pac. Rep. 521; 22 Am. St. Rep. 335; 12 L. R. A. 46. See also *Estate of Packer*, 125 Cal. 396, 399; 58 Pac. Rep. 59. The entire estate, both real and personal, is liable in the hands of the executor to the charge of all the debts: *Estate of Woodworth*, 31 Cal. 595, 614; *Murphy v. Farmers etc. Bank*, 131 Cal. 115, 119; 63 Pac. Rep. 368. The executor has no more right to sell personal than real estate, unless necessary for its preservation, to pay charges upon it. Personal estate not bequeathed, like real estate, goes to the heir, under our statute, and not to the executor, except for the purpose of settling the estate and paying the debts and charges upon it. The executor no more owns it (as he did at common law), than he does real estate; and he is no more authorized to sell it unless necessary, than he is to sell real estate: *Estate of Woodworth*, 31 Cal. 595, 606. The whole property of a decedent, not exempt, both real and personal, is charged with the payment of debts: *McNutt v. McComb*, 61 Kan. 25; 58 Pac. Rep. 965; *Lake v. Hathaway (Kan.)*, 89 Pac. Rep. 666. As to the real estate, the title of the decedent, upon his death, descends at once to the heir, who is entitled to the possession thereof. No right or title therein goes to the administrator; not even possession: *Black v. Elliott*, 63 Kan. 211; 65 Pac. Rep. 215; following *Bauserman v. Charlotte*, 46 Kan. 480; 26 Pac. Rep. 1051; and *Kulp v. Kulp*, 51 Kan. 341; 32 Pac. Rep. 1118; 21 L. R. A. 550. The whole of the estate, both real and personal, goes into the possession of the executor or administrator, first for the payment of debts, and then for distribution under the will or the laws of succession: *In re Tuohy's Estate*, 33 Mont. 230; 83 Pac. Rep. 6. Therefore any question of title to the property belonging to the estate of a deceased person must be settled in an appropriate action brought in the district court as a court of general jurisdiction: *In re Tuohy's Estate*, 33 Mont. 230; 83 Pac. Rep. 486; *Estate of Burton*, 63 Cal. 36; *Estate of Groome*, 94 Cal. 69; 29 Pac. Rep. 487; *Stewart v. Lohr*, 1 Wash. 341; 25 Pac. Rep. 457; 22 Am. St. Rep. 150. Upon the appointment of an administrator, the court obtains jurisdiction of the real and personal estate of the deceased, and the admin-

istration of the estate is a proceeding in rem: *Furth v. United States etc. Trust Co.*, 13 Wash. 73; 42 Pac. Rep. 523. Under the rule that prior possession of public lands will entitle the possessor to maintain an action against a trespasser, the right of enjoyment of possession of public lands descends among the effects of a deceased person to the executor or administrator, and may be the subject of a sale under the order of a probate court, entitling the purchaser to be subrogated to the rights of the first holder: *Grover v. Hawley*, 5 Cal. 485, 486.

(3) **Rule where personalty is insufficient.** If there is not sufficient personalty to pay the aggregate of all classes of claims,—family allowance, debts, expenses, and charges of administration,—be the same more or less, or be it made up of items belonging to one or more of these classes of charges, real estate may be sold to pay the deficiency left over the amount which the personalty will pay: *Estate of Bentz*, 36 Cal. 687, 690. The California statute does not require all of the personal property to be exhausted before an order can be made for the sale of the realty: *Stuart v. Allen*, 16 Cal. 473, 503; 76 Am. Dec. 551. The long-established rule of priority in marshaling assets, as between legatees, devisees, and heirs, has not been disturbed by our statute. It follows that, as between a legatee of the personalty and a devisee of the realty, the executor is not authorized to appropriate the rents of real estate, which accrued subsequent to the decease of the testator, to the satisfaction of a mortgage debt in exoneration of the personalty: *Estate of Woodworth*, 31 Cal. 595, 609. The title to both real and personal property of one who dies without disposing of it by will passes, under the statute of Idaho, to the heirs of the intestate, subject, however, to the control of the probate court, and to the possession of any administrator appointed by that court for the purpose of administration. This being true, the minor heirs, in a proceeding for the confirmation of a sale of real estate and the conveyance thereof, are adverse parties to said proceeding, and to a proceeding to set aside the sale, and their guardian ad litem should be served with notice of appeal from the order in the premises: *Reed v. Stewart (Ida.)*, 87 Pac. Rep. 1002. It is the duty of the court first to ascertain whether the proceeds of a sale of personal property is sufficient to meet legitimate charges, expenses, and claims, before ordering a sale of the realty: *In re Houck's Estate*, 23 Or. 10; 17 Pac. Rep. 461. Provision is made in the state of Washington, by the statute, for the sale of real estate for the payment of the debts of decedent only in cases where there is not sufficient personal estate in the hands of the representative for that purpose: *Prefontaine v. McMicken*, 16 Wash. 16; 47 Pac. Rep. 231. A statute providing that, whenever it shall appear, after an inventory and appraisement, that the personal estate of any decedent is insufficient to discharge the just debts, resort may be had to the real estate, cannot be regarded

as prescribing a condition precedent to the exercise of the right, by the administrator, to resort to the real estate for the satisfaction of the payment of the debts. The right to resort to the realty is given whenever it appears that the personalty is insufficient for the purpose, independently of whether an inventory of the personal property and its appraisal has been filed or not: *Nichols v. Lee*, 16 Col. 147; 26 Pac. Rep. 157. There are two separate and distinct methods in Kansas by which real property in that state may be sold to satisfy the debts of a non-resident testator. One method is as follows: When a will has been duly proved in another state, upon the production, by the executor or other interested person, of an authenticated copy of the will and probate thereof, the probate court of any county in Kansas in which there is property upon which the will may operate may admit it to record; and the executor taking out letters, or the administrator with the will annexed, shall have the same power to sell and convey the real and personal estate, by virtue of the will or the law, as other executors or administrators with the will annexed shall or may have by law. The other method referred to does not contemplate the appointment of a Kansas executor or administrator, or any appointment in Kansas whatever. This latter method merely relates to the recognition, for the purpose of effecting the sale of real estate situated in Kansas, of an appointment made elsewhere: *Albright v. Bangs*, 72 Kan. 435; 83 Pac. Rep. 1030.

REFERENCES.

Order of sale of personal property for the payment of debts, etc.: See § 497, ante.

2. Particular interests in property.

(1) **Sales of mines and mining interests.** No sale of a decedent's estate is authorized, except when it is necessary, — 1. To pay family allowance; 2. Debts of the decedent; 3. Expenses of administration; or 4. Legacies. But mines and mining interests belonging to estates of decedents are an exception to this rule. Such interests may be sold, when it is expedient to do so, for the benefit of the estate, although the proceeds are not needed to pay debts, expenses, etc.; and where it is sought to sell mining property for the benefit of the estate, it is not required that the petition shall set forth the condition of any property except that which is to be sold. The manifest reason of this is, that the expediency of such sales is in no wise dependent upon the condition of other portions of the estate: *Smith v. Biscailuz*, 83 Cal. 344, 349; 21 Pac. Rep. 15; 23 Pac. Rep. 314.

(2) **Sale of property subject to lease.** The executor may sell property held under a lease, where there is no provision in the lease itself prohibiting a sale of the property during its term, and where the sale is made subject to such lease: *Estate of Brannan* (Cal.), 51 Pac. Rep. 320.

(3) **Sale of partnership interests.** When a partnership is dissolved by the death of one of the partners, its assets, debts, and credits remain as distinct from those of its late members, until its affairs are wound up, as before the dissolution: *Gleason v. White*, 34 Cal. 258. It would seem to be equally clear, that, if all die (whether within the jurisdiction of the same or of different probate courts), the assets, debts, and credits of the partnership do not become confused with the estate of the last survivor, but continue a separate existence, and that the rights of the representatives or successors of the several partners can only be determined in a court of equity, which has the power and machinery for settling those rights by appropriate decree: *Theller v. Such*, 57 Cal. 447, 461.

(4) **Sale of community interests.** The interest of the surviving widow in the community property is that of an heir, and her title to one half of the community property is to be administered as part of the estate of her husband, and is subject to sale for the payment of his debts: *Sharp v. Loupe*, 120 Cal. 89, 93; 52 Pac. Rep. 134, 586. Section 1402 of the Civil Code of California provides that, "in case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration." This is the same rule expressed in different terms by section 1516 of the Code of Civil Procedure of that state. The latter section declares that "all the property of a decedent shall be chargeable with the payment of the debts of the deceased, the expenses of administration, and the allowance to the family, except as otherwise provided in this code and in the Civil Code." The phrase, "all the property of a decedent," in the latter section, is the equivalent of "the entire community property," in the former: *Estate of Burdick*, 112 Cal. 387, 399; 44 Pac. Rep. 734; *Sharp v. Loupe*, 120 Cal. 89, 92; 52 Pac. Rep. 134, 586.

(5) **Homestead under United States land laws.** The homestead law of the United States vests the right in the land in the claimant himself, for his exclusive benefit, and if he dies before patent issues, leaving no widow, then in his heirs, or devisees, if they are at the time citizens of the United States. There is no authority under the land laws for an executor or administrator to consummate the inchoate claim of the decedent's homestead, or to sell his rights thereunder, for the benefit of the creditors: *Towner v. Rodegeb*, 33 Wash. 153; 74 Pac. Rep. 50, 51. If the homestead claimant dies before patent issues, or before the right to demand a patent has accrued, the land does not become a part of his estate. Upon his death, all his rights under the homestead entry cease, and his heirs become entitled to a patent, not because they have succeeded to his equitable interest, but because the law gives them preference as new homesteaders, and

allows them the benefit of the residence of their ancestor upon the land: *Gjerstadengen v. Van Duzen*, 7 N. D. 612; 76 N. W. Rep. 233; 66 Am. St. Rep. 679; *Chapman v. Price*, 32 Kan. 446; 4 Pac. Rep. 807. The same principle, under similar statutory provisions, is applied in case of the death of a pre-emptor. The subsequently perfected title inures to the benefit of the heirs, and can neither be devised by the pre-emptor nor sold in satisfaction of his debts or expenses of administration: *Wittenbrock v. Wheadon*, 128 Cal. 150; 60 Pac. Rep. 664; 79 Am. St. Rep. 32. Moreover, a homestead cannot be sold for debts contracted before patent issues: *Barnard v. Boller*, 105 Cal. 214; 38 Pac. Rep. 728; *Bank v. Riley*, 29 Or. 289; 45 Pac. Rep. 766. It follows that such debts cannot be enforced against the homestead by the processes of administration; and an attempted sale of the inchoate right thereof for the benefit of the creditors is void: *Towner v. Rodegeb*, 33 Wash. 153; 74 Pac. Rep. 50. Where a patent conveys land to the heirs, and not to the decedent, the heirs have the right to convey and give possession as grantees of the United States, and any attempted sale of such lands made by the administrator of the estate of the deceased is an absolute nullity, and no title is communicated thereby to any purchaser: *Coulson v. Wing*, 42 Kan. 507; 22 Pac. Rep. 570. Under the Revised Statutes of the United States, directing that, in case of the death of the claimant before perfecting title, it shall be competent for his administrator, or one of his heirs, to file the necessary papers to perfect the same, but that entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and that a patent thereon shall cause the title to inure to such heirs, as if their names had been specially mentioned, the right of possession of pre-empted land to which title is inchoate passes, on the death of the pre-emptor, to his administrator. The right of possession thus acquired is subject to a trust, which requires the administrator to proceed to perfect title in favor of the heirs, provided there are heirs, and the estate is in such condition as to enable him to do so, and the interest of the heirs, all things considered, so demand. But, aside from this trust, he is free to dispose of the possession for the best advantage of the estate. No fraud in the premises, on the part of the administrator, will be presumed; but, when there is no administrator, or, if there is one, and he consents, an heir may perfect the title. The statute puts only one limitation upon the administrator in dealing with the possession, which limitation is, that he should, for all purposes of perfecting the title, stand in possession as representing the ancestor for the benefit of the heirs and creditors alike; and, aside from such limitation, a salable possessory right passes to the administrator: *Burch v. McDaniel*, 2 Wash. Ter. 58, 63; 3 Pac. Rep. 586.

(6) **Sale of contracts for purchase of realty.** Contract for purchase of lands may be sold how: See § 576, ante.

(7) **Property under mortgage or other lien.** Where the court has jurisdiction of land, with power to order a sale, and a mortgagee claimant has subjected his mortgage to the jurisdiction of the court, by consent, and the proceedings have been fully carried out, and a deed issued to the mortgagee thereunder, it is thereafter too late to raise any question relating to the regularity of the proceedings, where there are no jurisdictional questions involved: *Dooly v. Russell*, 10 Wash. 195; 38 Pac. Rep. 1000. When mortgaged property of a decedent is sold at a probate sale, such sale of the decedent's interest in the land does not in any way affect the indebtedness of his widow to the estate, except to alter the security held by the estate for the payment of such debt. Instead of holding her interest as heir in the land of the estate, as security, it thereafter holds her interest as heir in the proceeds of such land: *Estate of Angle*, 148 Cal. 102; 82 Pac. Rep. 668. Where a mortgage is given by an heir, by which he mortgages his interest in an estate, and where the mortgaged land was subsequently sold by the administrator at probate sale, the mortgagee acquires, upon foreclosure, only a lien on the funds of the mortgagor in the hands of the defendant administrator; and, for the purpose of securing the amount due, is the assignee of the mortgagor's interest therein, with power, as his attorney, to demand and receive the same. The mortgagee is therefore entitled to recover of the administrator, payable out of the share of the mortgagor, the amount due, with costs as found by the court: *Gutter v. Dallamore*, 144 Cal. 665, 669; 79 Pac. Rep. 383. The purchaser at a mortgage sale, which is void for any reason, becomes the assignee of the mortgage and the debt secured thereby: *Smithson Land Co. v. Brautigam*, 16 Wash. 174; 47 Pac. Rep. 434; *Bryan v. Brasuis*, 162 U. S. 415; 16 Sup. Ct. Rep. 803; 40 L. ed. 1022. The heirs and a mortgagor cannot recover in an action against the mortgagee, who makes a void foreclosure, and in good faith takes possession under cover of such proceedings, where no claim is made that the debt was ever paid: *Investment Security Co. v. Adams*, 37 Wash. 211; 79 Pac. Rep. 625.

(8) **Same. Application of purchase-money.** Where a bidder has the privilege of paying the whole sum on the date of sale, it is error for the court to direct the entire amount to be credited upon a mortgage held by the purchaser against the property for an amount exceeding the amount of his bid, which mortgage debt was drawing interest at the rate of two and a half per cent per month, whereas, by the terms of the sale, half of the purchase-money was to have been cash in hand, and the remainder in ninety days, with interest from the date of sale, at the rate of one per cent per month: *Halleck v. Guy*, 9 Cal. 181, 197. Where property is sold by an administrator, and the purchaser has a mortgage claim against the property, which he presented to the estate, and the claim was allowed by the adminis-

trator and by the court, the amount of such claim upon the mortgage is a credit upon the purchase price, and the purchaser will not be compelled to pay such amount to the administrator of the estate in cash, before he is entitled to a conveyance of the property upon the sale and confirmation. It is sufficient, where the purchaser, or, in the event of his death, his administrator, credits the amount due upon the mortgage claim against the estate of the mortgagor, for such credit is equivalent to an actual payment of the amount in cash: *Estate of Lewis*, 39 Cal. 306, 309. The provision of the statute, that, "when any sale is made by an executor or administrator of land subject to any mortgage or lien, which is a valid claim against the estate of the deceased, the purchase-money shall be applied, after paying the necessary expense of the sale, first to the payment and satisfaction of the mortgage, and the residue in due course of administration," is not controlled by the general provisions of the statute in reference to the distribution of assets and payment of debts. The creditor merely gets the benefit of the contract made with the deceased, and is under no obligation to pay any other expenses than those incurred in the enforcement of the mortgage security: *Estate of Murray*, 18 Cal. 686, 687.

(9) *Choses in action.* It was not the intention of legislation, changing the rule at common law, to require an order for the sale of personal property to include choses in action, or to deprive the executor or administrator of the power of disposition over them: *Weider v. Osborn*, 20 Or. 307; 25 Pac. Rep. 715. In California, choses in action must be sold in the same manner as other personal property: *Bovard v. Dickenson*, 131 Cal. 162, 164; 63 Pac. Rep. 162. The statute has curtailed the power of the executor or administrator to sell or dispose of the personal property of the decedent, and limited it to such as is visible and tangible, except by an order of the probate court, either at public or private sale, as may be provided therein; but with this difference, the power of disposition of the executor or administrator remains as at common law, and the title of all choses in action is vested in him, with authority to collect and otherwise dispose of them: *Weider v. Osborn*, 20 Or. 307; 25 Pac. Rep. 715. An executor or administrator may sell or dispose of choses in action by indorsement to another, or to a distributee, without an order of the probate court, and such transfer passes the title, so as to enable the transferee or distributee to maintain an action on them; and the makers, in the absence of fraud, cannot abate such an action for a want of authority to make the transfer: *Weider v. Osborn*, 20 Or. 307; 25 Pac. Rep. 715. An administrator cannot sell the property under administration to pay for improvements on land of the heirs, erected by some unauthorized person years after the decedent's death: *Cain Heirs v. Young*, 1 Utah, 361.

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3. When sale is not authorized. Before a probate court, in Utah, is authorized to order an administrator to sell the lands of a decedent, two prerequisites must be observed: 1. There must be debts and charges against the estate unpaid; and 2. The personal property of the decedent must be insufficient to pay these debts and charges. Where, therefore, the petition for such a sale did not allege that there existed debts or charges against the estate unpaid, and did not allege that there was no personal property to pay such debts or charges, if any existed, there is no escape from the conclusion that the court had nothing before it to give it jurisdiction, and an order of sale based upon such petition is void: *Needham v. Salt Lake City*, 7 Utah, 319; 26 Pac. Rep. 920.

4. Petition for order.

(1) **In general.** A petition for the order of sale of the estate of a decedent, for the purpose of paying debts, whether made by the executor, or administrator, or a judgment creditor, must set out all the facts required to be shown by the statute: *Prefontaine v. McMicken*, 16 Wash. 16; 47 Pac. Rep. 231, 233. A substantial compliance with the statute is sufficient in setting forth the facts in the petition for an order of sale: *Estate of Arguello*, 85 Cal. 151, 152; 24 Pac. Rep. 641; *Richardson v. Butler*, 82 Cal. 174; 23 Pac. Rep. 9; *Silverman v. Gundelfinger*, 82 Cal. 548, 549; 23 Pac. Rep. 12; *Estate of O'Sullivan*, 84 Cal. 444, 447; 24 Pac. Rep. 281. The court gets jurisdiction, not merely by the actual existence of jurisdictional facts, but by their averment in the petition: *Holmes v. Oregon etc. R. R. Co.*, 7 Saw. 387; *Wright v. Edwards*, 10 Or. 298, 304. A petition for the sale of real property should show the facts required, since not only the judgment of the court is invoked to determine whether there shall be any sale, but also, if any, what property it is best for the interests of the heir should be sold: *Townsend v. Gordon*, 19 Cal. 189, 208. The general rule that matters of substance must be alleged in direct terms, and not by way of recital or reference, much less by exhibits merely attached to the pleading, is applicable with equal force and propriety to petitions for the sale of real estate to pay debts and expenses of administration: *Estate of Cook*, 137 Cal. 184, 186; 69 Pac. Rep. 968. The sufficiency of the particulars, in a petition for the sale of property, as to the condition of the property, must be determined by the circumstances of each case. Therefore, in a case where it is shown to be necessary to make a sale of some of the property of the estate for the purpose of paying claims against it, and the estate of the decedent consists of a single piece of real property, a court will require less particularity in the petition than where the estate comprises several pieces of property, and only one of such pieces is to be sold: *Estate of Devincenzi*, 119 Cal. 498, 501; 51 Pac. Rep. 845, 846; *Burris v. Kennedy*, 108 Cal. 331; 41 Pac. Rep. 458. If the court has, by the petition and notice, acquired jurisdiction, errors

afterward made in the exercise of it will not render the decree invalid: *Burris v. Kennedy*, 108 Cal. 331, 339; 41 Pac. Rep. 458.

(2) **Defects. Mistakes. Omissions.** A petition for the sale of the property of an estate is defective, and an order based thereon conveys no title, where there is no attempt at a statement of the condition of the property of the estate, nor of the value of the property asked to be sold, except a statement that it is of uncertain value, on account of litigation with reference thereto, and where the defects in the petition itself are not supplied by proofs at the hearing, and where the decree authorizing the sale does not state any general or other facts showing a necessity for the sale: *Estate of Rose*, 63 Cal. 346, 348. There is no difference between no petition at all, and a petition lacking the substantial averments required by statute: *Gregory v. McPherson*, 13 Cal. 562, 578. A petition may set forth inaccurately the amount of the personal property which has come to the hands of the administrator; it may even omit valuable portions thereof: yet, if it purports, on its face, to set forth the whole of such property, and how much of it, if any, remains undisposed of, the order for the sale which may follow cannot be attacked by reason of the inaccuracies or omissions: *Haynes v. Meeks*, 20 Cal. 288, 315. When the petition states that the personal property of the estate which will be shown by the inventory is insufficient, this averment, though informal and indirect, is equivalent to saying that the personal estate mentioned in the inventory is still on hand, and therefore undisposed of. No nice criticism of the mere form of statement for the purpose of ousting a court of jurisdiction will be made, where it is sought to declare its proceedings void: *Stuart v. Allen*, 16 Cal. 473, 503; 76 Am. Dec. 551. A recital in a petition for an order of sale as follows: "This petition respectfully represents that, in order to settle up the business of the estate of said deceased, to pay certain debts and demands due and owing by such estate," etc.,— is not a sufficient allegation that legal debts and legal charges exist unpaid against the estate: *Needham v. Salt Lake City*, 7 Utah, 319; 26 Pac. Rep. 920. A mistake in the petition, in stating the amount of the estate, is not fatal to the jurisdiction, as not truly setting forth the condition of the estate, or the amount of the property, so as to present to the court the proper data by which it can judge of the portion necessary to be sold: *Fitch v. Miller*, 20 Cal. 352, 383. The omission, in a petition for an order to sell real estate of a decedent, to state that the persons who were named in the petition as the devisees and legatees were also the heirs of the deceased, as appears from the order of sale, is not fatal to the validity of the order: *Estate of Levy*, 141 Cal. 639, 645; 75 Pac. Rep. 317. No sale is invalid on account of the omission to state in the petition any of the matters enumerated in the statute, provided the general facts showing that the sale is necessary are proven and found. The facts show-

ing that the sale is necessary are: that there are debts; that an allowance has been made for the support of the family, or that there are expenses of administration; and that there is not sufficient money in the hands of the administrator to pay them. Where such facts are alleged in the petition, even though erroneous, the decree is not void, nor the sale invalid on that ground: *Burris v. Kennedy*, 108 Cal. 331, 340; 41 Pac. Rep. 458.

(3) **May be made when. Laches in filing.** The administrator is justified in assuming that creditors will exhibit and prove their claims against the estate, and he is not required to wait until they do so before preparing to pay them. When he ascertains that the personal property will not be sufficient to pay the debts, he may then petition the court to sell the real estate: *Randel v. Randel*, 64 Kan. 254; 67 Pac. Rep. 837. A creditor may petition the court for a sale of the land of the estate, where the administrator neglects to perform his duty, at least within a reasonable time after the claim is presented and filed: *Estate of Wiley*, 138 Cal. 301, 307; 71 Pac. Rep. 441. An application for an order authorizing the sale of the real estate of a decedent should be refused, where there has been long delay preceding the filing of the petition without any satisfactory explanation: *Estate of Crosby*, 55 Cal. 574, 588. The right to sell real property in a proceeding for the payment of expenses and charges of administration accrued and to accrue is not lost by laches, where the application is made upon the double necessity of redeeming the mortgaged premises from an existing lien, and to pay the "debts, expenses, and charges of the administration accruing and to accrue": *Estate of Freud*, 131 Cal. 667, 673; 63 Pac. Rep. 1080; 82 Am. St. Rep. 407. Gross negligence or palpable laches on the part of the executor or administrator is sufficient reason for denying an order of sale in a given case: *Estate of Crosby*, 55 Cal. 574. No hard and fast rule has ever been promulgated defining what lapse of time in applying for a license to sell real property will amount to laches, and every case must necessarily be governed by its own particular facts and circumstances: *In re Smith's Will*, 43 Or. 595; 75 Pac. Rep. 133. The rule that laches will, in some cases, defeat a creditor's application for the sale of property of the estate goes only to the extent that a probate court has discretionary power to deny a petition for the sale of real estate when there has been unreasonable delay without circumstances to excuse it: *Estate of Arguello*, 85 Cal. 151, 154; 24 Pac. Rep. 641. An objection that there was an unreasonable delay in applying for the order of sale finds no support in facts showing a persistent and long-continued effort, on the part of the creditors, to bring the administrator to an accounting, and where litigation assumed so many phases and had been so protracted as to account for the delay which occurred: *Estate of Schroeder*, 46 Cal. 305, 320. Laches in applying for an appointment as administrator, and for a license to sell real

property, will not bar the right of the administrator to sell the realty, where delay in applying for letters of administration or license to sell has resulted in no such changes of ownership or physical conditions as to render it inequitable to sell, or where, by analogy to the statute of limitations prescribed in the jurisdiction, sufficient time has not run to bar the relief in the form proposed: *In re Smith's Will*, 43 Or. 595; 75 Pac. Rep. 133. There is no limitation in the state of Oregon as to the time when a claim against the estate of a deceased person may be presented, nor as to when an application for an order of sale of real property for the purpose of paying debts, etc., may be made: *In re Houck's Estate*, 23 Or. 10; 17 Pac. Rep. 461. Where a question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known to him were such as to put the duty of inquiry upon a man of ordinary intelligence: *Johnston v. Mining Co.*, 148 U. S. 360; 13 Sup. Ct. Rep. 585.

REFERENCES.

Laches of executors or administrators in applying for orders authorizing them to sell property for the payment of debts: See note 26 Am. St. Rep. 22-29.

(4) **Parties to the proceeding.** The creditor of an heir is in no sense a necessary party to a proceeding in an estate for leave to sell: *Nichols v. Lee*, 16 Col. 147; 26 Pac. Rep. 157. Under the statute of New Mexico, the surviving wife is a party to the proceeding, where it is sought to sell lands of the decedent in which she has an interest, which are not susceptible of division; but in such case her interest should be ascertained, so that her rights at the sale may be protected without putting her under the burden of protecting incidentally the rights of the creditors. And the proceedings to sell of real estate be joined in one suit with proceedings for the sale of real estate belonging to the decedent: *First Nat. Bank v. Lee*, 8 N. M. 589; 45 Pac. Rep. 1114.

(5) **Necessity for sale.** The necessity for a sale is not a matter for an executor or administrator to determine, but is a conclusion which the court must draw from the facts stated, and the petition must furnish the materials for its judgment: *Pryor v. Downey*, 50 Cal. 388, 398; 19 Am. St. Rep. 656. The executor has no more right to sell personal estate than he has to sell real estate, unless necessary for its preservation, or to pay charges upon it; but there may be as great a necessity for selling it, for the purpose of marshaling the assets between the legatees, heirs, and devisees, as to pay debts: *Estate of Woodworth*, 31 Cal. 595, 605. The facts showing that a sale is necessary are: that there are debts; that an allowance has been made for the support of the family, or that there are expenses

of administration; and that there is not sufficient money in the hands of the executor or administrator to pay them: *Burris v. Kennedy*, 108 Cal. 331, 339; 41 Pac. Rep. 458. It is not necessary to the right of the administrator to petition for, or to the power of the court to order, a sale, that there should first be a demand upon the administrator to sell. It is his duty to petition for a sale whenever a necessity arises under the statute. The creditor, or any one interested, may make application, if the administrator neglects to apply for the order: *Estate of Roach*, 139 Cal. 17, 19; 72 Pac. Rep. 393. The statute in California does not make it necessary that an account of the executor's transactions shall be rendered and a final adjudication had upon it before the court can make an order for the sale of the real estate to meet the expenses of administration. It cannot, therefore, be said that where an executor applies for an order authorizing him to sell real property belonging to the estate of his testator for the purpose of satisfying a claim in his own favor, for services and expenses as executor, that an account should be first presented and settled. It is proper, and not premature, for the court to make an order of sale on finding a legal necessity for such sale: *Abila v. Burnett*, 33 Cal. 658, 665. The description and condition of the property quite fully appear, and the necessity for a sale sufficiently appears, when it is shown that there are debts or expenses of administration, and that there is no money, or personal property, or income from which to meet these liabilities: *Estate of Roach*, 139 Cal. 17, 21. A petition which discloses the nature, extent, and value of the personal property belonging to the estate, and contains a detailed statement of facts from which it sufficiently appears that the personal property is not sufficient to meet the claims and costs allowed against the estate, sufficiently shows the necessity for resorting to the real property: *Bateman v. Reitler*, 16 Col. 547; 36 Pac. Rep. 548. The question as to whether there was a necessity for a sale is one for the probate court to decide, and its unreversed decision, whether right or wrong, is absolutely binding upon the parties in a collateral attack thereon: *Lake v. Hathaway* (Kan.), 89 Pac. Rep. 666.

(6) **Condition of property.** The court should be informed, by the petition, of the condition of the property; that is, whether the property is improved or unimproved, productive or unproductive, occupied or vacant, and the like. Such information is necessary to enable the court to intelligently exercise its judgment in the selection of the property of the estate, which can be most advantageously sold. Where the condition of the property is not stated, the petition is substantially defective, and the provision found in the statute, as to supplying defects by proof at the hearing, has no application to a petition, the sufficiency of which is directly attacked by general demurrer, or by objection to its sufficiency, taken upon appeal from the order of sale: *Estate of Smith*, 51 Cal. 563, 565. An objection that the petition

fails to state the condition of the property will not be considered on appeal, where such objection was not made in the court below, where the petition states the jurisdictional facts required by the statute, and where the attack is collateral and not direct: *Baum v. Roper*, 132 Cal. 42, 48; 64 Pac. Rep. 128. In the case of mining property, which a guardian seeks to sell for the interest of his ward's estate, it is not required that the petition should set forth the condition of any property except that which is to be sold. The manifest reason of this is, that the expediency of such sales is in no wise dependent upon the condition of other portions of the estate: *Smith v. Biscailuz*, 83 Cal. 344, 349; 21 Pac. Rep. 15; 23 Pac. Rep. 314.

(7) **Description of property.** The sufficiency of a description of one parcel of land does not cure defects of description as to other parcels; for the statute requires that all of the real estate of the deceased should be described: *Wilson v. Hastings*, 66 Cal. 243, 245; 5 Pac. Rep. 217. Where a petition for an order of sale describes the land as in "Township 29 N.," etc., instead of in "Township 25 N.," where the same is situated, and in connection with the statement that the land is in "Township 29 N." is the further statement that it is in "King County," in which said township is not situated, the description is fatally defective, and a sale under such petition is void: *Hazelton v. Bogardus*, 8 Wash. 102; 35 Pac. Rep. 602. Where, in a contract for the sale of land, the property is described as "the whole of the Redding ranch," purchased by deed of a certain date, and the place of record of such deed is specified, the description is sufficient; and where the land, so described in a decree of distribution, has been distributed to the heirs of a deceased person, they have a marketable title thereto: *Bates v. Howard*, 105 Cal. 173, 183; 38 Pac. Rep. 715.

(8) **Reference to other papers.** Reference may be made in the petition to other papers to show the facts: *Wilson v. Hastings*, 66 Cal. 243, 246; 5 Pac. Rep. 217. The petition may refer to the inventory for the description of the real property, and the inventory thereupon becomes a part of the petition for that purpose: *Richardson v. Butler*, 82 Cal. 174, 178; 23 Pac. Rep. 9; 16 Am. St. Rep. 101. But a reference to the inventory in the petition for one purpose cannot be taken as a reference for any other purpose to supply an omission of some necessary statement: *Townsend v. Gordon*, 19 Cal. 189, 208. A petition for an order of sale may refer to the inventory for the description of the real estate to be sold; but where the inventory is deficient as to the description, the petition itself is insufficient to give the probate court jurisdiction to order a sale of the property: *Wilson v. Hastings*, 66 Cal. 243, 246; 5 Pac. Rep. 217. See *Stuart v. Allen*, 16 Cal. 473. Where a petition sufficiently shows to the court what the interest of the deceased in the land was at the time of his

death, and contains, by reference to the inventory, a full description of all real property of the estate at the time the sale is asked, and gives to the court all the information on that subject contemplated by the code, the sale cannot be held void for want of a sufficient description of the real property in the petition itself, apart from the inventory: *Richardson v. Butler*, 82 Cal. 174, 179; 23 Pac. Rep. 9; 16 Am. St. Rep. 101. Schedules attached to the petition constitute a part thereof, and if, in the body of the petition, it is stated that the values and conditions of the realty are set forth in a particular schedule, naming it, and the only values there set forth are the appraised values, this, in the absence of special objection, is a sufficient statement as to present value: *Estate of Levy*, 141 Cal. 639, 643; 75 Pac. Rep. 317. The requirement of the statute, that the facts prescribed shall be stated in the petition, is peremptory. If the petition refers to another paper on file, for the purpose of a more full and explicit statement of facts, that paper might be considered in connection with the petition, and both be taken together as a statement of all the required facts. But it is apparent that no such result can be attained, unless the petition itself make the reference. It is not sufficient for the administrator to file a separate paper, not a part of, nor referred to in, the petition, though this paper contains part of the facts which the statute requires the petition to state: *Gregory v. Taber*, 19 Cal. 397, 410. See *Gregory v. McPherson*, 13 Cal. 562, 573. A reference, "for greater certainty," without stating for what the reference is made, whether for description, or value, or condition, is an insufficient reference to make the inventory a part of the petition as to description, or value, or condition: *Wilson v. Hastings*, 66 Cal. 243, 246; 5 Pac. Rep. 217. A reference to an inventory may be construed as justifying the omission to include in the petition a more particular statement of personal effects than that made in it, but such reference does not make the inventory a part of the petition for any other purpose: *Townsend v. Gordon*, 19 Cal. 188, 208. A petition for the sale of mining interests, referring to the inventory for a description of the real property, while sufficient as to the description, is defective in failing to set forth the condition and value of the estate, as required by the statute, if there is nothing in the petition, or the inventory and appraisal referred to therein, which indicates the condition of the mining interests, or of the mining company in which such interests are held, or of the mining claims, or whether they are being worked or are lying idle, or whether they are sources of profit or of loss to the estate: *Estate of Boland*, 55 Cal. 310, 314.

(9) Verifying the petition. A petition lacking a verification is invalid. The description of the property, its condition, value, and character, are jurisdictional facts, which must affirmatively appear in a verified petition, before a probate court can make any valid

order for the sale of the real property of an estate to pay debts. These are of the essence of the petition, without which it has no legal existence: *Estate of Boland*, 55 Cal. 310, 315. In the state of Washington, it has been held that a failure to verify the petition, which is the foundation of proceedings to sell real estate, is a mere irregularity; for, if the petition is in other respects sufficient, the court is given jurisdiction: *McCoy v. Ayers*, 2 Wash. Ter. 203; 3 Pac. Rep. 273. Schedules attached to the petition are a part of it, and are included in the verification. An objection that the petition is not properly verified because the certificate of verification is placed before the schedules which were attached to it, is not tenable: *Richardson v. Butler*, 82 Cal. 174, 180; 23 Pac. Rep. 9; 16 Am. St. Rep. 101.

(10) Amending the petition. The petition must contain a general description of all the real property of which the decedent died seised; and if it does not contain any such description, it is error to make the order of sale on such petition, though amended, without further notice. The court should treat the petition, when amended, as a new petition, and proceed de novo: *Gharky v. Werner*, 66 Cal. 388, 389. A petition based upon a former petition is, in effect, a continuation of a first application, where there was no revocation of the order made upon such first application, and the statute of limitations cannot be considered as barring the subsequent proceeding, where the first application on which it was based is not barred: *Estate of Montgomery*, 60 Cal. 645, 648.

(11) Defects cured by the order of sale. If the petition substantially complies with the requirements of the code, it may be aided by the order of sale as to all the facts showing the sale to be necessary, and giving the court jurisdiction, if the defect is supplied by proofs at the hearing, and the general facts showing such necessity are stated in the decree: *Dennis v. Winter*, 63 Cal. 16, 17. A defect in the petition, which consists in the failure to state whether the real property was separate or community property, is remedied by the fact that it is stated in the order directing the sale that the property was separate property: *Estate of Arguello*, 85 Cal. 151, 152; 24 Pac. Rep. 641.

(12) Defects not cured by the order. If the petition for the sale of real estate does not set forth the value of the real estate sought to be sold, the petition is fatally defective, and cannot be cured by recitals in the order of sale, or by inferences to be drawn from the inventory and appraisal of the estate referred to in the petition generally, but not specifically, as to the lands or their value: *Estate of Cook*, 137 Cal. 184, 190, 191; 69 Pac. Rep. 968. A petition in which the only recital upon the subject of condition and value of the land is, that it was an "unperfected claim under the homestead laws of

Congress," and which does not state what the land was worth, whether it was improved or unimproved, productive or unproductive, occupied or vacant, nor any other information by which the court might intelligently have exercised its judgment that the property could be most advantageously sold, is fatally defective, and a sale thereof is void for want of jurisdiction in the court to order it: *Kertchem v. George*, 78 Cal. 597, 599; 21 Pac. Rep. 372. A petition for an order of sale is fatally defective, where, with reference to personal property, there is no attempt to comply with the statute, and the court is left in entire ignorance as to the condition of the estate with respect to such property, information in respect to which is essential to its jurisdiction, and where, in respect to the real property asked to be sold, the petition does not show the condition of the land, whether it is improved or waste land, or whether it is yielding an income or is burdening the estate with expense, and does not purport to give a description of all the real estate of which the intestate died seised. The condition of the land that it is desired to sell should be stated so that the court may judge of the necessity of its sale: *Haynes v. Meeks*, 20 Cal. 288, 317. See *Estate of Boland*, 55 Cal. 514; *Janes v. Throckmorton*, 57 Cal. 386.

(13) **Creditor's petition.** A creditor of the estate of a decedent, whose claim has been allowed by the court, may petition for the sale of the real estate of such estate: *Estate of Coutts*, 87 Cal. 480, 481; 25 Pac. Rep. 685. When the proceeding for a sale is not instituted by the representative of the estate, but by a creditor, his standing, as such, must be averred and shown, in order to qualify him to institute the proceeding; but, when the real estate of the decedent is sold under the decree, the proceeds are to be paid over to the executor or administrator for administration under the direction of the probate court. The allowance of an ordinary claim against the estate of a deceased person does not give the creditor any superior right or lien over the real estate, or the proceeds arising from the sale thereof, prior and superior to the rights of any other creditor whose claim against the estate may be allowed: *First Nat. Bank v. Lee*, 8 N. M. 589; 45 Pac. Rep. 1114. A creditor of an estate, having a valid lien, may petition for an order of sale of the lands covered by the lien, and has the right, upon purchasing the property at the sale, to have the amount of his bid, less the necessary expense of sale, credited on his claim by reason of his lien upon said lands: *Estate of Wiley*, 138 Cal. 301, 303; 71 Pac. Rep. 441. The petition of a creditor, whose claim is secured by a lien upon specific property of the estate, to sell the land to enforce payment of the claim and lien, filed before the statute of limitations has expired, has the effect of arresting the further operation of the statute: *Estate of Wiley*, 138 Cal. 301, 308; 71 Pac. Rep. 441. Where a creditor of the executor files a petition asking for an order requiring the executor to sell so much of the real

estate as shall be necessary to pay his claim, and, upon the hearing, evidence upon every material allegation of his petition is introduced, it is error to grant a nonsuit, on motion of the devisees, upon the ground that the claim is against the executor; that, until he pays it and presents it in his account as an expense of administration, the court cannot act upon it; that the order allowing the claim is void; and that the claim is barred by the statute of limitations: *Estate of Coutts*, 87 Cal. 480, 481; 25 Pac. Rep. 685.

5. Opposing the application.

(1) *In general.* A grantee of one of the heirs of the deceased, being entitled, upon distribution of the estate, to the share of the heir so conveyed to him, is a person "interested" in the estate, and is entitled to oppose an application for an order of sale: *Estate of Steward*, 1 Cal. App. 57, 60; 81 Pac. Rep. 728; *Estate of Baum*, 92 Cal. 192; 28 Pac. Rep. 221. The court is not bound to refuse an order of sale whenever it appears that the required money can be obtained by mortgage. It may inquire into the wisdom of mortgaging the property, and the means of payment thereof possessed by the heirs, and, if it appears that the distributees must inevitably lose the entire property at some time before default and foreclosure, in case a mortgage be made, unless they can make a sale of the property, the court does not err in finding that a sale is necessary: *Estate of Newlove*, 142 Cal. 377, 382; 75 Pac. Rep. 1083. The provisions of the statute allowing objections to be made to the sale, and requiring, for its efficacy, a confirmation by the court, are intended to secure only such an execution of the order of sale that a just and fair price may be obtained for the property for the benefit of the estate. The authority of the court is limited to such a supervision and control, that this end may be effected: *Estate of Spriggs*, 20 Cal. 121, 126. The pendency of a suit involving title to a part of the real property is not, in itself, sufficient cause for refusing to make an order of sale; especially where the evidence taken concerning the merits of the action tends strongly to show that it was instituted in good faith. Whether a sale would impair the value of the land, under such circumstances, is a matter largely within the discretion of the court to determine: *Estate of Newlove*, 142 Cal. 377, 382; 75 Pac. Rep. 1083.

(2) *Demurrer to the petition.* The point that a statement is insufficient, which is easily understood as an admitted statement of a particular fact, and is merely shadowed by some uncertainty or want of fullness or aptness of expression, can be reached only by a special demurrer or objection in the court below: *Estate of Heydenfeldt*, 127 Cal. 456, 458; 59 Pac. Rep. 839; *Estate of Levy*, 141 Cal. 639, 643. See also *Silverman v. Gundelfinger*, 82 Cal. 548; 23 Pac. Rep. 12; *Estate of Devincenzi*, 119 Cal. 498, 500; 51 Pac. Rep. 845.

Upon a special demurrer the court might require a little more certainty, where the value is informally alleged; but where there is not such a total want of a statement of values as renders the petition defenseless against a collateral attack, which is in the nature of an objection, in an ordinary civil action, that the complaint does not state facts sufficient to constitute a cause of action, the petition will be held sufficient: *Silverman v. Gundelfinger*, 82 Cal. 548, 549; 23 Pac. Rep. 12. If a defect of parties plaintiff or defendant does not appear upon the face of the petition filed in a proceeding to sell, the objection may be taken by answer; but if no objection is taken, either by demurrer or by answer, the defendant is deemed to have waived the same: *Coulson v. Wing*, 42 Kan. 507; 22 Pac. Rep. 570. So far as the question of the insufficiency of the petition is concerned, an appellant occupies a no more advantageous position by reason of the filing of a general demurrer, than he would have occupied had he presented no demurrer and simply appealed from the order of sale. In either event the question for determination is as to whether or not the petition is substantially defective in any of the requirements of the code: *Estate of Levy*, 141 Cal. 639, 642; 75 Pac. Rep. 317. The provision of the statute, that a failure to set out the necessary facts in the petition will not invalidate the subsequent proceedings, if the defects are supplied by proof at the hearing and stated in the decree, has no applicability to a petition, the insufficiency of which is directly attacked by general demurrer in the probate court, or by objection to its sufficiency taken upon appeal from the order of sale: *Estate of Smith*, 51 Cal. 563, 565; *Estate of Boland*, 55 Cal. 310, 315; *Estate of Cook*, 137 Cal. 184, 188; 69 Pac. Rep. 968.

6. Sale for payment of debts.

(1) **In general.** One prominent purpose of administration is to pay the debts of the estate from the real and personal property of the deceased. To sell real estate to pay the debts is as plainly a step in the administration as is the sale of personal property for the same purpose; and while it is within the scope of the administration to sell either real or personal property, yet the legislature has the power to direct how this shall be done: *Burris v. Kennedy*, 108 Cal. 331, 338; 41 Pac. Rep. 458. An order for the sale of certain personal property to pay debts, set forth in a schedule of claims against the estate, is not a determination that the claim is a valid debt due from the estate: *Estate of Wells* (Cal. App.), 94 Pac. Rep. 856, 858. An executor or an administrator cannot be compelled, by a probate court, to sell the real estate of a decedent which has been distributed by order of the proper court, to pay debts established after such distribution. It is only property in the hands of the personal representative that can be sold by him, and such sale must be made in accordance with the statute: *Prefontaine v. McMicken*, 16 Wash. 16; 47 Pac. Rep. 231, 233. A probate court does not have any authority

to order a sale of the homestead for the purpose of paying debts of the deceased, although they are secured by a valid mortgage on the same: *Estate of Orr*, 29 Cal. 101, 104. While it is the duty of the administrator to preserve the estate, yet this does not mean that he is, at his discretion, to pay off all encumbrances resting on the property, upon the notion that the property may increase in value, and that thereby a speculation may be made for the estate. He cannot advance money to remove encumbrances, unless his intestate was bound to pay the money: *Estate of Knight*, 12 Cal. 200, 207; 73 Am. Dec. 531. A sale may be ordered when necessary to meet the prospective charges or expenses, though there be no debts or expenses of administration accrued and unpaid at the time the application is made: *Richardson v. Butler*, 82 Cal. 174, 179; 23 Pac. Rep. 9; 16 Am. St. Rep. 101; *Estate of Freud*, 131 Cal. 667, 670; 63 Pac. Rep. 1080; 82 Am. St. Rep. 407. The executor or administrator has power to use the money in his hands for the purpose of redeeming property of the estate from liens existing on it: *Estate of Freud*, 131 Cal. 667, 671; 63 Pac. Rep. 1080; 82 Am. St. Rep. 407. This power arises from the general character of the executor or administrator as a trustee charged with the duty of preserving the property of the estate: *Estate of Smith*, 118 Cal. 462, 466; 50 Pac. Rep. 701; *Estate of Freud*, 131 Cal. 667, 671; 63 Pac. Rep. 1080; *Burnett v. Lyford*, 93 Cal. 114, 118, 119; 28 Pac. Rep. 855. The same principle applies in the case of taxes, tax sales, etc.: *People v. Olvera*, 43 Cal. 492, 494; *Weinreich v. Hensley*, 121 Cal. 647, 657; 54 Pac. Rep. 254. And in cases of cattle or horses impounded and held for the expense of pasture: *Estate of Armstrong*, 125 Cal. 603, 605; 58 Pac. Rep. 183. But the principle does not apply where the lien is not a charge against the estate, and no part of it could ever be paid out of the estate: *Tompkins v. Weeks*, 26 Cal. 50, 60. Under the Washington statute, funeral expenses are a debt against the estate, and may be given preference in payment: *In re Smith's Estate*, 25 Wash. 93; 66 Pac. Rep. 93. The probate court has no authority to reach out and dispose of property belonging to the heirs of the decedent, which is in no respect subject to the debts or the liabilities of such decedent: *Coulson v. Wing*, 42 Kan. 507; 22 Pac. Rep. 570.

REFERENCES.

Order of payment of debts provided for by will: See § 570, ante. Payment of debts provided for by will, where the fund or estate appropriated therefor is insufficient to pay: See § 573, ante. Order of resort to the property of the testator for the payment of debts: See §§ 570, 573, 574, ante.

(2) **Contesting debts on the hearing.** Upon an application to sell real estate to pay debts, the heir can dispute the validity of the claims allowed, and to pay which the application is made. The peti-

tion to sell the real estate of an intestate is the substitute, under our system, for an action against the heir at common law. The heir is required to be cited, and is allowed to be heard. The hearing amounts to a re-examination of the claim, to test its validity as against the heir, and to produce or to prevent a decree for the sale of the land. If the claim is not valid, then, of course, the land ought not to be sold, if the application is made for the purpose of meeting such claim: *Beckett v. Selover*, 7 Cal. 215, 229; 68 Am. Dec. 237. See *Estate of Schroeder*, 46 Cal. 305, 318. Upon this question, it has been held that the allowance by the administrator, and the approval by the probate judge, of a claim against the estate is a quasi-judgment, and, in attacking it, the burden of proof is on the heir: *Hillebrant v. Burton*, 17 Tex. 138; approved in *Estate of Schroeder*, 46 Cal. 305, 319. "Allowance" is only prima facie proof of the validity of the claim; therefore, on an application to sell, the heir may dispute the claims, upon which the petition is based, although they have been allowed by the executor or administrator and probate judge: *Wingerter v. Wingerter*, 71 Cal. 105, 111; 11 Pac. Rep. 853. See *Beckett v. Selover*, 7 Cal. 215; 68 Am. Dec. 237. A judgment, in the state of Kansas, against the executor, in favor of a creditor, although binding upon the personalty, is not necessarily binding upon the heirs to the extent of subjecting the real estate descended to them for the satisfaction of any such judgment. Before there can be a valid order divesting them of their title by a sale for the payment of debts, the heirs must have an opportunity to be heard, and to contest not only the necessity or propriety of the sale, but also the justice and validity of the debts for the payment of which the sale is demanded: *Black v. Elliott*, 63 Kan. 211; 65 Pac. Rep. 215; following *Bauserman v. Charlott*, 46 Kan. 480; 26 Pac. Rep. 1051, and *Kulp v. Kulp*, 51 Kan. 341; 32 Pac. Rep. 1118; 21 L. R. A. 550. See also *O'Flynn v. Powers*, 136 N. Y. 419; 32 N. E. Rep. 1087.

(3) **"Demand."** When not a debt or claim. A demand against an estate, based on an instrument upon which the testator never could be made liable, is not a "claim" against the estate, within the meaning of the statute conferring power upon administrators, with license from the proper court, to sell the real estate of decedents to pay claims against their estates in the event of a deficiency of personal assets: *Weill v. Clark's Estate*, 9 Or. 387, 391. See also *Walker v. Diehl*, 79 Ill. 473, and *Gray v. Palmer*, 9 Cal. 616.

(4) **Expenses of administration.** The provisions of the statute which authorizes a sale of the property of a decedent for certain purposes are maintained to afford to creditors of the executors, as well as creditors of the decedent, the means of securing payment of their claims against the estate, and necessarily contemplate expenses of administration which the executor neglects or refuses to pay: *Estate of Coutts*, 87 Cal. 480, 482; 25 Pac. Rep. 685.

7. Sale to pay funeral expenses. An executor may petition for a sale of the real property in order to meet the expense of erecting a monument over the grave of the deceased person, pursuant to a provision in the will. The expense, in such a case, is included in funeral expenses: *Estate of Koppikus*, 1 Cal. App. 84; 81 Pac. Rep. 732; *Van Emon v. Superior Court*, 76 Cal. 589; 18 Pac. Rep. 877; 9 Am. St. Rep. 258.

8. Specific devises to contribute to payment of debts. Under the statute of Oregon, if any article of personal property has been specially bequeathed, it is exonerated from the operation of the order of sale until resort thereto becomes necessary for the payment of claims, by reason of a deficiency, in the proceeds of the sale of other property: *In re Noon's Estate (Or.)*, 88 Pac. Rep. 673, 675. A devise made in the will for the payment of an indebtedness due from the testator is required to contribute with the other devises to the payment of the debts of the estate and charges of administration. There is no exception made in the statute as to such devise: *Estate of Thayer*, 142 Cal. 453, 456; 76 Pac. Rep. 453. The remedy of a legatee, whose special bequest is applied to the payment of a claim, where there are other special bequests which would bear their proportion in the payment of a debt, is to seek contribution from the legatees of such other bequests: *Estate of Moulton*, 48 Cal. 191, 192.

REFERENCES.

Devises or legacies, when subject to and when exempt from payment of debts of administration: See § 574, ante. Contribution among legatees for the payment of debts, expenses of administration, etc.: See § 575, ante.

9. Sale to pay legacies. The probate court is not bound to decree a sale of the assets of an estate for the payment of legacies until there is an ascertained balance of assets, real or personal, in the hands of the executor or administrator. If the assets are merely claimed to exist, and the right to them is involved in litigation, either by an action brought by the executor or administrator to recover them for the estate, or by an action against the executor or administrator to recover them from the estate, then the estate is not ready for distribution, and the probate court, in the exercise of judicial discretion, may delay the distribution until the right to the assets is judicially determined, and the balance for distribution ascertained: *Estate of Ricaud*, 57 Cal. 421, 423.

REFERENCES.

Order of resort to the property of the testator for the payment of legacies: See § 709, post.

10. **Sale for best interests of the estate.** The California statute, which authorizes the property of a decedent to be sold, whether real or personal property, where it appears to be for the advantage, benefit, or best interests of the estate, is constitutional and valid: *Estate of Porter*, 129 Cal. 86, 87; 79 Am. St. Rep. 78; 61 Pac. Rep. 659. The provisions of section 1536 of the Code of Civil Procedure of California, as amended in 1893, in so far as they authorize a sale "for the advantage, benefit, and best interests of the estate," are unconstitutional as to titles that vested prior to such amendment, but such a sale is valid as to titles which vested subsequently to that amendment: *Gutter v. Dallamore*, 144 Cal. 665, 668; 79 Pac. Rep. 383. An amendment to the code, authorizing a sale to be made when it appears to be for the advantage, benefit, and best interest of the estate, cannot affect the title to the land vested in the heirs at the death of the decedent, which occurred prior to the enactment of such amendment; the right of the heirs is subject only to such powers to order a sale in the course of administration as were possessed by the court at the time of testator's decease, and are unaffected by subsequent legislation giving the power of sale for new purposes different from and greater than those conferred by the law in force at the death of the deceased: *Estate of Newlove*, 142 Cal. 377, 380; 75 Pac. Rep. 1083. Whether it be for the advantage, benefit, and best interests of the estate, or those interested therein, to order a sale of more than one parcel of real estate, is a question of fact to be determined by the court upon the evidence before it in reference thereto; and to the extent that its decision depends upon inferences to be drawn from the situation of the property, or of the parties who are interested therein, it is not open to review: *Estate of Steward*, 1 Cal. App. 57; 81 Pac. Rep. 728. Upon the death of the ancestor, the property of the intestate at once vests in the heir; it vests subject to conditions imposed by the statute, such as the qualified possession and control of the administrator, under the direction of the court, for its care and its appropriation to the payment of the debts of the decedent, expenses of administration, and other liabilities enumerated in the statute; but, as the right of the heir to inherit the estate is itself a creature of the statute, there can be no question as to the power to impose these liabilities upon the estate, subject to which the property vests in the heir. Directions for the control of the estate have no other basis than that of the preservation of the best interests of those in whom the statute vests the right of property. An amendment to a statute adding, as a ground upon which an order of sale may be made, the following: "Or when it appears to the satisfaction of the court that it is for the advantage, benefit, and best interests of the estate, and those interested therein, that the real estate, or some part thereof, be sold, the executor or administrator may sell any real as well as personal property of the estate upon an order of the court," is not unconstitutional, and where a testator died after the enactment of such amendment to the code,

the court may order a sale, upon the ground mentioned in such amendment, under such circumstances that the consent of the owner, if he were capable of giving it, would be presumed: *Estate of Porter*, 129 Cal. 86, 99; 61 Pac. Rep. 659; 79 Am. St. Rep. 78.

11. Order to show cause. Notice of hearing.

(1) **In general.** The absence of any order to show cause, and of any service of the notice upon all persons interested in the estate, as provided by statute, is fatal to the validity of the sale: *Campbell v. Drais*, 125 Cal. 253, 258; 57 Pac. Rep. 994. The court may proceed at once, on completion of the publication of the order, at the time named in the order. It is not required that thirty days shall have elapsed after the completion of publication of the order to show cause before the court has jurisdiction of persons interested in the estate, even though some of such persons reside in a foreign country. There is no analogy between this method of obtaining jurisdiction of the person in probate proceedings, and by the publication of summons in ordinary civil actions: *Estate of Roach*, 139 Cal. 17, 21; 72 Pac. Rep. 393. The posting of a notice on the twelfth day of July, giving notice of a hearing of the petition on the twenty-second day of the same month, is sufficient as a ten-day notice: *Bates v. Howard*, 105 Cal. 173, 182; 38 Pac. Rep. 715. An administrator's deed is void, even upon a collateral attack, if there was no notice to the heirs of the time and place at which the application to sell real estate to pay debts could be heard: *Chicago etc. R. Co. v. Cook*, 43 Kan. 83; 22 Pac. Rep. 988. See *Mickel v. Hicks*, 19 Kan. 578. An order to show cause why a sale should not be granted, directed only "to all persons interested," is not required to be addressed to the heirs of the deceased by name. While it would be proper to name the parties interested, where the same are known, yet it has been held by the supreme court, in the state of Washington, that it is not essential, under existing legislation: *Furth v. United States etc. Trust Co.*, 13 Wash. 73; 42 Pac. Rep. 523. Nor is it required, under the Washington statute, that an order for the publication of the notice, with the designation of the particular newspaper, shall be contained in the order to show cause why a sale should not be granted: *Furth v. United States etc. Trust Co.*, 13 Wash. 73; 42 Pac. Rep. 523. Upon the hearing of a petition by an administrator for an order of sale of real estate to pay judgments, and costs, and expenses of administration, an objection was made to the introduction in evidence of the said judgments, on the ground that they had not been filed in time, and because of omissions which were supplied by amendments made some years after the judgments were rendered, and before the hearing; but it was held that the provision as to the time of filing was merely directory; that the amendments in the judgments were to correct clerical errors and misprisions by the record itself; and that the court did not exceed its powers in permitting the amendments: *Estate of Schroeder*, 46 Cal. 305, 316. Under the Kansas statute

relating to proceedings of the probate court for the sale of lands of decedents, the court has full authority and discretion to fix the time of the notice as it sees fit, and, in doing so, is in no wise restricted by law. The defect in the notice must have rendered the proceedings void in order to avail the heir, upon collateral attack, in an action of ejectment: *Thompson v. Burge*, 60 Kan. 549; 57 Pac. Rep. 110. See also *Wyant v. Tuthill*, 17 Neb. 495; 23 N. W. Rep. 342.

(2) **Service of notice.** Where objection is made that the order of sale is void because there was no service of the order to show cause entered, after the filing of the petition, upon the minor heirs, and it is urged that the appointment of the guardian ad litem was made on the same day on which the order of sale was entered, the act of the court and of the guardian in making a sale cannot be held void, because the statute does not prescribe that service must be made of a copy of the order before such appointment, and the statute is silent as to the time of the appointment: *Stuart v. Allen*, 16 Cal. 473, 504; 76 Am. Dec. 551. The order to show cause must be personally served at least ten days before the hearing, on all persons interested, etc., or be published in some newspaper, as the court may direct. If all persons interested join in the petition for the sale, or assent in writing thereto, the notice may be dispensed with, and the hearing had at any time. The language of the statute, that the appearance of an appointed attorney "is sufficient proof of the service of the notice on the parties he is appointed to represent," implies that there must be notice to the parties and proof of the service of such notice, and merely means that after such service the "appearance" of the attorney, under certain circumstances, may be taken as sufficient proof of the fact of service. But where it affirmatively appears that there was neither notice nor service, there is no jurisdiction. The attorney cannot waive both notice and service: *Campbell v. Drais*, 125 Cal. 253, 258; 57 Pac. Rep. 994. An attorney for minor heirs can represent them only in a proceeding which has been duly inaugurated, and in which the court has already jurisdiction of the minors by such service of summons or notice as the code provides. Therefore he has no authority to represent them in a proceeding to sell the real estate of a decedent until after the court has obtained jurisdiction of their persons by the service of notice upon them. He cannot waive such notice, nor by any of his acts invest the court with jurisdiction of their persons, which it has not already acquired: *Campbell v. Drais*, 125 Cal. 253, 258; 57 Pac. Rep. 994.

12. Hearing.

(1) **Demand for jury trial of issues.** Where a demand for a trial by jury of the issues raised upon an opposition to the executor's petition to sell real property belonging to the estate to pay debts, etc., was made in the lower court only in the objections filed, and not by a written demand for a trial by jury as required by the statute, and, so

far as the record shows, the demand was never called to the attention of the court or judge until the hearing began, a trial by jury was properly denied, no matter what the issues were: *In re Tuohy's Estate*, 33 Mont. 230; 83 Pac. Rep. 486.

(2) **Questions not considered.** Upon an application for an order to sell property, the court will not hear and determine a question of heirship. Such fact may be determined at the final settlement of the estate, in proceedings connected therewith. When parties appear, claiming to be heirs of the intestate, they should be permitted to show any relevant and pertinent cause why a sale of the real property should not be made in accordance with the petition, without questioning their heirship: *In re Houck's Estate*, 23 Or. 10; 17 Pac. Rep. 461.

(3) **Findings.** It has never been definitely determined that findings are necessary in probate orders, such as an order for the sale of real property; but where the record does not show that findings were not waived, the error, if any, is immaterial: *Estate of Arguello*, 85 Cal. 151, 153. See *Reynolds v. Brumagim*, 54 Cal. 258; *Estate of Crosby*, 55 Cal. 574; *Estate of Sanderson*, 74 Cal. 199; 15 Pac. Rep. 753; *Campbell v. Coburn*, 77 Cal. 36; 18 Pac. Rep. 860. A finding, in a former proceeding, which is not necessary to the judgment in that proceeding, cannot operate as an estoppel as against any one in a subsequent proceeding upon an application for an order to sell real estate for the payment of debts and costs of administration: *Estate of Heydenfeldt*, 127 Cal. 456; 59 Pac. Rep. 839. See *Lillis v. Emigrant Ditch Co.*, 95 Cal. 553; 30 Pac. Rep. 1108.

13. Notice after appeal. After the remittitur of the appellate court has been filed in the probate court, the last-named court is at liberty to hear and dispose of a petition upon such notice as may be provided by its general rules, or as it may deem reasonable in the particular case; and, unless it should be made to appear that it has abused its discretion in this respect, or that the parties entitled thereto have been prevented from having a hearing, its action will not be set aside. It is not necessary for the court below, after reversal of its former order, again to give the notice required by the statute, where it originally complied with the requirements of the statute, and had obtained jurisdiction in the matter and over all persons interested therein. The court's subsequent action upon the petition is a movement within its jurisdiction, to be reversed only for some error in law which might be shown upon a direct appeal: *Estate of Coutts*, 100 Cal. 400, 403; 34 Pac. Rep. 865.

14. Order of sale.

(1) **In general.** An order of sale, after notice to all parties interested, and after examination of the proofs presented, is an adjudication of the court that the sale of the property described is necessary.

From this order the administrator, and any person interested in the estate, may appeal, but, unless taken, the order is conclusive and binding upon them: *Estate of Spriggs*, 20 Cal. 121, 125. An order for the sale of real estate is not one made in the pre-existing proceeding, in which the court has already acquired jurisdiction, but it is in reality a judgment in a new, separate, and independent proceeding; depending for its validity upon the sufficiency of the facts contained in the petition: *Ethell v. Nichols*, 1 Ida. 741, 745. It is not necessary to particularize, in an order for the sale of a decedent's property, items constituting the debts and expenses of administration accrued and to accrue: *Estate of Roach*, 139 Cal. 17, 21; 72 Pac. Rep. 393. The order of sale imports a finding of the truth of the general facts showing that the sale is necessary, and that evidence of that effect was given at the hearing: *Burris v. Kennedy*, 108 Cal. 331, 339; 41 Pac. Rep. 458. It will be presumed that the evidence sustains the findings and the order, where the court finds that outstanding debts existed, and that there were charges of administration accrued and to accrue: *Estate of Roach*, 139 Cal. 17, 21; 72 Pac. Rep. 393. The order of sale cannot be obviated, nor can its efficacy be impaired, by the fact that it may subsequently appear that too low an estimate was placed by the court upon the value of the property ordered to be sold, or as to the price it would bring: *Estate of Spriggs*, 20 Cal. 121, 125. The order for a sale of perishable personal property is not required to state that such property was "perishable property, and liable to assessment and taxation," inasmuch as such statements are not necessary to the order, and are, in truth, mere surplusage: *Halleck v. Moss*, 22 Cal. 266, 275. The order for the sale and the order of confirmation are both judicial acts. The sale is a judicial sale, and therefore not within the statute of frauds: *Halleck v. Guy*, 9 Cal. 181, 196; 70 Am. Dec. 643.

(2) **Validity of.** It would be better practice for the court, in all cases where there are several distinct parcels of property, to insert in its order a direction that the sale cease when the amount required has been obtained; but the omission of such a direction cannot invalidate the order or the sales made in pursuance of it: *Estate of Spriggs*, 20 Cal. 121, 125. The principle that no sale can be had without the order of the court applies also to claims of causes of action existing in favor of the estate. So where an executrix, appointed in another state, attempted to assign and transfer to the plaintiff, by an instrument in writing executed by her as such executrix, presumably in such foreign state, all the claim and cause of action of said estate, under instruments of writing held by the estate against the plaintiff, it was held that such transfer and assignment, without authority of the probate court, was invalid, the presumption being that the laws of such foreign state, prohibiting probate sales without order of court, are the same as the laws of this state, in the absence of evidence to the contrary: *Bovard v. Dickenson*, 131 Cal. 162, 164; 63 Pac. Rep. 162. See also

Wickersham v. Johnson, 104 Cal. 407; 38 Pac. Rep. 89; 43 Am. St. Rep. 118; Rankin v. Newman, 114 Cal. 635, 660; 46 Pac. Rep. 742; 34 L. R. A. 265. The provision of the statute declaring that no sale of any property of an estate shall be valid unless made upon an order of the probate court applies only to sales by executors and administrators. It has no reference to judicial sales under the decrees of the district courts, nor to sales in pursuance of testamentary authority: Fallon v. Butler, 21 Cal. 24, 31; 81 Am. Dec. 140. See Larco v. Casaneuava, 30 Cal. 561, 567. An order of sale, where it appears that the person applying for the order never had letters issued to him, and never qualified as administrator, is void, and a statute passed for the purpose of curing defects of form, omissions, or errors, etc., is without effect, in so far as it attempts to validate such judgment or order: Pryor v. Downey, 50 Cal. 388, 398. Where the order of sale provides "that such sale shall cease when an amount not less than ten thousand dollars and not exceeding eleven thousand dollars has been obtained," such provision does not render the whole order void: Richardson v. Butler, 82 Cal. 174, 180; 23 Pac. Rep. 9; 16 Am. St. Rep. 101. An order of sale providing for the sale of other property before a sale is made of a particular lot or tract described therein, is in conformity with the requirements of the Washington code, and a sale of the property that was last to be resorted to will not be set aside, where it appears that the administrator complied with the order by first offering the other property for sale in the manner provided: In re Bryant's Estate, 38 Wash. 337; 80 Pac. Rep. 555.

15. Notice of sale.

(1) **In general.** A sale upon insufficient notice is at least voidable, if not absolutely void: Haynes v. Meek, 10 Cal. 119; Halleck v. Moss, 17 Cal. 340, 344. The probate court, in its order confirming a sale, declared that the notice of sale had been posted in three public places. Evidence was introduced with the intent to show that one of the places was not a "public" place, within the meaning of the code. It was held that the court, having jurisdiction of the proceeding, could, within that jurisdiction, find the fact that the place was a public place, and that such finding could not be attacked collaterally: Richardson v. Butler, 82 Cal. 174, 180; 23 Pac. Rep. 9; 16 Am. St. Rep. 101.

(2) **Publication.** Under the California statute, notice of a sale must be published "for two weeks successively next before the day on or after which the sale is to be made," and the publication must be "as often, during the prescribed period, as the paper is regularly issued." This means that the publication must be for two successive weeks, and in each successive issue of the paper up to the day on or after which the sale is to take place. Under this statute, a notice published on January 27th, February 3d, and February 10th is sufficient

for a sale which takes place on February 15th: *Estate of O'Sullivan*, 84 Cal. 444, 448; 24 Pac. Rep. 281. Where publication of a notice of administrator's sale, under a statute and order requiring publication for "at least four successive weeks," etc., was made for three weeks in a paper, at which time the paper discontinued publication, and the fourth publication was in a paper not mentioned in the order, it has been held that the discontinuance of the paper did not annul the order, nor turn the question of publication, or of further publication, over to the discretion of the administrator, and that the order of sale was void from the beginning, for that reason: *Townsend v. Tallant*, 33 Cal. 45, 51; 99 Am. Dec. 617. On an appeal from an order confirming a sale of real property on the ground of insufficiency of the notice of sale, it has been held that where a statute prescribes that the notice shall be published in a newspaper for three weeks successively, etc., the phrase "three weeks successively" has the same meaning as "three successive weeks." It simply indicates the time during which the sale must be advertised, and not the manner of the publication, as that it shall be published successively during the period. The word "successively" refers to weeks, and not to the publications of the paper. Therefore it is not required, where a publication under such an order is had in a daily newspaper, that the notice be published in each issue of the paper: *Estate of Cunningham*, 73 Cal. 558, 559; 15 Pac. Rep. 136. Publication, under a statute which requires notice of the sale to be published "for three weeks successively next before such sale," is insufficient, where the notice of sale was published in a weekly newspaper for three successive weeks, but not during the last week next before the day named for the sale, there being an interval of nine days between the completion of the last publication and the day of sale: *Hartley v. Croze*, 38 Minn. 325. So, also, where a notice of sale named April 21, 1892, as the day on or after which the sale would be made, and the notice was published in a daily newspaper from the fifth to the nineteenth day of that month, such publication is insufficient; for if publication in the daily paper may be omitted for one day, it may be omitted for two or more days, and there can, in such case, be no certainty as to when the last publication must be made: *Hellman v. Merz*, 112 Cal. 661, 666; 44 Pac. Rep. 1079. Where there is nothing in the statute to indicate a legislative intent that the publication of the notice of sale shall be in a daily rather than a weekly paper, the publication in a weekly paper is sufficient to meet all requirements of the law: *Estate of O'Sullivan*, 84 Cal. 444, 447; 24 Pac. Rep. 281. Where notice of sale had been given by publication in a newspaper, but it is not shown that it had been so given under the authority of any order directing it to be done, this is a fatal defect of proof in relation to the notice under which the sale was made, and for this reason, and for the additional reason that no notices had ever been posted, the sale was invalid: *Halleck v. Moss*, 17 Cal. 340, 344.

16. **Ordering resale.** Where no other course is open, it is proper for the court, in its discretion, to order a resale: *Estate of Long* (Cal. App.), 91 Pac. Rep. 169. A resale of real estate, made after annulment of the first sale, but based upon the original unverified petition, is, as was the first sale, void for want of jurisdiction: *Estate of Boland*, 55 Cal. 310, 316. Where an executor, upon a resale of property,—directed by the court, at the hearing for confirmation, because of an advanced bid having been made,—contracted with the purchaser at the second sale, after the sale but before confirmation, and received a deed from the purchaser, immediately after confirmation to such purchaser, the executor holds the legal title to the property in trust for the devisees under the will, subject to a proper accounting for money paid on the purchase, for repairs, etc., less rents received, and for any other proper transactions that may exist between the parties: *O'Connor v. Flynn*, 57 Cal. 293, 295. Where the executors of a vendor have canceled his contract for the sale of land, for default of the purchaser, and thus regained title, they may sell and convey such real estate, and account to the court of their appointment for the proceeds as personalty, and the title so conveyed is good as against the heirs of the decedent claiming title by succession: *Clapp v. Tower* (N. D.), 93 N. W. Rep. 862.

17. **Nunc pro tunc order of sale.** Where, on the return-day mentioned in the order to show cause, a hearing was had and proofs made, and a decree directing a sale was also made on that day; and subsequently, seven days later, another decree or order of sale was made, referring to the same petition, and reciting that the order theretofore made in the matter had been vacated for errors, and where the sale took place under a later order, although the later order was not in form a nunc pro tunc order, it must be so regarded, as it was evidently in lieu of the order made on the first day of the hearing, although, by mistake, a different decree was then entered: *Burris v. Kennedy*, 103 Cal. 331, 340; 41 Pac. Rep. 458.

18. **Public sale.** Under the provisions of the statute of California, all sales must be made at public auction, unless, in the opinion of the court, the best interests of the estate would be subserved by a private sale. When, however, a private sale is asked for, the court may act upon the opinion of the executor or administrator and order such a sale to be made. Where, upon a petition of a creditor for an order of sale at public auction, and where a private sale is not asked for by the administrator, the court does not improperly exercise its judgment in ordering a public sale, although the administrator is present at the hearing of the petition, and objects to having the property sold at public auction, on the ground that a private sale would be most beneficial to the estate and to the creditors thereof: *Estate of Dorsey*, 75 Cal. 258, 260; 17 Pac. Rep. 209. The duty of an administrator is not,

necessarily, inconsistent with an agreement to ask for an order of sale, upon consideration that the purchaser will give an agreed sum at the sale, nor does this amount to a private sale, for the very agreement contemplates that the sale shall be public, and the court has no power to make or to authorize any other sale, or a sale in any other mode: *Stuart v. Allen*, 16 Cal. 474, 499; 76 Am. Dec. 551.

19. **Private sale.** Where land is sold by the executor at private sale, and return made thereof, and not at public sale, as directed in the order of sale, the court has no jurisdiction to confirm it, and the sale is void on the face of the record: *Schlicker v. Hemenway*, 110 Cal. 579, 581; 42 Pac. Rep. 1063; 52 Am. St. Rep. 116. Neither an executor nor a legatee can authorize a sale of the property of a decedent, and therefore neither can ratify such sale; nor can an agent, empowered by a decedent in his lifetime to sell certain property, effect a sale thereof after the decease of his principal. The agency is terminated by death, and thereafter the estate acquires the property for purposes of administration, and for the benefit of all classes of creditors, in the manner prescribed by the statute: *Krumbick v. White*, 107 Cal. 37, 41; 39 Pac. Rep. 1066. Under the Oregon statute, the county court is vested with discretion in the matter of ordering private sales of the personal property of an estate, and may allow the administrator compensation for clerk's rent of a store, and other expenses connected therewith, but the court is powerless to authorize the purchase of goods to replenish the stock. As to such expenses, the administrator will be charged on his own account: *In re Osburn's Estate*, 36 Or. 8; 58 Pac. Rep. 521.

20. **Return of sales.** At the hearing of a return of sale of certain real estate, made by the administrator, under order of the court, it is within the jurisdiction of the court to postpone a further hearing upon the matter until another day to receive additional bids, even though an offer is made, at the time of the original hearing, of ten per cent more in amount than that named in the return. The provision of the California statute, giving the court discretion to accept the offer of an made or of ordering a new sale. It is authorized to receive as many discretion to the alternative of accepting the first offer that may be made or of ordering a new sale. It is authorized to receive as many bids as may be made, and, upon a consideration of all the bids, may then determine whether to accept the highest, or to order a new sale: *Estate of Griffith*, 127 Cal. 543, 544; 59 Pac. Rep. 988. A recital in the decree confirming the fact that the return of the sale was duly verified by affidavit is conclusive as to that fact, and a finding of fact to the contrary does not in any manner affect the conclusiveness of the recital in the decree. The fact is not a jurisdictional one, and the principle applied to the inconclusiveness of statements or recitals in judgments, conferring jurisdiction, does not apply: *Dennis v. Winter*, 63 Cal. 16, 18.

21. Irregularities in sales. Mutual mistake. Informality as to the delivery of personal property upon a probate sale does not make the sale so far void that it cannot be ratified by the probate court in some subsequent order: *Brewster v. Baxter*, 2 Wash. Ter. 135; 3 Pac. Rep. 844. Irregularities, in no wise fatal to the proceedings, may be subsequently cured by the order of the court confirming the sale: *Furth v. United States etc. Trust Co.*, 13 Wash. 73; 42 Pac. Rep. 523. Irregularities, defects, and inconsistencies in the proceedings do not necessarily render a decree ordering a sale void, for, where it appears that the court was acting within the scope of its jurisdiction in making its final decree, such inconsistencies, irregularities, and defects may be corrected upon appeal, and the decree will not be nullified in an indirect attack: *Stuart v. Allen*, 16 Cal. 474, 499. Technical objections to a sale, where there is no pretense that the sale under which appellants claim was in fact fraudulent, or that it was without adequate consideration, or in any way unfair, will not be regarded as sufficient to overturn, for want of jurisdiction, the judgment of a court, or to destroy a title to realty honestly acquired: *Richardson v. Butler*, 82 Cal. 174, 180; 23 Pac. Rep. 9; 16 Am. St. Rep. 101. Mere irregularities do not affect the title, and such objections cannot prevail in a collateral attack upon the order of sale: *Dennis v. Winter*, 63 Cal. 16, 18. See *Irwin v. Scriber*, 18 Cal. 499; *Halleck v. Moss*, 22 Cal. 266, 276. The failure of a probate court to require a new or an additional bond from the executor, if any is necessary, with resident sureties, does not render void the sale of real estate which was subsequently confirmed by the probate court: *Higgins v. Reed*, 48 Kan. 272; 29 Pac. Rep. 389. Though the petition for a sale is irregular and defective, in not stating some of the things that the statute requires it to state, yet if it is sufficient to give the court jurisdiction, questions raised in a collateral proceeding as to the publication of the order to show cause, a failure of the petition to state the amount of the personal estate undisposed of, to state that a sale of the real estate was necessary in the course of administration, or to state whether the deceased left any debts, are defects insufficient to affect the title in the hands of bona fide purchasers: *Ackerson v. Orchard*, 7 Wash. 377; 34 Pac. Rep. 1106. In a case where there is no misstatement or concealment of any fact, and no misrepresentation as to the law, and which presents only a mutual mistake of the purchaser of certain land sold under the order of the probate court and the administrator as to the law, each believing that, under the facts, the land was part of the decedent's estate, there can be no estoppel based on such error: *Gjerstadenjen v. Van Duzen*, 7 N. D. 612; 76 N. W. Rep. 233.

22. Fraudulent sales. If the administrator and another person enter into a contract with the purchaser at a probate sale, after the sale and before confirmation, to purchase the property from the latter, such contract is a violation of the statute which prohibits an executor or

administrator from being interested in a sale made by him, and is voidable, at the election of heirs or other persons interested in the estate, but is not absolutely void: *Burris v. Kennedy*, 108 Cal. 331, 341; 41 Pac. Rep. 458. In such cases the sale is always virtually to the administrator, and it is that fact which renders it voidable: *Burris v. Kennedy*, 108 Cal. 331, 343; 41 Pac. Rep. 458. Where, in order to overthrow title to property purchased at a probate sale, by proof of a fraudulent conspiracy between the administrator and the real purchaser, the facts constituting the fraud must be averred; and this rule applies in an action to quiet title, where the only possible defense would be proof of such fraudulent conspiracy. The defendant, in such a case, could not give proof without an averment of the facts constituting the fraud: *Burris v. Adams*, 96 Cal. 664, 668; 31 Pac. Rep. 565; *Wetherly v. Straus*, 93 Cal. 283; 28 Pac. Rep. 1045. An executor or administrator, as the case may be, who fraudulently sells any real estate of the decedent, is made, by statute, liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein, but this liability does not apply to the sureties, and the statute affords no warrant for an action upon the bond of the administrator for the recovery of double the value of the land alleged to have been fraudulently sold by him: *Weihe v. Statham*, 67 Cal. 245, 248; 7 Pac. Rep. 673. Where fraud is not established by the record, or the evidence, and the court acquires jurisdiction to order and confirm the sale, the proceedings are not void, and their regularity is not subject to attack in a collateral manner as against a bona fide purchaser: *Ackerson v. Orchard*, 7 Wash. 377; 34 Pac. Rep. 1106; 35 Pac. Rep. 635; *McKenna v. Cosgrove*, 41 Wash. 332; 83 Pac. Rep. 240; *Otis Brothers Co. v. Nash*, 26 Wash. 39; 66 Pac. Rep. 111; *Huberman v. Evans*, 46 Neb. 784; 65 N. W. Rep. 1045; *Phillips v. Phillips*, 13 S. D. 231; 83 N. W. Rep. 94; *Hahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742.

23. Executor purchasing at his own sale.

(1) **Generally prohibited.** The rule that prohibits an executor from purchasing at his own sale is based upon the principle that a trustee is disabled from purchasing trust property, whether the purchase is made directly by himself or through another: *Webb v. Branner*, 59 Kan. 190; 52 Pac. Rep. 429. If an administrator purchases property of the estate at a foreclosure sale, he cannot claim title thereto adversely to the estate, but he is a trustee thereof, and will be compelled to reconvey to the estate upon payment to him of the amount equitably due him from the estate: *Smith v. Goethe*, 147 Cal. 725; 82 Pac. Rep. 384, 387. If two executors lend money of the estate, taking a trust deed on certain real estate as security, and, the money not being paid, a foreclosure is had, and one of the executors bids in the property, taking a deed investing him personally with the title, his creditors, who have attached the land, are entitled to subject it to their claims,

where the statute declares that all conveyances or agreements in writing affecting title to real estate shall, when recorded, take effect as to subsequent bona fide encumbrancers without notice. They are supposed to have known that the executor might lawfully purchase for himself at the sale by the trustee, and, finding upon the record a deed from which it appears that he has so purchased, they have the right, in the absence of other knowledge, to regard the property as his: *Perkins v. Adams*, 16 Col. App. 96; 63 Pac. Rep. 792, 795.

REFERENCES.

Validity of sale to surety on executor's bond: See note 4 L. R. A. (N. S.) 820, 821. Purchases in the interest of executors or administrators at sale made by them: See note 12 Am. Dec. 85, 86. An executor or administrator is not permitted to purchase any property of the estate, directly or indirectly, at sales thereof: See § 592, ante.

(2) **Invalidity of such purchase. Remedy.** An executor who bargains with the purchaser of property sold by the estate, after purchase and before confirmation, places his interest in conflict with his duty, and such purchases will be set aside as void, at the instance of the cestui que trust, and a resale ordered: *O'Connor v. Flynn*, 57 Cal. 293, 296. Where the agent of the administrator purchases the property at a tax sale, while he or his tenants are in possession, such purchase does not pass, or otherwise affect the title to the property: *Burnall v. Lynch*, 36 Cal. 135, 146. While, upon the face of the proceedings, the sale may appear to be a bona fide sale and an actual transfer, yet where it was only a device by which the administrator undertook to acquire, indirectly, title for himself, as trustee, this is as much a violation of the fiduciary relation, and as great a fraud, in the eye of the law, as though the administrator had made a direct sale to himself: *Webb v. Branner*, 59 Kan. 179; 52 Pac. Rep. 429. A corrupt agreement entered into by an executrix, while acting as such, with a person, by which, upon a sale of the property of the estate, such person is to purchase the same and share with the executrix the profits of the transaction, is interdicted by the law, and any contract sued upon by such purchaser, as, for instance, for commissions in purchasing and selling the property, and for interest on the advances, etc., cannot be enforced in court, either against the representative of the estate or any person who knowingly indorsed instruments relating to the transaction, as such contract is not only contrary to the express provisions of the statute, but is also contrary to public policy, and is void: *Jones v. Hanna*, 81 Cal. 507, 509; 22 Pac. Rep. 883. If the administrator, in effect, purchases at his own sale, the cestui que trust has several remedies which may afford him adequate relief. He may have the sale set aside and the administrator declared a trustee; he may sue upon the administrator's bond; or he may proceed to recover the penalty of double the value of the land sold, where the statute provides for such penalty: *Boyd v. Blankman*, 29 Cal. 20, 35; 87 Am. Dec. 140. Though an heir

acquiesced in the settlement of the administrator's accounts, and was paid the amount awarded thereunder, yet, if the administrator failed to act in good faith, and effected a fraudulent and indirect sale to himself, and the heir, by reason of his fraud and concealment, was not aware of the facts in the case, he is not estopped from bringing his action to recover his interest in the property thus fraudulently sold, together with the rents and profits thereof: *Webb v. Branner*, 59 Kan. 190; 52 Pac. Rep. 429.

(3) **Such purchase is not void when.** An executor or administrator is prohibited by the statute from purchasing the property of the estate he represents: *Burnett v. Lyford*, 93 Cal. 114, 120; 28 Pac. Rep. 855; *Danielwitz v. Sheppard*, 62 Cal. 339. A violation, however, of such prohibition does not render a sale or conveyance to the administrator absolutely void. It is only voidable within a reasonable time, at the election of the heirs or other persons interested in the estate, who must rescind, and, in doing so, restore to the purchaser the money which has been paid as a consideration: *Burris v. Kennedy*, 108 Cal. 331, 342; 41 Pac. Rep. 458; *Burnett v. Lyford*, 93 Cal. 114, 118; 28 Pac. Rep. 855. If an administrator has, without actual fraud, purchased property of the estate at his own sale, the transaction is not absolutely void, but only voidable, at the suit of the cestui que trust: *Furth v. Wyatt*, 17 Nev. 180; 30 Pac. Rep. 828. There is nothing in the law to prohibit the executor from becoming interested and acquiring an interest in property after the estate has ceased to have an interest therein. So where an executor acquired an interest after a sale, for its full value, although an interest so acquired may create a suspicion that he was interested in the first sale, it is, nevertheless, not sufficient to authorize setting the sale aside: *Estate of Millenovich*, 5 Nev. 161. Where the administrator, in good faith, and to save the estate from costs, and to preserve the same, purchased a mortgage claim, and such purchase resulted in benefit to the estate, without gain to the administrator, the administrator is entitled to be protected and remunerated: *Furth v. Wyatt*, 17 Nev. 180; 30 Pac. Rep. 828. An executor or administrator may purchase the property of a decedent he represents, to protect it from a sacrifice by foreclosure at the suit of a mortgagee. In such a case it will be considered that he is acting within the exercise of his duties as a representative, rather than as a purchaser of the claim for his own benefit: *Burnett v. Lyford*, 93 Cal. 114, 118; 28 Pac. Rep. 855.

24. Substitution of purchasers. The mere substitution of one purchaser for another cannot affect the validity of the sale. The order directing the sale, and the order confirming it, give vitality to the purchase: *Halleck v. Guy*, 9 Cal. 181, 197; 70 Am. Dec. 643.

25. Illegal contracts with executor or administrator. A contract entered into between the widow of a decedent as administratrix of the

estate, and by another person as heir, with a third person, by which it was agreed that all moneys derived from the sale of real property belonging to the estate over and above a stated figure should be paid to such third party for services, etc., is an agreement unauthorized by any provision of the statute, and is contrary to the policy of the law. Hence a judgment recovered by such third person for the amount derived from the property, over and above the amount stated in the contract in such agreement, will not be sustained: *Danielwitz v. Sheppard*, 62 Cal. 339, 342.

26. Irregularities cured by retroactive acts. Where the sale is void, merely in consequence of a failure of those having the direction of it to observe conditions imposed by the legislature itself, and which it could have dispensed with in the beginning, and the sale has been otherwise valid, the legislature may, by a retroactive act, cure the defect: *Mitchell v. Campbell*, 19 Or. 198; 24 Pac. Rep. 455, 457. The title of heirs to the property is subject to the paramount right of the government to direct its disposition, if necessary, for the purpose of liquidating existing claims against the estate of the decedent. The title of the heirs vests in them by operation of law, but is subject to such right of disposition. If, therefore, the property is sold under an order of the probate court, by a duly appointed and qualified executor or administrator, for the purposes mentioned, and a valuable consideration has been paid therefor by the purchasers in good faith, the heirs are not deprived of any vested right, although the conditions upon which the general statute authorized the sale to be made were not strictly complied with: *Mitchell v. Campbell*, 19 Or. 198; 24 Pac. Rep. 455.

27. Sales by guardian. The provision of the statute requiring the petition to show the amount of personal estate, and how much remains undisposed of, is inapplicable to a guardian's sale. The reasons requiring that the personal estate of a deceased person should be first sold do not apply to the estates of a ward. In the latter case, the court, in determining whether the real or personal estate should be sold, should ordinarily be governed by the same reasons which would influence a competent adult in disposing of his own property. A determination of what is for the best interest of the ward must control: *Estate of Hamilton*, 120 Cal. 421, 424; 52 Pac. Rep. 708. The petition for a sale by a guardian is required to state only the condition of the estate to be sold, when the sale is asked upon the sole ground that it is for the benefit of the ward that his real estate, or some part of it, should be sold and the proceeds otherwise invested: *Smith v. Biscailuz*, 83 Cal. 344, 351; 21 Pac. Rep. 15; 23 Id. 314. The order for a guardian's sale must describe the land to be sold with sufficient certainty, and this must be so without reference to any extraneous matter. The record cannot be helped out by reference to a document not found in the order itself: *Hill v. Wall*, 66 Cal. 130, 132; 4 Pac. Rep. 1139. See

Crosby v. Dowd, 61 Cal. 557. Where the statute relating to a guardian's sale provides for the publication of notice, and further provides that the relatives living in the county, if the court thinks proper, shall be given such notice as the court deems reasonable, this clearly implies that the kind or character of the notice to be given is a matter for the judge to determine, and that a personal notice is not absolutely demanded by the statute. Furthermore, it is a matter of discretion, upon the part of the court, whether to give any notice whatever to the relatives residing in the county: *Asher v. Yorba*, 125 Cal. 513, 515; 58 Pac. Rep. 137. See also *Burroughs v. De Couts*, 70 Cal. 373; 11 Pac. Rep. 734. Though a non-resident guardian of non-resident minor devisees assumes to consent to a probate sale in this state on behalf of such minor devisees, such consent is insufficient to give the court here jurisdiction to make an order of sale of their property in this state. Such guardianship gives no authority here to bind the estate of non-resident minor devisees, that is situated in this state: *Wilson v. Hastings*, 66 Cal. 243, 246; 5 Pac. Rep. 217. Where a collateral attack is made upon a guardian's sale of the land of a minor, the burden of showing that the sale was not a valid one, or that it was void, is upon the person who attacks the same. The absence of evidence in the record, upon such collateral attack, showing the jurisdictional facts, may be taken as evidence of their existence: *Asher v. Yorba*, 125 Cal. 513, 516; 58 Pac. Rep. 137.

28. Sales by foreign executor. An executor or administrator in another jurisdiction, with power to sell, and having property of his testator or intestate, may sell the same, and vest title in the purchaser. The title of the purchaser is complete, as between the parties, when the property (in this case indorsed certificates of stock) has been delivered. And with reference to such sale and transfer of stock, it is not necessary to have letters of administration issued in this state in order to obtain a transfer on the books of the corporation. Nor is it necessary that the bond provided for in section 326 of the Civil Code of California be required by the corporation from the purchaser of the stock: *Brown v. San Francisco Gas Light Co.*, 58 Cal. 426, 428.

29. Exchange is not a sale. The exchange, by an executor, of one form of currency, belonging to the estate, for another form, cannot be treated as a sale: *Estate of Sanderson*, 74 Cal. 199, 214; 15 Pac. Rep. 753.

30. Sales without order. Section 1561 of the Code of Civil Procedure of California implies an authority in the testator to confer power on his executor to sell property without the order of the court, and declares that when such authority is given, the executor may sell any "property of the estate" without such order. The "property of the estate" here referred to "must receive the same construction as the

same words have when used in other sections of this title, and must include the entire estate and the property of which the decedent died seised, including the interest of the surviving widow as well as that of the other heirs": *Sharp v. Loupe*, 120 Cal. 89, 92; 52 Pac. Rep. 134, 586. Where an administrator sells property belonging to the estate, without an order of the court authorizing him to do so, and in the absence of any authority under the will, he, in legal effect, converts such property to his own use, and becomes responsible for its value, with legal interest thereon: *Estate of Radovich*, 74 Cal. 536, 539; 16 Pac. Rep. 321; 5 Am. St. Rep. 466.

31. Title conveyed by sale. The rule of *caveat emptor* applies to a purchaser at an administrator's sale: *Towner v. Rodegeb*, 33 Wash. 153; 74 Pac. Rep. 50; *Gjerstadengen v. Van Duzen*, 7 N. D. 612; 76 N. W. Rep. 233; 66 Am. St. Rep. 679; *Smith v. Wildman*, 178 Pa. St. 245; 35 Atl. Rep. 1047; 36 L. R. A. 834; 56 Am. St. Rep. 760; *Lindsay v. Cooper*, 94 Ala. 170; 11 So. Rep. 325; 16 L. R. A. 813; 33 Am. St. Rep. 105. In the absence of any special agreement as to the title of the property sold, it is incumbent upon the vendee to examine the title for himself, and to point out any objections he may have to the title tendered him by the vendor: *Easton v. Montgomery*, 90 Cal. 307, 313; 27 Pac. Rep. 280; 25 Am. St. Rep. 123; *Estate of Pearsons*, 98 Cal. 603, 613; 33 Pac. Rep. 431. Sales made under orders of the probate court pass only such title as the decedent had at the time of his death, and such as the estate may have subsequently acquired: *Meyers v. Farquharson*, 46 Cal. 190, 200. Under this principle, that a sale by an executor passes only such interest in and title to the property sold as the decedent had at the time of his death, a sale of the interest of the estate in community property, made by the wife in her capacity as executrix, does not affect the wife's one-half interest in the property sold: *Estate of Wickersham*, 139 Cal. 652, 656; 73 Pac. Rep. 541. No distinction is made between sales of community property to pay debts and to pay expenses of administration. Such a sale passes the wife's title, and also the title of any heir, under the statutory provision declaring that the community property shall be subject to claims against the estate and for purposes of administration: *Sharp v. Loupe*, 120 Cal. 89, 93; 52 Pac. Rep. 134. If an executor or administrator sells the land of a decedent, under an order of the court, to pay the debts and expenses of administration, the title vests as of the date of the death of the decedent, and divests the lien of a mortgage made thereon by an heir. Hence such mortgage cannot be foreclosed as against the purchaser: *Gutter v. Dallamore*, 144 Cal. 665, 669; 79 Pac. Rep. 383. The statement of a witness regarding the claim of title of the plaintiff, where too indefinite to be the basis of a judgment as to title, cannot in any sense be considered as an estoppel: *Wilson v. Hastings*, 66 Cal. 243, 246; 5 Pac. Rep. 217. The question of the power of the executor to sell any property of the decedent under a power in

the will is not involved in proceedings before the court, upon petition filed by the executor, praying for the construction of certain clauses of the will, and for the determination of his duties in reference thereto, prior to the sale of the land. Nor can the purchaser, upon an appeal from an order confirming a sale, urge that, by such proceeding, the executor had doubts as to his power to sell any portion of the estate of the testator, that thereby the title to the land sold by him was rendered uncertain, and therefore that the purchaser ought not to be compelled to take the same, and that the court should not have made a confirmation of the sale: *Estate of Pearsons*, 98 Cal. 603, 610; 33 Pac. Rep. 431.

32. Bona fide purchasers.

(1) **Rights of.** A bona fide purchaser, at a probate sale to pay a mortgage executed, under authority of the court, by the executor, takes the land from the estate free of any claim of lien or charge against it for a personal obligation of the widow: *McKenna v. Cosgrove*, 41 Wash. 332; 83 Pac. Rep. 240. When one purchases land at a void or voidable judicial sale, in entire ignorance that it is void, and in good faith pays money thereon, which is applied to the satisfaction of a lien or encumbrance on the land, he should be put in the place of the creditor, to the extent, at least, that his money has satisfied the lien: *Russell v. Mixer*, 42 Cal. 475; *Waldrup v. Black*, 74 Cal. 409, 412; 16 Pac. Rep. 226; *Favill v. Roberts*, 50 N. Y. 222. But where the purchaser knew of the want of power of the executor to sell without an order of the probate court, was warned not to purchase without an order and sanction of said court, but purchased in the face of this knowledge and caution, he is not an ignorant purchaser in good faith to which the doctrine of subrogation would, under any circumstances, apply: *Huse v. Den*, 85 Cal. 390, 400; 24 Pac. Rep. 790; 20 Am. St. Rep. 232. Where the sale is a fraud upon the heirs, a purchaser of the property can only be protected upon the hypothesis that he was a purchaser for a valuable consideration, in good faith and without notice. Where the fact of notice is clearly charged in a bill to set aside the sale for fraud, and a specific denial of such facts, and knowledge thereof, are not made in the answer, the answer does not contain a sufficient denial of notice, though it contains affirmative averments to the effect that the defendant purchased the property for a valuable consideration, in good faith, and without any knowledge or suspicion, on his part, of any unfairness, illegality, or wrongfulness on the part of the administrator: *Scott v. Umbarger*, 41 Cal. 410, 418.

(2) **How affected by adverse possession.** In an action to recover possession of real property sold at an administrator's sale, adverse possession thereof for the period prescribed by the statute of limitations vests a perfect title in the possessor as against the former holder of the title and all the world, and the tenure in the property is as certain under the proof of an adverse holding during the period prescribed by

the statute of limitations, as it would be under an absolute deed of conveyance: *Mitchell v. Campbell*, 19 Or. 198; 24 Pac. Rep. 455, 459.

33. Necessary sale is valid when. No sale of the real estate of a decedent, made by an administrator or executor, is invalid on account of a failure to set forth, in the petition therefor, the facts showing such sale to be necessary, if the general facts showing the necessity of the sale are proved and found: *Blackman v. Mulhall* (S. D.), 104 N. W. Rep. 250, 253. A failure to set forth any of the facts enumerated in section 1537 of the Code of Civil Procedure of California, prescribing what the verified petition for the sale of real property of a decedent shall contain, will not invalidate the sale, provided the general facts showing that a sale is necessary are proved and found: *Burris v. Kennedy*, 108 Cal. 331, 339; 41 Pac. Rep. 458.

34. Voidable sales. Where an executor, as a trustee, charged with the duty of selling the property, purchases the same from his cestui que trust, and takes a conveyance directly to himself, or acts through the intervention of a third person, the sale is not, as a general rule, absolutely void: *Blockley v. Fowler*, 21 Cal. 329; *Boyd v. Blankman*, 29 Cal. 19; but is voidable, at the election of the cestui que trust: *Blockley v. Fowler*, 21 Cal. 329; *Guerrero v. Ballerino*, 48 Cal. 118; *Tracy v. Colby*, 55 Cal. 71; and without reference to the question of the adequacy of the price: *San Diego v. San Diego etc. R. R. Co.*, 44 Cal. 106; *O'Connor v. Flynn*, 57 Cal. 293. This principle is applicable in a case where the executors, acting under a power of sale in the will, purchase, from absent devisees, property belonging to the estate, and convey the same, under their power, to the wife of one of the executors, and, after distribution, obtain the conveyance thereof to themselves, where it is admitted that the wife acted for the executors throughout the transaction: *Goldson v. Dunlap*, 73 Cal. 157, 159; 14 Pac. Rep. 576. The legislature itself cannot make a void proceeding valid. It can no more impart a binding efficacy to a void proceeding, than it can take one man's property from him and give it to another: *Pryor v. Downey*, 50 Cal. 388, 405. A contract entered into by an administrator with a prospective purchaser, which is reported to the probate court, with a petition praying the court to confirm the agreement, or if the court should conclude not to confirm the contract, then that an order for sale be made, is not contrary to public policy and void; nor is a decree passed thereon void because the prayer for the petition for an order of sale is in the alternative, the main object of the petition being to obtain from the court a confirmation of the private agreement. Although the petition is defective in this respect, the decree is not rendered a nullity where the final decree is made in the usual form: *Stuart v. Allen*, 16 Cal. 474, 499. A mere volunteer, who institutes proceedings in probate upon an estate in which he has no interest, and for the ostensible purpose of paying the debts of such

estate, but, in fact, to procure a sale of a part of the estate to himself, and directs, controls, and manages the proceedings in probate successfully to that end, has no standing in a court of equity. Such a sale is voidable, and will be set aside at the instance of any one injured thereby: *Bergin v. Haight*, 99 Cal. 52, 55; 33 Pac. Rep. 760.

35. Void sales. An order of sale upon a defective petition is utterly void: *Pryor v. Downey*, 50 Cal. 388, 399. A conveyance cannot be said to be utterly void unless it is of no effect whatsoever and is incapable of confirmation or ratification. The acceptance of the purchase-money, with full notice that the administrator was the purchaser, per interpositam personam, would unquestionably amount to a ratification of the sale: *Boyd v. Blankman*, 29 Cal. 20, 35; 87 Am. Dec. 146. Lands acquired under the provisions of a statute of the United States, providing that "no lands acquired under the provisions of this chapter in any event become liable to the satisfaction of any debt contracted prior to the issue of the patent therefor," are subject to such statute. The probate court of a state has no authority to order a sale of such lands for the payment of debts of the patentee, contracted prior to the issuance of the patent, and a sale made under such circumstances is void: *Watkins L. & M. Co. v. Mullen*, 8 Kan. 705; 54 Pac. Rep. 921. An order of sale is void as to a minor without any guardian at the time, and who was not made a party to the proceeding, where the statute explicitly provides that the order to show cause shall be directed to all persons interested, and if any of the devisees or heirs are minors, that a general guardian shall be appointed before proceeding to act upon the petition: *Fiske v. Kellogg*, 3 Or. 503. If the court authorizes and directs an executor to sell certain real estate of a decedent at public auction, but the executor, instead of doing so, negotiates a private sale, and reports it as such to the court, such sale is void, and there is no power to confirm it: *Schlicker v. Hemenway*, 110 Cal. 579, 581; 52 Am. St. Rep. 116; 42 Pac. Rep. 1063. A probate sale of real estate, made without the required order to show cause, and without the required service or publication of notice, is void: *Campbell v. Draais*, 125 Cal. 253, 257; 57 Pac. Rep. 994. If the deceased left personal property, not specially bequeathed, which is primarily liable for the payment of his debts, the court is powerless to order a sale of the real estate until the proceeds of the sale of the former class of property is exhausted. Under such circumstances, an order for the sale of any part of the real property would be void, but if such order is not obeyed by the executors, no injury results therefrom: *In re Noon's Estate* (Or.), 88 Pac. Rep. 673, 675.

REFERENCES.

Sales by executors or administrators are void, because in excess of the order of sale, when: See note 37 Am. Dec. 65, 66.

36. Vacating sales. It has been suggested that the proper procedure to set aside a sale, void or voidable, would be by a direct proceeding, for, under our probate system, the true theory is, that both the real and personal estate of the intestate vest in the heir, subject to the lien of the administrator for the payment of debts and the expenses of administration, and with the right in the administrator of present possession. If the sale is void or voidable, the lien of the administrator continues; and it would seem equitable that the purchaser, who has paid the debts of the estate, should have a lien upon the estate for his purchase-money. All the equities of all parties could, it is said, be better settled in a direct proceeding: *Haynes v. Meeks*, 10 Cal. 110, 120; 70 Am. Dec. 703. An action to set aside a fraudulent probate sale of land, made by an administrator, involves the determination of a right or interest in real property, and is to be tried where the real property is situated: *Sloss v. De Toro*, 77 Cal. 129, 132; 19 Pac. Rep. 233. A creditor, who accepts payment of his debt out of sales of property of the estate, knowing that there are no other assets, will not be permitted afterward to attack the validity of the sale under any circumstances; because one who, with full knowledge of the facts, accepts the benefit of a void judicial sale is thereby precluded from questioning its validity: *Powers v. Scharling* (Kan.), 92 Pac. Rep. 1099. See also *Meddes v. Kenny*, 176 Mo. 200; 75 S. W. Rep. 633; 98 Am. St. Rep. 496. The district court, considered apart from the probate court, in the state of Colorado, has jurisdiction to hear and determine a cause instituted for the purpose of annulling and setting aside a sale made by an administrator, and for the purpose of quieting the title to the property sold under the decree of the probate court: *Ryan v. Geigel* (Col.), 89 Pac. Rep. 775. A sale of the real estate of a decedent will not be held void because the petition fails to give a description of all the real estate of which the deceased died seised, or the value or condition of the different parcels: *Burris v. Kennedy*, 108 Cal. 331, 339; 41 Pac. Rep. 458. A sale cannot be treated as invalid because the administrator received a promissory note from the purchaser for a portion of the price of the property sold, where it appears that the note was in addition to the full cash value of the stock; that the administrator reported that the sale was advantageous to the estate; and that the court, in confirming the sale, determined the sale to be thus advantageous: *Estate of Kibbe*, 57 Cal. 407, 408.

37. Rights of heirs.

(1) **In general.** Upon the death of the ancestor, the heir becomes vested at once with the full property, subject to the liens for the payment of debts, expenses of administration, etc., and, subject to these liens and the temporary right of possession of the administrator, the heir may at once sell and dispose of the property, and has the same right to judge for himself of the relative advantages of selling or holding, that any other owner has: *Smith v. Olmstead*, 83 Cal. 582, 586;

26 Pac. Rep. 521; 22 Am. St. Rep. 235; 12 L. R. A. 46, quoting from and approving *Brenham v. Story*, 39 Cal. 188. A special act of the legislature empowering the probate court to order a sale of the property of an estate, either at public or private sale, at the discretion of the administrator, "as in the judgment of the said administrator will best promote the interest of those entitled to the estate," would be to pass beyond the proper functions of the administrator and constitute him the forced agent of the living for the management of their estates: *Brenham v. Story*, 39 Cal. 179, 186. While probate proceedings are, at least, quasi proceedings in rem, yet, where the statute provides for the service of notice upon persons, the same rule applies as in ordinary civil actions. Where, therefore, a sale is made without notice to show cause, as provided by statute, and no service of any kind is made upon the heirs, the court acquires no jurisdiction to make the order of sale, and the sale, if made, is invalid and void: *Campbell v. Draie*, 125 Cal. 253, 258; 57 Pac. Rep. 994. If there has been a purchase, by an administrator, at his own sale, made by order of the probate court, of land belonging to the estate, it is necessary, in order to cut off the cestui que trust from any recourse upon the land and to restrict him to the proceeds, that there be either some positive act of affirmation of the sale, or such an acquiescence in it, manifested by the receipt of the proceeds, or such a delay, beyond the period fixed by the statute of limitations, in commencing proceedings to set it aside, or in some other manner, that the court will deem it equivalent to and presumptively a ratification of the sale. By disaffirmance, the cestui que trust elects to have the legal title held as it was before the sale, and have the property remain subject to all the trusts with which it was formerly charged: *Boyd v. Blankman*, 29 Cal. 20, 32; 87 Am. Dec. 140. Where the court has jurisdiction to appoint an administrator of the estate of a deceased person, and where the letters that issued were duly attested, the heirs, in a collateral proceeding to set aside a probate sale made of the property, will not be permitted to say that there was no administration of the estate at all, and it is unquestionable that, as against any collateral attack, the attestation to the letters will be deemed conclusive evidence of the administrator's due qualification and of his authority to act as such: *Dennis v. Bint*, 122 Cal. 39, 42; 54 Pac. Rep. 378; 68 Am. St. Rep. 378. A creditor of an heir can acquire no better right in the estate of a decedent than that held by the heir himself. Hence if the heir owes the estate more than the value of his share, and does not pay his debt, he has no interest in the property of the estate, and it necessarily follows that a creditor of the heir, by a sale and purchase, under judicial process, of his nominal interest, can acquire no right in the property: *Boyer v. Robinson*, 26 Wash. 117; 66 Pac. Rep. 119, 120. The appointment of "attorneys for absent and minor heirs," prior to the filing of a petition for leave to sell, cannot satisfy a statute requiring the appointment of a guardian for minor heirs, to represent them before the petition shall have been acted upon: *Townsend v. Tallant*, 33 Cal. 45, 52; 99 Am. Dec. 617.

(2) **Heirs under guardianship.** Where a person unites in himself the capacities of administrator and guardian, although the two, so far as general uses are concerned, are necessarily incompatible, yet, in a special proceeding, set on foot by the person as administrator against his ward, and for the distinct purpose of divesting the ward of his title as heir, the administrator cannot represent the ward: *Townsend v. Tallant*, 33 Cal. 45, 52; 99 Am. Dec. 617. It was objected that the real estate of certain wards could not be sold by an order of the probate court, because its disposition was controlled by will, under which they held, the provision of the will being that the devisees "may each 'take out' one half of his share when he comes of age, and the other half not until all the other children come of age." But, whatever effect this provision might have in controlling the use of the property until the devisees were entitled to take its control by the terms of the will, the title to the property, the estate of the devisees, undoubtedly vested in the devisees upon the death of the testator, and a statute authorizing the sale of the estate of any person under guardianship, when necessary, or when for his benefit, in certain cases, is sufficiently comprehensive to authorize the sale of such estate, and if legally made, to transfer whatever estate the wards had to the purchasers: *Fitch v. Miller*, 20 Cal. 352, 385.

(3) **Actions by heirs in general to set aside sales.** Where an executor or an administrator has sold the real property of a decedent by order of the probate court, the heirs of the decedent are barred from bringing an action to recover the property sold, unless such action is brought within three years next after the sale, or within three years after they attain majority; and this rule applies, whether the invalidity of the sale resulted from an insufficiency in the petition for sale, in the notice of sale, or in the notice for the appointment of an administrator, or other insufficiency in the progress of the administration: *Ganahl v. Soher*, 68 Cal. 95, 97; 8 Pac. Rep. 650. After an administrator's deed, made pursuant to an order or judgment of the proper court, directing a sale, has been placed on record, heirs, under the Kansas statute, must sue to recover the property within five years, or be deemed to have admitted the validity of the sale and conveyance, whether they had notice of the proceedings or not. After the expiration of that time, the purchaser cannot be called upon to vindicate their legality: *O'Keefe v. Behrens*, 73 Kan. 469; 85 Pac. Rep. 555. Compare *Gage v. Downey*, 94 Cal. 241; 29 Pac. Rep. 635. In an action brought by heirs to obtain a decree that the legal title to lands in the estate, sold fraudulently, is held in trust for the plaintiffs, and that defendants convey the same, the answer, in effect, admits that the pretended sale was purely fictitious, and was made for the purpose mentioned in the complaint, where it fails to deny the fraud alleged in the complaint: *Scott v. Umbarger*, 41 Cal. 410, 416.

The laches of the administrator, who, under our system, represents the heirs, while he holds office as such, must be imputed to the beneficiary, and the remedy of the heir, where the administrator fails to sue to recover land, or to set aside a probate sale, is against the administrator: *Wheeler v. Bolton*, 54 Cal. 302; *McLeran v. Benton*, 73 Cal. 329, 343; 14 Pac. Rep. 879; 2 Am. St. Rep. 814.

(4) **Actions by minor heirs to set aside sales.** In an action of ejectment, brought by a minor through his guardian ad litem, to recover certain land sold by the administrator of his father's estate, which administrator also represented the minor as guardian, and where such sale was declared void for this and other irregularities, it cannot be maintained that the minor is estopped from maintaining the action upon the ground that he, although an infant, received the purchase-money paid at the probate sale of the land in question, upon a judicial accounting with the administrator, it not appearing that the minor received any money from his guardian on that occasion, or on any other, and where the only questions involved in such accounting were as to receipts and disbursements by the administrator, the final balance being in his favor: *Townsend v. Tallant*, 33 Cal. 45, 55; 99 Am. Dec. 617. A person who assumes to act as administrator, who has not given the official bond required by law, and who is not even under the sanction of an oath of office, cannot be said to represent the interests of minor heirs, so as to raise the bar of the statute of limitations against them. The principle that the administrator represents the heirs (minors as well as others), and that when he is barred by limitation they also are barred, has no application where the acts of the person assuming to act as administrator cannot be sustained, even upon the ground that he is an officer de facto: *Staples v. Connor*, 79 Cal. 14, 16; 21 Pac. Rep. 380. The limitation reserving to minors, and others under legal disability to sue, the right to commence an action for the recovery of any estate sold by an executor or administrator under the probate law, applies alike to all probate sales of real estate, void as well as voidable, belonging to persons who have died since the passage of the probate act: *Ganahl v. Soher*, 68 Cal. 95, 97; 8 Pac. Rep. 650. The attorney for minor heirs can represent them only in the proceeding which has been duly inaugurated, and in which the court has already jurisdiction of the minors, by such service of summons or notice as the code provides; he cannot waive their rights, nor by any of his acts invest the court with jurisdiction of their persons which it had not already acquired: *Campbell v. Drais*, 125 Cal. 253, 258; 57 Pac. Rep. 994.

38. Sales under power in the will.

(1) **In general.** The power to sell without an order from the court does not apply to nor restrict the statutory powers of the executor or executrix to sell under an order of the court whenever it is shown

to be necessary to sell, or beneficial to the persons interested in the estate to do so: *Campbell's Estate* (Cal.), 87 Pac. Rep. 573, 574; *Estate of Pforr*, 144 Cal. 126; 77 Pac. Rep. 825. An administrator cannot make investments for the heirs, nor satisfy adverse claims, nor sell because the estate would profit by it: *Brenham v. Story*, 39 Cal. 179, 188. A sale by an executor under a power in the will is not a judicial sale, nor does the statutory requirement that no title shall pass until the sale is confirmed give to it the incidents of a judicial sale: *Godell v. Sanford*, 31 Mont. 163; 77 Pac. Rep. 522, 524. A power of sale given to the creditors as such is not applicable to trust property distributed to them as trustees under the will: *Goad v. Montgomery*, 119 Cal. 552, 561; 63 Am. St. Rep. 145; 51 Pac. Rep. 681. A sale under a power in a will must be made by the executors in the course of administration; and the court has power at any time to direct a sale, when it is necessary for the purposes of administration, to pay creditors, or when it will be for the advantage of those interested in the estate, or when such interested persons assent to it: *Estate of Pforr*, 144 Cal. 121, 126; 77 Pac. Rep. 825. When a testator confers upon each one of several executors full power to administer, and gives to each all the power over his property which he himself possesses, power is conferred thereby, not to his executors jointly, but to each of them, and consequently each one is authorized to dispose of the property for the purposes mentioned in the will: *Panaud v. Jones*, 1 Cal. 488, 510. The legislature may give to the husband the right to authorize an executor to sell any portion of the community property without obtaining an order of the court therefor: *Sharp v. Loupe*, 120 Cal. 89, 91; 52 Pac. Rep. 134, 586. The testator has the same right to authorize the executor to determine the portion of his estate which should be sold for the purpose of paying his debts, as he had to designate any portion to be appropriated for their payment: *Sharp v. Loupe*, 120 Cal. 89, 93; 52 Pac. Rep. 134, 586. There is a clearly marked distinction between a mere executor (whether his power to sell lands is conferred by the will or by the order of the probate court), and an executor to whom the lands are devised in trust to carry into effect the provisions of the will. In the former case he possesses the power of sale, but in the latter he takes the fee, or any less estate which the testator may devise: *Estate of Delaney*, 49 Cal. 76, 85.

(2) No implied power when. An executor has no implied power to sell lands, arising from the mere charge of debts upon it made by the will. The lands descend to the heir or devisee, subject to the charge, and the executor has no power to sell them to enforce the charge: *Worley v. Taylor*, 21 Or. 589; 28 Pac. Rep. 903, 904.

REFERENCES.

Executor or administrator is vested with power of sale by implication when: See note 87 Am. Dec. 209-217.

(3) **Discretion of executor.** Though executors may have a discretion, under the terms of a will, in making payments for the support of certain designated beneficiaries, yet they have no right to sell real property belonging to the estate for that purpose without application to and authority from the proper court: *Allen v. Barnes*, 5 Utah, 100; 12 Pac. Rep. 912, 916. The right to determine whether or not a sale should be made pursuant to a power of sale in the will is lodged by the testator in the discretion of his executor, who has been given "full power and authority to grant, bargain, sell, and convey all property, real or personal, or to pay dividends, without application to any court for authority to do so." The court will not inquire into the fairness of the sale, where one is made, or the reasonable adequacy of the purchase price, where such questions are not presented by averments and proof; and the discretion of the executor, exercised in good faith, as to whether or not the sales were for the best interests of the estate, is controlling: *Estate of Wickersham*, 139 Cal. 652, 655; 73 Pac. Rep. 541.

(4) **For best interests of estate.** A power of sale, given by will to an executor as such, is a limited power, where it manifestly embraces only the right to make a sale for the best interests of the estate: *Cowell v. South Denver Real Estate Co.*, 16 Col. App. 108; 63 Pac. Rep. 991, 993. A power given in a will to an executor to make a sale for the best interests of the estate, and coupled with a life estate, gives no right to make any sale or disposition of the property, unless such a sale or disposition is necessary to carry out the express provisions of the will, and is essential to the due administration of the estate: *Cowell v. South Denver Real Estate Co.*, 16 Col. App. 108; 63 Pac. Rep. 991, 995. Where there is a general devise without any specification as to the estate devised, and an absolute power of disposal, the donee may convey a title in fee, although he may be required to account for the proceeds as a trustee; and this applies to a case in which the testator devised and bequeathed to his widow all his property for certain uses and purposes, with power to sell and to dispose of the same for the use and benefit of the estate: *Savage v. Savage (Or.)*, 94 Pac. Rep. 182, 184.

(5) **Devesting estate.** A clause in a will, which empowers the executor to sell land to pay the testator's debts, cannot operate to divest a child's title to the land, though such child was born after the making of the will, if it was not named or provided for therein: *Worley v. Taylor*, 21 Or. 589; 28 Pac. Rep. 903, 905. An estate which is cast on the heir by the law, or devolved on him by will, cannot be divested or taken away by the exercise of the power of sale given in the will to a representative, unless the intention is most clearly and most unmistakably expressed, and the exercise of that power is essential to the execution of the evident purposes of the testator:

Cowell v. South Denver Real Estate Co., 16 Col. App. 108; 63 Pac. Rep. 991, 993.

(6) **Agent to sell. Compensation.** A statute which prescribes the compensation of executors does not apply to the compensation of executors making a sale under a power in the will. In such cases the executor has a right to employ an agent to make the sale, and to agree with him as to his compensation: *Ingham v. Ryan*, 18 Col. App. 347; 71 Pac. Rep. 899.

(7) **Purchasers. Estoppel.** The purchaser from an executor, at a sale under a power in the will, deals with him, in making the purchase, as he would with any other vendor: *Estate of Pearsons*, 98 Cal. 603, 612; 102 Cal. 569, 574; 36 Pac. Rep. 934. Purchasers at a sale made by virtue of a power in the will are estopped from saying that they received no title, or that the sale was irregularly made, where they have assented thereto for years, entered into possession of the property, sold portions thereof, made payments on the purchase price, and in all respects have ratified the sale until sued for the balance of the purchase price: *Godell v. Sanford*, 31 Mont. 163; 77 Pac. Rep. 522, 525.

(8) **Validity of sale.** Before a power in a will to make a sale can have any validity, it is essential that the will shall have been admitted to probate: *Estate of Pearsons*, 98 Cal. 603, 613; 33 Pac. Rep. 451. A person empowered by will to make a sale of property may be vested with a wide discretion in doing so, and the sale will not be disturbed where the donee of a power does not appear to have transgressed his rights under the terms of the will: *Godell v. Sanford*, 31 Mont. 163; 77 Pac. Rep. 522, 525. Where the intent of the testator was to withdraw his estate from the operation of the probate act, and vest in his executor full power to convert, in his own way, the estate into cash for the benefit of the devisees, it is not essential to the validity of his sale that it should be conducted in the statutory mode. The party, in such case, acts under the will, and, like a power of an attorney, the will is to be looked to and consulted on the question of power, and if found sufficient, the act must be declared valid: *Larco v. Casaneuava*, 30 Cal. 561, 569. A sale of the estate of a decedent, by an executor and trustee of the estate with power to sell, but not to mortgage, may be valid, and transfer the estate to the purchaser, although mortgages given to secure the debts for which the property was sold are void. In such a case the purchaser will not hold the property as security for a debt, but as an absolute transfer: *Sprague v. Betz* (Wash.), 87 Pac. Rep. 916, 918. Where a sale was made by an executor, and the deposit and the bid were made for a proposed sale to be authorized by an order of the court, and it was such a sale only which was confirmed, the validity of the sale must be

determined by the sale made, and not by the supposed validity of a sale which might have been made under authority given in the will: *Hellman v. Merz*, 112 Cal. 661, 667; 44 Pac. Rep. 1079. A memorandum of agreement to sell, the sale being under a power in the will, is sufficient, where it contains the names of the parties, a sufficient description of the property for identification, and the price and terms of purchase, and states that the sale is made subject to confirmation by the superior court; and such memorandum cannot be said to be insufficient to take the sale out of the statute of frauds: *Estate of Robinson*, 142 Cal. 152, 155; 75 Pac. Rep. 777. A power of sale in the will does not authorize a conveyance, by the executor, of the wife's share of the community property: *King v. La Grange*, 50 Cal. 328.

(9) **Equitable conversion. Election for reconversion.** The question of equitable conversion is a question of intention. If it is apparent from the terms of the will that it was the testator's intention that his estate be sold and the proceeds given to his beneficiaries, an equitable conversion results, even if the direction for the sale is not imperative: *Estate of Pforr*, 144 Cal. 121, 128; 77 Pac. Rep. 825. As reconversion depends upon an election therefor by the beneficiaries, such election is an affirmative element in the establishment of their right to the land, and must be manifested by some unequivocal act or declaration; and the plaintiff, whose right of action rests upon a reconversion resulting from such election, must not only show this fact by his complaint, but also establish it by proof: *Bank of Ukiah v. Rice*, 143 Cal. 265; 76 Pac. Rep. 1020, 1022. Until the beneficiaries make an election for reconversion of the estate, and manifest such intention to the executor, they are not entitled to the possession of the land, nor to exercise any dominion over it. The executor of the will is entitled to the possession of the land until the estate is settled or delivered to the heirs or devisees, "by order of the court": *Bank of Ukiah v. Rice*, 143 Cal. 265; 76 Pac. Rep. 1020, 1022. Where a testator directs land to be sold, and the proceeds thereof to be distributed between certain designated beneficiaries, such beneficiaries may elect, before the sale has taken place, to take the land instead of its proceeds, and when they have so elected and sufficiently manifested their election, the authority to sell the land cannot thereafter be exercised by the executor, but is extinguished. The estate is to be reconverted into real property, and, by reason of such reconversion, the relation of the beneficiaries to the land is the same as if it had been directly devised to them: *Bank of Ukiah v. Rice*, 143 Cal. 265; 76 Pac. Rep. 1020, 1022. A conveyance by one beneficiary of his undivided interest in land will not operate as a reconversion of that interest: *Bank of Ukiah v. Rice*, 143 Cal. 265; 76 Pac. Rep. 1020, 1023. The commencement of an action for a partition of land is a positive and unequivocal act, indicating an election to take the land, where, by the terms of the will, land is to be sold and the proceeds divided

between certain beneficiaries: *Bank of Ukiah v. Rice*, 143 Cal. 265; 76 Pac. Rep. 1020, 1023 (showing other positive and unequivocal acts indicating an election for a reconversion).

REFERENCES.

Equitable conversion: See note 5 L. R. A. 104.

(10) **Devise in trust with power to sell.** By a will devising to the executor the fee of the lands in question, to be held in trust for the purposes mentioned in the will, the testator intended to give and did give the executor the power of sale without requiring a compliance with the provisions of the probate act applicable to the procuring of orders of sale and confirmations: *Estate of Delaney*, 49 Cal. 76, 85. The renunciation, by the widow of the testator, of her right under the will, and the order of the probate court setting off to her a portion of the property as common property, does not extinguish the trust declared in the will, nor divest the executor of the fee, nor alter his powers, in the remaining portion of the property: *Estate of Delaney*, 49 Cal. 76, 84. It is within the province of the probate court to determine whether a valid trust has been created, but the power to regulate and direct its subsequent administration is in a court possessed of general equity jurisdiction: *Estate of Hinckley*, 58 Cal. 518; *Estate of Thompson*, 101 Cal. 349, 353; 35 Pac. Rep. 991; *Morffew v. San Francisco etc. R. R. Co.*, 107 Cal. 587, 594; 40 Pac. Rep. 810. Under a will creating a trust for the purpose of the preservation of an estate, "with an ordained succession of trustees," permitting, however, a sale of unproductive property if found desirable, the lands thus delivered into the hands of a trustee, although he is also executor of the estate of the deceased, ceases to be part of the estate in the course of administration, and the probate court and its successor, the superior court, in the exercise of probate jurisdiction, has no further control of the same: *Morffew v. San Francisco etc. R. R. Co.*, 107 Cal. 587, 594; 40 Pac. Rep. 810. The circumstance that, at a future time, there is to be a division of the property among the remaindermen, beneficiaries of the trust, does not affect the rule: *Estate of Thompson*, 101 Cal. 349, 353; 35 Pac. Rep. 991; 36 Pac. Rep. 28, 508; *Morffew v. San Francisco etc. R. R. Co.*, 107 Cal. 587, 594; 40 Pac. Rep. 810. No ground for an action to declare a trust exists, where the title to real estate is vested in the heirs under a will giving to the executor complete power to dispose of the property of the estate "as to him shall seem best, etc., and without responsibility": *Anguisola v. Arnaz*, 51 Cal. 435, 439. The quantity of interest which passes to the trustee in case of an express trust is commensurate with the necessities of his office; the trustee shall have an estate in fee, if that is necessary, to enable him to perform the duties imposed upon him, although it is not, in terms, given to him by the instrument creating the trust. A devise of lands, in trust, to sell,

clothes the trustee with a fee, because that is necessary to the execution of the trust: *Morffew v. San Francisco etc. R. R. Co.*, 107 Cal. 587, 595; 40 Pac. Rep. 810; *Young v. Bradley*, 101 U. S. 787. A provision in a will, appointing a trustee apparently for the sole purpose of investing the proceeds of the sale of lands, and the payment of the same to relatives of the decedent, and from which no intention of the testator is apparent to devise the land directly to the trustee, does not create a testamentary trust to sell land: *Estate of Walker*, 149 Cal. 627; 85 Pac. Rep. 310. A life estate in the trustee, being created by express words in the will, with limitation over, is not enlarged to a fee by a power of sale: *Morffew v. San Francisco etc. R. R. Co.*, 107 Cal. 587, 596; 40 Pac. Rep. 810. The lands of an estate, delivered into the hands of the executor, as the donee of a power under the will, in his character as trustee, cease to be a part of the estate in the course of administration; and the probate court, in the exercise of probate jurisdiction, has no further control of the same: *Morffew v. San Francisco etc. R. R. Co.*, 107 Cal. 587, 594; 40 Pac. Rep. 810.

(11) **Directions coupled with the trust. Effect of.** A will which merely gives the executor certain directions to be observed in carrying out its conditions does not create an express trust in the real property to which such directions relate. To the extent that such directions are inconsistent with the law, they are nugatory: *Estate of Pforr*, 144 Cal. 121, 125; 77 Pac. Rep. 825. A direction, in the will, to the executor to collect the rents and maintain the estate for a definite term, is not a restriction upon its alienation during that period, nor is the provision for its sale at the expiration of such term a prohibition against its sale prior to that time: *Estate of Pforr*, 144 Cal. 121, 126; 77 Pac. Rep. 825. A provision contained in a will, directing the executor to sell the property within one year, is merely directory, and does not limit the exercise of the power to that period, where power to sell is coupled with, and is subsidiary to, certain express trusts, and is given as the means, and the only means, of carrying out those trusts: *Kidwell v. Brummagim*, 32 Cal. 437, 442.

REFERENCES.

Interest in lands is taken by an executor or administrator under the will for the purpose of executing a power when: See note 12 Am. Dec. 102-104. Right of executor, after discharge, to sell real estate under a direction in the will: See note 2 L. R. A. (N. S.) 623.

(12) **Power passes to administrator with will annexed.** The power to sell as set forth in a will passes to the administrator with the will annexed, as such power is not merely personal, but is given to the executor, as such, by virtue of his office: *Kidwell v. Brummagim*, 32 Cal. 436, 442. A distinction is made, however, between cases where

the power to sell under a will passes to the administrator with the will annexed, not as a mere naked power, but a power coupled with various trusts which could only be carried out through an execution of the power, and those cases which clearly show that where the terms made use of in creating the power, detached from other parts of the will, confer merely a naked power to sell: *Kidwell v. Brummagim*, 32 Cal. 437, 440.

(13) **Particular sales under power in the will.** An executor having moved, before the hearing, to dismiss his own petition for a sale, upon a satisfactory showing that the sale had in fact been made by him in his character of devisee in trust, and no creditor or distributee having objected, the court should have dismissed the proceeding, and left the sale to stand upon the same footing with other sales made by the trustee as such: *Estate of Williams*, 92 Cal. 183, 187; 28 Pac. Rep. 227, 679.

REFERENCES.

Sales of property of testators under authority of the will generally: See § 571, ante.

(14) **Purchase by executor failing to qualify.** The fact that a person is named in the will as executor, and actually applies for letters, but refuses or fails to qualify as executor, does not constitute him a trustee for the estate at the time the contract of sale was made, and at which sale such person becomes a purchaser, where it appears that he paid full consideration for the property purchased by him, and that the estate was in no way injured by his acts: *Bowden v. Pierce*, 73 Cal. 459, 464; 14 Pac. Rep. 302; 15 Pac. Rep. 64.

(15) **Return of sales under power in will. Confirmation.** While an executor may sell land under a power in the will, his sale thereof must be reported to the court and confirmed, as in other cases of sales of real property by executors or administrators: *Northrop v. Marquam*, 16 Or. 173; 18 Pac. Rep. 449, 457. The statute contemplates that the same proceedings shall be had with respect to the return of sale, whether the sale is made under a power in the will or under an order of court. If the will creates a naked power, — a power not coupled with an interest, — the executors must give notice of the sale, return accounts thereof, and, unless there are special directions in the will, must conduct the sale in all respects as if made under an order of the court. If no date was fixed by order of the court or judge, and no notice of the hearing of the report, or the filing thereof, was given by posting or publication, and where it does not appear in the record that the persons interested in the estate were actually present at the hearing, in person or by attorney, the order purporting to confirm the sale is properly set aside, as the probate court may annul it whenever the attention of the judge is called to

the circumstance that it was made without the acquisition of jurisdiction over the persons of all interested: *Estate of Durham*, 49 Cal. 490, 495; *Perkins v. Gridley*, 50 Cal. 97, 100. An executor, to whom lands have been devised in trust for sale to pay debts of the estate, can legally sell and convey such lands to a purchaser without confirmation by the probate court: *Estate of Williams*, 92 Cal. 183, 185; 28 Pac. Rep. 227, 679. If, under a will, the executor is given power, after the expiration of two years from the death of the testator, to sell any portion of his estate at public or private sale, "without any order of court, or being required to account to any court," such will does not have the effect of creating a valid trust in relation to the land, or any other trust than such as pertains to the office as executor, and such sale must be confirmed by the court before title is passed: *Bennalack v. Richards*, 116 Cal. 405, 408; 48 Pac. Rep. 622; 125 Cal. 427, 432; 58 Pac. Rep. 65. If the only persons interested in the proceeds of any sale of the property of the estate have so ratified the contract made by the executor under a supposed power in the will as to estop them from disputing it, the probate court may, upon that ground alone, confirm the sale, and direct the execution of a conveyance on a compliance by the purchaser with the terms of the contract: *Estate of Walker*, 149 Cal. 627; 85 Pac. Rep. 310.

39. Sale of pretermitted child's interest. A pretermitted child is not estopped, by the decree of distribution, from claiming any portion of the estate, where the proceedings as to such child are void for want of jurisdiction: *Pearson v. Pearson*, 46 Cal. 610, 635. Minor children of the decedent, not provided for in his will, and the will not showing that the omission to provide for them was intentional, succeed immediately, by operation of law, to the same portion of the testator's real property as if no will had been made. As to such portion, the testator is to be regarded as dying intestate, and its succession is directed by law, and not by the will. As a necessary consequence of this construction, it follows that every provision of the will, directly or indirectly attempting to dispose of such portion of the estate, except for the discharge of the decedent's debts, or other charges accruing in due course of administration, is inoperative as against such child. This title of a pretermitted child cannot be divested by a sale made by the executrix of his father's will: *Smith v. Olmstead*, 88 Cal. 582, 585; 26 Pac. Rep. 521; 22 Am. St. Rep. 235; 12 L. R. A. 46; quoting from and approving *Brenham v. Story*, 39 Cal. 188. See *Estate of Wardell*, 57 Cal. 489. The omitted child takes title by descent, and becomes a tenant in common with the devisees: *Pearson v. Pearson*, 46 Cal. 610, 628. A power of sale in a will does not authorize a sale of the interest of a child not mentioned in the will: *Smith v. Olmstead*, 88 Cal. 572; 22 Pac. Rep. 1143. An order of confirmation, in such cases, imparts no validity to the sale as against such interests; it only adjudicates that the power contained in the

will had been followed, and that the sale was for a fair price: *Smith v. Olmstead*, 88 Cal. 582, 588; 26 Pac. Rep. 521; 22 Am. St. Rep. 235; 12 L. R. A. 46 (quoting from and approving *Brenham v. Story*, 39 Cal. 188). A recital in the decree, and the appearance of the "attorney appointed to represent the minor heirs of said estate," must be construed as an appearance by him only for the minors whom he had been appointed to represent, and not for a minor pre-permitted child for whom he had no authority to appear: *Pearson v. Pearson*, 46 Cal. 610, 636.

40. Limitation of actions for vacating sale. An application to sell real estate of a decedent is not, in any sense of the term, an action to recover real estate or the possession of it; nor is it an action arising out of the title thereto, or the rents and profits thereof; and, since the petition for the sale must set forth the debts of the estate, it would seem that the appropriate limitation may then be invoked in order to defeat a particular claim, and therefore the sale *pro tanto*: *In re Tuohy's Estate*, 33 Mont. 230; 83 Pac. Rep. 486, 490. The period of three years prescribed by the statute within which the heirs of the decedent may avoid a sale made by an executor or administrator does not run if it appears that the heirs had no cause of action against the purchaser: *Campbell v. Drais*, 125 Cal. 253, 260; 57 Pac. Rep. 994. The limitation of the code with reference to actions for the recovery of any estates sold by an executor or administrator does not affect the question of title, but simply refers to a right of action. Hence, if no title passed at a probate sale, it is in the heirs and their grantees, and is not affected by the statute of limitations: *Gage v. Downey*, 94 Cal. 241, 251; 29 Pac. Rep. 635; 79 Cal. 140; 21 Pac. Rep. 855.

III. CONFIRMATION OF SALES AND CONVEYANCES.

1. Discretion of court as to confirmation. The court doubtless has the power to confirm or refuse to confirm, but this is not an arbitrary power; it is neither more nor less than a sound discretion, and must be exercised with a just regard to the rights of all concerned, subject to the review of the appellate tribunal, and the propriety of its exercise depends upon the circumstances of each case. A rightful exercise of this discretion requires due consideration of the rights and interests of all concerned, the purchaser as well as others: *Dunn v. Dunn*, 137 Cal. 51, 59; 69 Pac. Rep. 847.

2. Authority to confirm, when presumed. As the court has power to make an order confirming an administrator's sale of personal assets in a proper case, its authority to act will be presumed, unless the want of such authority is clearly made to appear: *Jerrue v. Superior Court* (Cal. App.), 95 Pac. Rep. 906, 907.

3. When required. The court has no authority or jurisdiction to set aside the order of sale, to refuse to confirm a sale, or to hear any evidence in relation thereto outside of the method provided by statute, and in disregard of the rights of a purchaser after a sale. If the order of sale is regularly made, and it has not been appealed from, it is binding upon all. The purchaser is entitled to have the sale confirmed, if there is no valid reason within the law why this should not be done: *Dunn v. Dunn*, 137 Cal. 51, 58; 69 Pac. Rep. 347. Upon the court's own finding that the sale "was legally made and fairly conducted"; that due proof was made, to its satisfaction; that the price was not disproportionate to the value of the property; and that a sum exceeding the bid of the appellant (ten per cent, exclusive of the expenses of a new sale) cannot be obtained,—it only remains for the court to confirm the sale, where the order of sale has not been vacated, and no appeal has been taken therefrom, even though it is admitted that the court erred in directing too large an amount of the property to be sold: *Estate of Spriggs*, 20 Cal. 121, 126. Words in a will, which direct that the executor "shall have the property sold" at the expiration of two years after the testator's death, and shall distribute the proceeds among designated beneficiaries, do not confer upon the executor the power to sell as a trustee. The sale which is thus directed is to be made by the executor as executor of the will, and as a part of his administration of the estate, and not as a trustee of an express trust, and will be ineffectual without a confirmation by the court: *Estate of Pforr*, 144 Cal. 121, 126; 77 Pac. Rep. 825. Under the statute of Idaho, it is mandatory that all sales be reported, under oath, to the probate court and be confirmed by it, before title to the property sold can pass; and where there is no return of sale, the order confirming a sale is void: *People v. Cunningham*, 6 Ida. 113; 53 Pac. Rep. 451.

4. When not required. Under a will that creates a trust, with power in the trustee to sell the property without the intervention of any court, no confirmation by the court is required or authorized by law: *Morffew v. San Francisco etc. R. R. Co.*, 107 Cal. 587, 595; 40 Pac. Rep. 810. If the order of sale is *coram non judice*, then the "sale" is no sale, and it cannot be made valid and binding by any number of so-called confirmations. The sale being void, there is no subject-matter upon which the order of confirmation can act: *Townsend v. Tallant*, 33 Cal. 45, 54.

5. No power to confirm when. If, at the time an executor or administrator asks for a confirmation of a sale of the real estate of a deceased person, the court is confronted with a valid order by which that sale has been annulled, it is without jurisdiction to grant the application: *Estate of Devincenzi*, 131 Cal. 452, 453; 63 Pac. Rep. 723.

6. Objections to confirmation. The provisions of the statute allowing objections to be made to the sale, and requiring for its efficacy a confirmation by the court, are only intended to secure such an execution of the order of sale that a just and fair price may be obtained for the property for the benefit of the estate. The authority of the court is limited to such a supervision and control that this end may be effected: *Estate of Spriggs*, 20 Cal. 121; *Estate of Leonis*, 138 Cal. 194, 199; 71 Pac. Rep. 171. At a probate sale the court is regarded as the vendor, and the purchaser who buys property at the sale has the right to a conveyance that will vest in him the title of the property sold. He may present, in objection to its confirmation, any facts that will impair or defeat the title thereby transferred: *Estate of Pearsons*, 98 Cal. 603, 612; 33 Pac. Rep. 451. An objection to the confirmation of the sale, on the ground that the bond required by the probate judge had not in fact been given, is a valid one, and the objecting party should be permitted to submit his proof in support of his objection: *Estate of Arguello*, 50 Cal. 308, 310.

7. Effect of the order. The order of confirmation is a final judgment, and, in the absence of an appeal, is as conclusive on the rights of the parties as could be any adjudication by a court of competent jurisdiction: *Lake v. Hathaway* (Kan.), 89 Pac. Rep. 666; *Watson v. Trondle*, 33 Neb. 450; 50 N. W. Rep. 331; 29 Am. St. Rep. 492. The fact that the court confirms a sale upon the return thereof, made by an administrator pursuant to an order of sale, is not an adjudication against the alleged purchaser. He may not have bid at all, or if he did bid, he may have been, by timely withdrawal, or otherwise, legally released from any obligation thereon. In an action to enforce the alleged contract of purchase against him, the proceedings, at most, could constitute evidence only in a *prima facie* case: *Jerrue v. Superior Court* (Cal App.), 95 Pac. Rep. 906, 907.

8. Refusing confirmation. Effect of the order. On refusal to confirm the first sale, it is in the discretion of the court either to order a new sale or to accept another bid of an advance of ten per cent and additional costs: *Griffin v. Warner*, 48 Cal. 383, 385. Or the court may merely vacate the sale and continue the cause for further proceedings: *Griffin v. Warner*, 48 Cal. 383, 385. In a case where confirmation is set aside for insufficiency of notice of the hearing, proceedings for hearing upon the application to confirm may be renewed, and, if the bid be disproportionate to the value of the property in the amount designated by the statute, such sale may be set aside: *Estate of Durham*, 49 Cal. 490, 495; *Perkins v. Gridley*, 50 Cal. 95, 100.

9. Refusal to report sale for confirmation. Effect of. Where the executor refuses to report a sale to the court for confirmation, in

violation of a duty imposed upon him by law, and having put the purchaser in possession, and permitted him to make improvements to an amount nearly or quite equal to the value of the property at the time the contract of sale was made, he cannot invoke the aid of a court of equity to compel an accounting, or to place the property in the hands of a receiver, until some future order of the court. In making the sale, the executor exercised and exhausted his power to deal with the property, unless, upon reporting to the court, confirmation of the sale was refused: *Bennalack v. Richards*, 125 Cal. 427, 433; 58 Pac. Rep. 65.

10. Action to set aside confirmation. No one but parties interested in the estate may object to confirmation. This being true, a complaint does not state facts sufficient to constitute a cause of action, and a demurrer thereto is properly sustained, where the action to set aside a confirmation is brought by parties who allege that they are willing to pay an advance of ten per cent on the price for which the lands were sold, all objections by the heirs and other parties interested to confirmation having been withdrawn or abandoned: *Terry v. Clothier*, 1 Wash. 475; 25 Pac. Rep. 673.

11. Conveyance.

(1) In general. The word "administrator," following the name of a person in a deed, is simply descriptive of the person, and is not entitled to any greater significance: *Love v. Love*, 72 Kan. 658; 83 Pac. Rep. 201, 202. Where land was purchased from the estate in good faith, and the purchase price thereof was paid into the estate and used in the administration thereof, the administrator's deed should not be set aside without repayment of the purchase price: *Ball v. Clothier*, 34 Wash. 299; 75 Pac. Rep. 1099, 1104; *Wilson v. Morrell* (Wash.), 32 Pac. Rep. 733, 734.

REFERENCES.

Validity of deed by executor or administrator to person other than the purchaser: See note 5 Am. & Eng. Ann. Cas. 708.

(2) May be ordered when. The probate court has jurisdiction to order a conveyance by an administrator after confirmation of a sale, in a case where the purchase price of the premises sold was paid by the purchaser in cash, less the amount of the mortgage debt against the premises held by the purchaser, for which he was entitled to a credit: *Estate of Lewis*, 39 Cal. 306, 307. Where an executor, in satisfaction of mortgage debts, has accepted conveyances of the encumbered land, and also foreclosed mortgages, and, on the sale of the real property affected thereby, takes deeds therefor to himself as executor, he will, as a condition precedent to his discharge and libera-

tion of his bondsmen, and in order that any right, title, or interest he may have in such premises may be transferred, be required to execute quitclaim deeds of certain designated property: *In re Roach's Estate* (Or.), 92 Pac. Rep. 118, 127.

(3) **Is individual deed when.** An administrator's deed, which recites that it was made by the grantor as "administrator of the estate," etc., but which is acknowledged by him individually, is his individual deed, and not his deed as an administrator, where such deed contains no recital showing that it was intended to be a deed by such person in his official capacity as administrator, except as above indicated: *Estate of Conroy* (Cal. App.), 93 Pac. Rep. 205, 206.

(4) **Conditions not to be imposed.** When the sale is confirmed, and a deed is ordered and made, the purchaser, or his assignee, is entitled to the possession of it, on payment of the purchase-money, and neither the administrator nor the court can impose any other condition than the payment of the purchase-money, no matter in whose hands the deed is left for delivery: *Cockins v. McCurdy*, 40 Kan. 758; 20 Pac. Rep. 470.

REFERENCES.

Effect of covenants in conveyances made by executors or administrators: See note 17 Am. Dec. 224-228.

(5) **Title carried by.** Where a trustee is clothed with the legal title, and is not restrained by the terms of the trust, a conveyance by him, although in violation of the trust, carries the legal title, and the beneficiaries must seek their remedy in equity: *Davidson v. Mantor* (Wash.), 89 Pac. Rep. 167. Though an administrator's deed may be ineffectual to convey the legal title, it may pass to the vendee an equitable title: *Wilson v. Morrell* (Wash.), 32 Pac. Rep. 733, 734. The only effect of an administrator's deed is to convey to the purchaser the title of the deceased. Such a deed can contain no warranty of the title. The purchaser must know the law, the character of the sale, the effect of the deed, and is bound to examine the title for himself. The language of the notice puts him upon his guard. In these sales, caveat emptor is the rule: *Halleck v. Guy*, 9 Cal. 181, 197.

(6) **Is void when.** A conveyance made by an administrator to himself is ipso facto void, without regard to the statute, for it bears its own invalidity upon its face: *Boyd v. Blankman*, 29 Cal. 20, 24; 87 Am. Dec. 140. An administrator's deed is void where it appears that the land was sold without the prescribed order, showing notice of the time and place of the hearing of the petition to sell, and fixing the length of time and the manner in which notice should be given: *Graden v. Mais* (Kan.), 95 Pac. Rep. 412.

(7) **Mandate to compel.** A writ of mandate will lie to compel the administrator to execute a conveyance to which the purchaser is entitled: *People v. Cunningham*, 6 Ida. 113; 53 Pac. Rep. 451.

REFERENCES.

Effect of qualifying words, "as executor" and "as administrator": See note 15 L. R. A. 850-852. Form and contents of deed of executor or administrator: See note 56 Am. Dec. 55-58.

IV. DIRECT AND COLLATERAL ATTACK UPON SALES.

1. **Direct attack in general.** If the proceedings on a probate sale were defective or irregular in any way, they can only be attacked by a direct action brought for that purpose. They cannot be impeached in any collateral suit: *Irwin v. Scriber*, 18 Cal. 499. If the petition upon which the order of sale was made is so defective that the court did not acquire jurisdiction, the order may be assailed at any time upon a collateral as well as upon a direct attack; but if the facts stated in the petition were sufficient to confer jurisdiction upon the court to hear the application, its order directing the sale cannot be impeached upon a collateral attack: *Estate of Devincenzi*, 119 Cal. 498, 500; 51 Pac. Rep. 845. On direct appeal from an order of sale, a substantial compliance with the provisions of the statute is essential to the validity of such order: *Estate of Byrne*, 112 Cal. 176; 44 Pac. Rep. 467; *Estate of Levy*, 141 Cal. 639, 643; 75 Pac. Rep. 317.

2. **Distinction between direct and collateral attack.** An action to enjoin the delivery of a deed executed by the executor, and to set aside the orders of a probate court for the sale, and confirmation of the sale, of land in pursuance of which the deed was executed, is a collateral attack on the proceedings in and decision of a court of record: *Lake v. Hathaway* (Kan.), 89 Pac. Rep. 666; *Watson v. Trondle*, 33 Neb. 450; 50 N. W. Rep. 331; 29 Am. St. Rep. 492. The attack on a probate sale is direct and not collateral, where it is based upon the ground of fraud. The fraud must be, however, a fraud extrinsic or collateral to the questions examined and determined in the action. Among the instances given in the books are such as these: keeping the unsuccessful party away from the court by a false promise of a compromise; or purposely keeping him in ignorance of the suit; or where an attorney fraudulently attempts to represent a party and connives at his defeat, or, being regularly employed, corruptly sells out his client: *Bergin v. Haight*, 99 Cal. 52, 56; 33 Pac. Rep. 760. See *Pico v. Cohn*, 91 Cal. 129, 133; 25 Pac. Rep. 470; 27 Pac. Rep. 537; 25 Am. St. Rep. 159. Proceedings in an application for a probate sale are subject to review and reversal, as in other cases, upon a direct attack made by appeal from the order directing the sale, and upon such review any substantial departure from the statutory require-

ments compels a reversal; the distinction being that upon a collateral attack the proceedings will be sustained, and the purchaser's title held good, unless it appears that the court did not acquire jurisdiction to order the sale; while, upon a direct attack by appeal from the order, it may be reversed for error, though the court had jurisdiction: *Estate of Cook*, 137 Cal. 184, 186; 69 Pac. Rep. 968.

3. Collateral attack.

(1) **In general.** Probate sales will not be upheld, even against a collateral attack, when the petition in the proceeding for an order of sale affirmatively discloses an entire want of any statement of facts essential, under the statute, to give jurisdiction: *Wright v. Edwards*, 10 Or. 298, 306. A party, in a collateral proceeding to set aside an administrator's sale, is bound by the findings in the judgment of the court in the proceedings resulting in the sale, especially where such party was also a party to such proceedings: *Bateman v. Reitler*, 19 Col. 547; 36 Pac. Rep. 548. If a court of general jurisdiction, and particularly charged with the administration of estates, acquires jurisdiction of the subject-matter and of the parties, its orders and judgments are not open to attack in a proceeding brought by the heirs to set aside an administrator's sale and for other relief, the same being a collateral proceeding: *Bateman v. Reitler*, 19 Col. 547; 36 Pac. Rep. 548. If the petition for an order of sale sufficiently states the facts necessary to give the court jurisdiction, the order thereon, being a judicial determination in a proceeding of which the court has jurisdiction over the subject-matter and of the parties interested therein, is not subject to a collateral attack: *Estate of Devincenzi*, 119 Cal. 498, 501; 51 Pac. Rep. 845. The authority of the administrator to sell land of a decedent is not impaired by the absence of the impress of a seal upon his letters of administration, where his authority is impeached collaterally: *Dennis v. Bint*, 122 Cal. 39, 43; 54 Pac. Rep. 378; 68 Am. St. Rep. 17. When an order of sale is relied upon as a defense in a collateral proceeding, the authority of the court to make the order must exist; for, if it acted without jurisdiction, its order or decree is a nullity, and confers no right or title, and cannot be asserted as a defense to bar a recovery: *Wright v. Edwards*, 10 Or. 298, 302. A minor heir, who was four years of age at the time of a probate sale, may commence an action of ejectment within two years after reaching his majority; but irregularities or defects in giving or publishing notice of the pendency of the proceeding for a sale of real property of the deceased cannot vitiate the proceedings of the probate court when attacked collaterally in such an action: *Thompson v. Burge*, 60 Kan. 549; 57 Pac. Rep. 110. A title acquired on a probate sale is not affected by mere irregularities, and, upon collateral attack, such objections cannot be made: *Dennis v. Winter*, 63 Cal. 16, 18.

(2) **What cannot be questioned.** A finding of the court that a petition for the sale of the land of a decedent was presented by two administrators, and an order of sale made in the name of both, cannot be questioned in a collateral proceeding, though there may have been a defect in the appointment of one of the administrators: *Blackman v. Mulhall* (S. D.), 104 N. W. Rep. 250, 254. The publication of an order to show cause why the real property of a decedent should not be sold, for two days less than the time prescribed by statute, does not render the sale void, nor affect its validity, in a collateral proceeding. Where there is some notice, an irregularity or the insufficiency thereof cannot be questioned in a collateral proceeding: *Blackman v. Mulhall* (S. D.), 104 N. W. Rep. 250, 255. If a decree ordering the sale of a decedent's real estate states that the same is based upon a verified petition, with certain auxiliary proceedings essential to its validity, and recites all jurisdictional facts, it cannot be attacked collaterally on the ground that the petition was not verified, and failed to specify facts sufficient to justify the order granting leave to sell: *Phillips v. Phillips*, 13 S. D. 231; 83 N. W. Rep. 94, 95.

(3) **Presumptions on.** If an order confirming the sale of a decedent's land to pay debts recites that the sale was legally made and fairly conducted, that the amount received is not disproportionate to the value of the land, and orders and decrees that the said sale be and the same is hereby in all things confirmed, it must be assumed, on collateral attack, that the probate court had before it the required proof showing that all of the provisions of the statute had been complied with: *Blackman v. Mulhall* (S. D.), 104 N. W. Rep. 250, 255. The same presumption must now attach to decrees in probate proceedings, upon collateral attack, as to judgments in cases at common law or in equity, and the sufficiency of the proceedings, or petition for an order of sale, will be tested by the same liberal rule which applies to the pleadings in an ordinary action upon such attack: *Burris v. Kennedy*, 108 Cal. 331, 338; 41 Pac. Rep. 458.

(4) **What is good on collateral attack.** Where the petition for a probate sale fails to state the value of the property sought to be sold, but where, following the description of the property in the schedule annexed to the petition, it is stated that "the said one-half interest was appraised at seven thousand dollars," the petition is good, on collateral attack, and is sufficient under the statute, as it fully and fairly answers the purpose of the code: *Silverman v. Gundelfinger*, 82 Cal. 548, 550; 23 Pac. Rep. 12. Where the petition of the administrator sets forth that there was no personal property belonging to the estate, this is sufficient, upon collateral attack, to warrant an order for the sale of real estate, where the petition is otherwise sufficient: *McKenna v. Cosgrove*, 41 Wash. 332; 83 Pac. Rep. 240. Though an order to show cause why the sale of a decedent's land

should not be made for the payment of debts fails to use the words, "that the party is required to show cause why the sale should not be ordered," it is good, as against a collateral attack, where it substantially complies with the statute by giving notice that application has been made for a sale, and that a hearing will be had at the time designated in the notice, and one of the recitals in the order is that all the proceedings required by the statute have been complied with, as this is an adjudication that the proceedings prior to the granting of the order were valid: *Blackman v. Mulhall* (S. D.), 104 N. W. Rep. 250, 255.

V. APPEAL.

1. **In general.** If an appeal is taken from an order vacating a sale of the real estate of a deceased person before such order is entered in the minutes of the court, the appeal is premature, and gives the court no jurisdiction of the subject-matter: *Estate of Devincenzi*, 131 Cal. 452, 453; 63 Pac. Rep. 723. An appeal from an order vacating a sale of the real estate of a deceased person is ineffectual, where there was a want of jurisdiction, whether such appeal was dismissed or not: *Estate of Devincenzi*, 131 Cal. 452, 454; 63 Pac. Rep. 723. Parties who have been duly notified of the proceedings for the sale of the property of a decedent should be held to have waived all objections to the petition not made in the court below: *Estate of Levy*, 141 Cal. 637, 643; 75 Pac. Rep. 317.

2. **Non-appealable orders.** An order directing the executor or administrator to make a sale under a previous order is not appealable: *Estate of Martin*, 56 Cal. 208, 209. An order of the probate court refusing to set aside an order of sale previously entered is not the subject of appeal: *Estate of Smith*, 51 Cal. 563, 565.

3. **Appealable orders.** Writs of error lie from the supreme court of the state of Colorado to every final judgment or decree of the county courts of that state, including a decree in probate for the sale of the lands of an estate of a deceased person. Such cases may be reviewed on the ground that the judgment or decision is final: *Sloan v. Strickler*, 12 Col. 179; 20 Pac. Rep. 611; *Vance's Heirs v. Rockwell*, 3 Col. 240. Where, on an application for the sale of real estate to pay debts, the matter under adjudication is the construction of the will, and a decree is entered after a full hearing, the same is final and appealable, and cannot be set aside unless the statutory steps are instituted for its vacation: *In re Barker's Estate*, 33 Wash. 79; 73 Pac. Rep. 796. An order refusing to hear evidence or to confirm the sale is, in effect, an order against directing the sale or conveyance of real estate, and is therefore appealable, under the language of the California statute: *Estate of Leouis*, 138 Cal. 194, 197; 71 Pac. Rep. 171.

4. Parties interested or aggrieved. It is a statutory rule that a litigant can appeal only from an order affecting a substantial right. This rule accords with the fundamental principle, everywhere recognized, that the administrator has no appeal unless aggrieved by the judgment or decree of the trial court: *Hume v. Turner*, 42 Or. 202, 208; 70 Pac. Rep. 611, 614; *In re Smith's Will*, 43 Or. 595; 75 Pac. Rep. 133. An order confirming a sale and directing a conveyance to be made is appealable. The right of the purchaser at such sale to be heard at the return of sale is implied from the statute, and such person may be a party "aggrieved" by the action of the court, whether he be "interested" in the estate or not: *Estate of Pearsons*, 98 Cal. 603, 605; 33 Pac. Rep. 451. Where the administrator has allowed claims against the estate, and the law imposes upon him the duty to sell the real property, and he petitions for leave to sell, the administrator in such proceeding represents the creditor, and has an appealable interest in the order denying him license to sell the real property: *In re Smith's Will*, 43 Or. 595; 75 Pac. Rep. 133. In a proceeding for the sale of real estate belonging to a decedent's estate, the guardian ad litem of the minor heirs is entitled, as an adverse party, to service of the notice of appeal from an order confirming a sale of such real estate. Under the provisions of the Idaho statute, title descends to the heirs, subject to the control of the probate court for the purposes of administration, etc. The heirs are therefore affected by a modification or reversal of the order or judgment appealed from, and are adverse parties, within the meaning of the provisions of such statute: *Reed v. Stewart (Ida.)*, 87 Pac. Rep. 1002; *Aulbach v. Dahler*, 4 Ida. 654; 43 Pac. Rep. 322; *Titiman v. Alamance Min. Co.*, 9 Ida. 240; 74 Pac. Rep. 529. On appeal by a purchaser, at the first sale of property, from an order of the probate court authorizing the administrator to resell the property, which order was made after the court had vacated and annulled the decree of confirmation of the previous sale, although the appellant was in no way a party to the order directing a resale, the court will assume, for the purposes of the decision, that such purchaser at the original sale was a party aggrieved by the order for a resale: *Estate of Boland*, 55 Cal. 310, 312.

5. Parties not interested or aggrieved. The administrator is not a party aggrieved by an order denying the petition to sell, where none of the parties interested in the property objected to the terms of the order, and the administrator, therefore, is not entitled to an appeal from such order: *Estate of Steward*, 1 Cal. App. 57; 81 Pac. Rep. 728. A party interested adversely to the estate, as a claimant of the land, is not a party injured or aggrieved by an order authorizing the administrator to mortgage the property of the estate covered by the lien, which will be lost unless redeemed. Such party has no standing in court, and his grievance, if any, in failing to acquire the property of the estate cannot be considered: *Estate of Freud*, 131 Cal. 667, 674; 63 Pac. Rep. 1080; 82 Am. St. Rep. 407.

6. Affirming the order of sale on appeal. Where an order of sale is made, and the owner, who has succeeded to the title of the sole devisee, has expressly consented to the order of sale, such order must be affirmed, whether it is erroneous or otherwise, if the appellant claims no interest therein: *Estate of Schroeder*, 46 Cal. 305, 317.

7. Record on appeal. Where the record is produced upon the hearing, and it purports to contain a full and detailed statement of everything that occurred in the course of the proceedings on the petition for leave to sell, there is no room left for presuming that anything more was done than what the record recites, nor anything less, nor anything different: *Townsend v. Tallant*, 33 Cal. 45, 53; 99 Am. Dec. 617. Where it appears that an order of sale was not granted on the day the caption would indicate, it will be presumed that there was a mistake in making up the record, rather than that the order was made before the return-day: *Russell v. Lewis*, 3 Or. 380, 385. An affidavit purporting to embody the objections of a purchaser, who neglects or refuses to comply with the terms of the sale, to the granting of a motion to set aside a sale of real estate and ordering a resale, and which affidavit was stricken from the files, will not, nor will the ruling of the court thereon, be considered on appeal from the order: *Estate of Long* (Cal. App.), 91 Pac. Rep. 169. The petition, citation, and proof of service are as essential parts of the record in a probate case as are the pleadings, process, and return in proceedings in the circuit court. It has been held, therefore, that where the statute regulating probate proceedings does not contain a provision directing the clerk of the probate court to attach together papers constituting the judgment roll, similar to the provision of the general practice act relating to the judgment roll, that the general act should be construed to include probate cases: *Gilmore v. Taylor*, 5 Or. 89, 91. The supreme court cannot act upon a stipulation as a basis for a judgment to be entered in that court, consenting that the order of confirmation be affirmed in part, unless the stipulation be signed by all the parties to the proceeding, either in person or by attorneys: *Estate of Arguello*, 50 Cal. 308, 310.

8. Decree. Effect of, on appeal. It is not error for an appellate court to go behind the order of sale made in a probate court, and to hear and sustain objections to the order of sale itself, in order to ascertain whether the sale should be approved or not, the objections coming from one who had no opportunity to be heard: *Estate of Gibbs*, 4 Utah, 97; 6 Pac. Rep. 525. Whether a sale will be for the advantage, benefit, and best interests of the estate, or those interested therein, is a question of fact to be determined by the probate court upon the evidence before it in reference thereto; and to the extent that its decision depends upon inferences to be drawn from the situation of the property, or of the parties who are interested

therein, it is not open to review upon an appeal from the order: *Estate of Steward*, 1 Cal. App. 57, 60; 81 Pac. Rep. 728. If the court finds as an ultimate fact that an estate is indebted to a plaintiff in an action brought to recover a debt, the appellate court will not disturb such finding, where the evidence is not before the court: *Merithew v. Orr*, 90 Cal. 363, 364; 27 Pac. Rep. 295. On an appeal from an order refusing to confirm a sale, the purchaser cannot object that the court had no power to direct a new sale, where such order was made upon the application of the executor, and where a written offer, at the time of the return, was made by the purchaser of a ten per cent advance over the amount named in the return, it being in the discretion of the court, under the provisions of the statute, either to accept such offer and confirm the sale or to order a new sale: *Estate of Reed*, 3 Cal. App. 142; 85 Pac. Rep. 155.

9. Res judicata. Law of the case. The doctrine of *res judicata* applies to the judgments and decrees of a probate court, as well as to those of any other judicial tribunal: *Garwood v. Garwood*, 29 Cal. 515, 522. A ruling, given upon a former appeal, construing a will, and holding that it gave no power to the executors to sell the real estate without an order of the probate court, and holding that the sales and conveyances attempted to be made without such order were void, is the law of the case, and conclusive upon the points in subsequent appeals: *Hill v. Den*, 54 Cal. 6, 21; *Huse v. Den*, 85 Cal. 390, 399; 24 Pac. Rep. 790; 20 Am. St. Rep. 232.

CHAPTER V.

CONVEYANCE OF REAL ESTATE OR TRANSFER OF PERSONAL PROPERTY, BY EXECUTORS AND ADMINISTRATORS, IN CERTAIN CASES.

- § 593. Completion of contracts for sale of property.
- § 594. Petition for conveyance or transfer. Notice of hearing.
- § 595. Form. Petition for order directing administrator specifically to perform contract to convey real estate.
- § 596. Form. Petition for order directing executor specifically to perform contract to convey real estate. (Incomplete transaction.)
- § 597. Form. Order appointing time for hearing petition for specific performance of contract to convey.
- § 598. Interested parties may contest.
- § 599. Form. Objections to order directing specific performance, by administrator, of decedent's contract to convey real estate.
- § 600. Conveyance or transfer to be ordered when.
- § 601. Form. Order for conveyance of land sold by decedent.
- § 602. Form. Order for conveyance of land sold by decedent. (Conditional.)
- § 603. Execution of conveyance or transfer, and recording of order therefor.
- § 604. Right of petitioner to enforce the contract.
- § 605. Form. Dismissal of petition for an order directing an administrator to convey land.
- § 606. Effect of conveyance or transfer.
- § 607. Effect of recording copy of decree.
- § 608. Same. Does not supersede power of court to enforce decree.
- § 609. Where party entitled to conveyance is dead.
- § 610. Decree may direct possession to be surrendered.

EXECUTORY CONTRACTS OF DECEASED. SPECIFIC PERFORMANCE.

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| <ul style="list-style-type: none"> 1. Contracts of decedent to convey real estate. (1) Scope and validity of statute. (2) Jurisdiction. Probate courts and equity. (3) Petition. (4) Specific performance may be enforced when. (5) Specific performance cannot be enforced when. (6) Nunc pro tunc orders. Costs. (7) Appeal. Law of the case. | <ul style="list-style-type: none"> 2. Enforcement of other contracts made by decedent. (1) Obligation to perform contracts of deceased. (2) What contracts may be enforced. (3) What contracts cannot be enforced. 3. Contracts to make a will. (1) When enforceable. (2) When not enforceable. (3) Parties. Misjoinder. |
|---|--|

§ 593. Completion of contracts for sale of property. When a person who is bound by contract in writing to convey any real estate, or to transfer any personal property, dies before making conveyance or transfer, and in all cases when such decedent, if living might be compelled to make such conveyance or transfer, the court, having jurisdiction of the probate proceedings of the estate of such decedent, may make a decree authorizing and directing the executor or administrator of such deceased person to convey or transfer such real estate or personal property to the person entitled thereto. **Kerr's Cyc. Code Civ. Proc., § 1597.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Arizona.** Rev. Stats. 1901, par. 1836.
- Colorado.** 3 Mills's Ann. Stats., secs. 4722, 4723.
- Idaho.** Code Civ. Proc. 1901, sec. 4224.
- Kansas.** Gen. Stats. 1905, § 3012.
- Montana.** Code Civ. Proc., sec. 2750.
- Nevada.** Comp. Laws, sec. 2961.
- North Dakota.** Rev. Codes 1905, § 8155.
- Oklahoma.** Rev. Stats. 1903, sec. 1702.
- South Dakota.** Probate Code 1904, § 254.
- Utah.** Rev. Stats. 1898, sec. 3935.
- Washington.** Pierce's Code, § 1292.
- Wyoming.** Rev. Stats. 1899, sec. 4817.

§ 594. Petition for conveyance or transfer. Notice of hearing. On the presentation of a verified petition by the executor or administrator, or by any person claiming to be entitled to such conveyance from an executor or administrator, setting forth the facts upon which the claim is predicated, the court, or a judge thereof, must appoint a time and place for hearing the petition, and must order notice thereof to be served on the executor or administrator personally when he is not the petitioner, and published at least four successive weeks before such hearing, in such newspaper in this state as the court may designate. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 501), § 1598.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Arizona.** Rev. Stats. 1901, par. 1837.
- Colorado.** 3 Mills's Ann. Stats., secs. 4722, 4723, 4724.

Idaho. Code Civ. Proc. 1901, sec. 4225.
Kansas. Gen. Stats. 1905, §§ 3012, 3013, 3014.
Montana. Code Civ. Proc., sec. 2751.
North Dakota. Rev. Codes 1905, § 8156.
Oklahoma. Rev. Stats. 1903, sec. 1703.
South Dakota. Probate Code 1904, § 255.
Utah. Rev. Stats. 1898, sec. 3936.
Washington. Pierce's Code, § 1293.
Wyoming. Rev. Stats. 1899, sec. 4818.

§ 595. Form. Petition for order directing administrator specifically to perform contract to convey real estate.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
 [Title of form.]

To the Honorable the ____² Court of the County³ of ____,
 State of ____.

This, the verified petition of ____, respectfully shows:
 That on the ____ day of ____, 19____, ____, now deceased,
 executed and delivered to your petitioner a contract, in writing,
 a copy of which is hereinafter set forth, wherein and
 whereby he agreed to sell and convey to your petitioner, for
 a consideration therein stated, that certain real estate situated
 in the county⁴ of ____, state of ____, particularly
 described in said written contract;

That the said ____ died on the ____ day of ____, 19____,
 without having made such conveyance; but that, prior to
 such death, petitioner performed all of the matters and things
 required by said agreement to be performed by him, and by
 reason of the premises was, and is, entitled to a specific performance
 of said agreement, according to the terms thereof,
 to wit: a conveyance of the premises described in said instrument;
 and said decedent, if living, might be compelled to
 make such conveyance;

That, subsequent to the death of said decedent, ____ was
 appointed administrator⁵ of his estate; that he took the oath
 and filed a bond as such administrator;⁶ and that he is now
 the duly qualified and acting administrator⁷ of said estate.

The following is a full, true, and correct copy of the contract
 of which specific performance is herein sought: ____.⁸

Wherefore your petitioner prays for an order of this court authorizing and requiring the said administrator⁹ specifically to perform said agreement, by executing to petitioner a good and sufficient conveyance of the real estate in said contract specifically described. _____, Petitioner.

_____, Attorney for Petitioner.

[Add usual verification.]

Explanatory notes. 1. Give file number. 2. Title of court. 3, 4. Or, city and county. 5-7. Or, executor. 8. Give copy of contract. Under the California statute as it now exists, a copy of the contract is not required: **Kerr's Cal. Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 501), § 1598.** If a copy is available, the better practice would seem to be to insert it; but if it is omitted, the petition must be changed, to avoid reference to copy set forth, and a description of the land inserted in its proper place, instead of referring to the contract for description. 9. Or, executor.

§ 596. Form. Petition for order directing executor specifically to perform contract to convey real estate. (Incomplete transaction.)

[Title of court.]

[Title of estate.]

{ No. ____.¹ Dept. No. ____
 { [Title of form.]

To the Honorable the ____² Court of the County³ of _____, State of _____.

This, the verified petition of _____, respectfully shows: That on the ____ day of _____, 19____, _____, now deceased, executed and delivered to your petitioner a contract, in writing, to convey to your petitioner, for the sum of _____ dollars (\$____), that certain real estate situated in the county⁴ of _____, state of _____, particularly described as follows, to wit: _____;

That, by the terms of said agreement, the said property was to be paid for in ____⁵ monthly instalments of _____ dollars (\$____), each, with interest;

That, after the payment of ____⁶ instalments, but before the payment of all thereof, the said _____ died, and, after proceedings duly had therefor, the will of said _____ has been admitted to probate in this court, and letters testamentary

duly issued to —, who is now the duly qualified and acting executor of said will;⁷

That your petitioner is ready and willing and desires to pay in full the balance owing on said contract of purchase hereinbefore described, and that, upon such payment, your petitioner is entitled to a conveyance of said real estate; and that said decedent, if living, might be compelled to accept such payment and to make such conveyance.

Wherefore your petitioner prays for a decree authorizing and directing the said executor⁸ to execute a conveyance of said property to your petitioner upon payment of the remaining instalments of money due, with interest thereon.

—, Attorney for Petitioner.

—, Petitioner.

[Add usual verification.]

Explanatory notes. 1. Give file number. 2. Title of court. 3, 4. Or, city and county. 5. Give number of instalments, or other terms of contract. 6. State number. 7. Or, letters of administration on the estate of said — were duly issued to —, who is now duly qualified and acting administrator of said estate. 8. Or, administrator.

§ 597. Form. Order appointing time for hearing petition for specific performance of contract to convey.

[Title of court.]

[Title of estate.]

} No. —.¹ Dept. No. —
{ [Title of form.]

—, having filed his verified petition in this court, setting forth facts on which he bases a claim that he is entitled to the specific performance of a contract, made with him, by said decedent in his lifetime, to convey certain real estate, which said contract is set forth in his petition, and praying for an order requiring the administrator² of the above-entitled estate to execute to him a conveyance of the following described real property, to wit: —, —

It is ordered, That —,³ the — day of —, 19—, and the court-room of said court at —,⁴ in the said county⁵ of —, state of —, be, and the same are hereby, appointed as the time and place for the hearing of said peti-

tion; and that notice thereof be served on said administrator * personally, and published in —, a newspaper published in this state, for at least four⁷ successive weeks before said hearing. —, Judge of the — Court.

Dated —, 19—.

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Day of week. 4. State location of court-room. 5. Or, city and county. 6. Or, executor (unless petition is filed by him). 7. Or other time prescribed by statute.

§ 598. Interested parties may contest. At the time and place appointed for the hearing, or at such other time to which the same may be postponed, upon satisfactory proof by affidavit or otherwise, of the due publication of the notice, the court shall proceed to hear the said petition, and all persons interested in the estate may appear and contest such petition, by filing their objections in writing, and the court may examine, on oath, the petitioner and all who may be produced before him for that purpose. **Kerr's Cyc. Code Civ. Proc.**, § 1599.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1838.

Colorado. 3 Mills's Ann. Stats., sec. 4724.

Idaho.* Code Civ. Proc. 1901, sec. 4226.

Kansas. Gen. Stats. 1905, §§ 3014, 3021.

Montana.* Code Civ. Proc., sec. 2752.

Oklahoma.* Rev. Stats. 1903, sec. 1704.

South Dakota.* Probate Code 1904, § 256.

Washington. Pierce's Code, § 1294.

Wyoming. Rev. Stats. 1899, sec. 4819.

§ 599. Form. Objections to order directing specific performance, by administrator, of decedent's contract to convey real estate.

[Title of court.]

[Title of estate.]

{ No. —.¹ Dept. No. —
[Title of form.]

Now comes —, an heir at law² of said deceased, and objects to the granting of the order prayed for in the petition

of —, heretofore filed herein, directing the administrator³ of said estate to convey to him the land described in his petition; and for cause of contest alleges:

That no notice of the hearing of said petition has ever been published, as required by order of this court;⁴

That the alleged written contract to convey was not binding upon said deceased, for the reason that —;⁵

That the alleged contract between petitioner and said deceased was procured from the decedent, in his lifetime, by the duress and fraud of said petitioner, in the following manner, to wit: —.⁶

Wherefore he prays that the order sought in said petition be denied. —, Contestant.

—, Attorney for Contestant.

Explanatory notes. 1. Give file number. 2. Or, residuary legatee under the last will and testament of —, deceased; or otherwise, according to the fact. 3. Or, executor. 4. Or, by a judge of this court. 5. State the facts showing why contract was not binding. 6. State the facts out of which duress and fraud arose, as fully as would be required in a complaint in equity setting up duress and fraud. Set forth, in subsequent paragraphs, any other causes which would have been a defense to decedent in an action for the specific performance of the contract, such as a different contract, rescission, want of title in plaintiff, statute of limitations, want of equity, etc.

§ 600. Conveyance or transfer to be ordered when. If, after a full hearing upon the petition and objections, and examination of the facts and circumstances of the claim, the court is satisfied that the petitioner is entitled to a conveyance of the real estate described in the petition, a decree authorizing and directing the executor or administrator to execute a conveyance thereof to the petitioner must be made. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 502), § 1600.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1839.

Colorado. 3 Mills's Ann. Stats., sec. 4725.

Idaho. Code Civ. Proc. 1901, sec. 4227.

Kansas. Gen. Stats. 1905, § 3015.

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Montana. Code Civ. Proc., sec. 2753.
North Dakota. Rev. Codes 1905, § 8156.
Oklahoma. Rev. Stats. 1903, sec. 1705.
South Dakota. Probate Code 1904, § 257.
Utah. Rev. Stats. 1898, sec. 3937.
Washington. Pierce's Code, § 1295.
Wyoming. Rev. Stats. 1899, sec. 4820.

§ 601. Form. Order for conveyance of land sold by decedent.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.] }

Now comes _____, the petitioner herein, by _____, his attorney, and proves to the satisfaction of the court that notice of the time and place of the hearing of the petition herein to obtain an order for the conveyance of land sold by said decedent was duly served on _____, the administrator² of said estate, for the time required by law and by order of the court, and was duly published in the _____, a newspaper of general circulation, published in the county³ of _____, at least four successive weeks before the time fixed for said hearing; and said administrator⁴ also appearing by _____, his attorney, and the court, after hearing the evidence, being satisfied that the deceased was bound by a contract, in writing, to convey the property hereinafter described to _____, but that he died before making such conveyance, and that said petitioner is entitled to a conveyance as prayed for in his petition, —

It is therefore ordered, adjudged, and decreed by the court, That the said _____, as administrator⁵ of the estate of _____, deceased, be, and he is hereby, authorized and directed to execute forthwith, as such administrator,⁶ a deed of conveyance to said _____ for the land described as follows, to wit: _____.⁷

Entered _____, 19____.

_____, County Clerk.
By _____, Deputy.⁸

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Or, city and county. 4-6. Or, executor. 7. Describe the land. 8. Orders need not be signed: See note, § 77, ante.

§ 602. Form. Order for conveyance of land sold by decedent. (Conditional.)

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Now comes _____, the petitioner herein, by _____, his attorney, and proves to the satisfaction of the court that notice of the time and place of hearing his petition herein was duly served on _____, the administrator² of said estate, in the manner and for the time required by law and the order of court, and was duly published in the newspaper known as _____, a newspaper of general circulation, published in the county³ of _____; that said publication was made for four successive weeks⁴ before the time appointed by the court for said hearing; and said administrator⁵ also appearing by _____, his attorney, the court, after hearing the evidence, being satisfied that the deceased was bound by a contract, in writing, to convey the property hereinafter described to the said _____, but that he died before making such conveyance, and that said petitioner is entitled to a conveyance upon the conditions hereinafter stated, —

It is therefore ordered, adjudged, and decreed by the court, That the said _____, as administrator⁶ of the estate of said deceased, be authorized and directed to execute, as such administrator,⁷ a deed of conveyance to said _____ for the land described as follows, to wit: _____.⁸

It is further ordered, That said deed be delivered to said _____ only upon the payment by him, to said administrator,⁹ of the sum of _____ dollars (\$ _____), the said payment and delivery to be concurrent.¹⁰

_____, County Clerk.

Entered _____, 19____.

By _____, Deputy.

Explanatory notes. 1. Give file number. 2. Or, executor of the will of said deceased. 3. Or, city and county. 4. Or as prescribed by the court. 5-7. Or, executor. 8. Describe the land. 9. Or, executor. 10. Insert other conditions, if any remain unperformed.

§ 603. Execution of conveyance or transfer, and recording of order therefor. The executor or administrator must exe-

cute the conveyance or transfer according to the directions contained in the decree, which decree shall be prima facie evidence of the correctness of the proceedings, and of the authority of the executor or administrator to make the conveyance or transfer. If the transaction relate to real property a certified copy of the decree must be recorded with the deed in the office of the recorder of the county in which the land conveyed is situated. **Kerr's Cyc. Code Civ. Proc.**, § 1601.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Arizona.** Rev. Stats. 1901, par. 1840.
- Colorado.** 3 Mills's Ann. Stats., sec. 4726.
- Idaho.** Code Civ. Proc. 1901, sec. 4228.
- Kansas.** Gen. Stats. 1905, § 3016.
- Montana.** Code Civ. Proc., sec. 2754.
- Oklahoma.** Rev. Stats. 1903, sec. 1706.
- South Dakota.** Probate Code 1904, § 258.
- Washington.** Pierce's Code, §§ 1296, 1299.
- Wyoming.** Rev. Stats. 1899, sec. 4821.

§ 604. **Right of petitioner to enforce the contract.** If, upon the hearing, as hereinbefore provided, the right of the petitioner to have a specific performance of the contract is found to be doubtful, the court must dismiss the petition without prejudice to the rights of the petitioner, who may, at any time within six months after such dismissal, proceed by action to enforce a specific performance thereof. **Kerr's Cyc. Code Civ. Proc.**, § 1602.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1841.
- Idaho.*** Code Civ. Proc. 1901, sec. 4229.
- Montana.*** Code Civ. Proc., sec. 2755.
- North Dakota.** Rev. Codes 1905, § 8158.
- Oklahoma.** Rev. Stats. 1903, sec. 1707.
- South Dakota.*** Probate Code 1904, § 259.
- Utah.*** Rev. Stats. 1898, sec. 3938.
- Wyoming.*** Rev. Stats. 1899, sec. 4822.

§ 605. Form. Dismissal of petition for an order directing an administrator to convey land.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.] }

The petition of _____, praying for an order directing the administrator² of the estate of _____, deceased, specifically to perform the agreement of his decedent, by executing to said petitioner a conveyance of certain real estate described in said petition, coming on regularly this day for hearing,³ the court proceeds to hear the proofs adduced, and to consider the objections to said petition, and, after such hearing and consideration, finds that the petitioner's right to demand a specific performance of the contract described in his petition is doubtful.

It is therefore ordered, That said petition be, and the same is hereby, dismissed without prejudice to the right of petitioner to proceed, at any time within six months⁴ from date hereof, to enforce, by action, a specific performance of said agreement.

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Or, having been regularly postponed, by order of court, to the present time. 4. Or other time prescribed by statute.

§ 606. Effect of conveyance or transfer. Every conveyance or transfer made in pursuance of a decree as provided in this chapter, shall pass title to the property contracted for, as fully as if the contracting party himself was still living, and executed the conveyance or transfer. **Kerr's Cyc. Code Civ. Proc.**, § 1603.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901; par. 1842.

Colorado. 3 Mills's Ann. Stats., sec. 4727.

Idaho. Code Civ. Proc. 1901, sec. 4230.

Kansas. Gen. Stats. 1905, § 3017.

Montana. Code Civ. Proc., sec. 2756.

Nevada. Comp. Laws, sec. 2962.
North Dakota. Rev. Codes 1905, § 8157.
Oklahoma. Rev. Stats. 1903, sec. 1708.
South Dakota. Probate Code 1904, § 260.
Washington. Pierce's Code, § 1296.
Wyoming. Rev. Stats. 1899, sec. 4823.

§ 607. **Effect of recording copy of decree.** A copy of the decree for a conveyance or transfer as provided in this chapter, duly certified and recorded in the office of the recorder of the county in which the property is situated, gives the person entitled to the conveyance or transfer a right to the possession of the property contracted for, and to hold the same according to the terms of the intended conveyance or transfer, in like manner as if the same had been conveyed or transferred in pursuance of the decree. **Kerr's Cyc. Code Civ. Proc.**, § 1604.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1843.
Idaho. Code Civ. Proc. 1901, sec. 4231.
Montana. Code Civ. Proc., sec. 2757.
Oklahoma. Rev. Stats. 1903, sec. 1709.
South Dakota. Probate Code 1904, § 261.
Utah. Rev. Stats. 1898, sec. 3937.
Washington. Pierce's Code, § 1300.

§ 608. **Same.** Does not supersede power of court to enforce decree. The recording of any decree, as provided in the preceding section, shall not prevent the court making the decree from enforcing the same by other process. **Kerr's Cyc. Code Civ. Proc.**, § 1605.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1844.
Idaho.* Code Civ. Proc. 1901, sec. 4232.
Montana.* Code Civ. Proc., sec. 2758.
Oklahoma. Rev. Stats. 1903, sec. 1710.
South Dakota.* Probate Code 1904, § 262.

§ 609. Where party entitled to conveyance is dead. If the person entitled to the conveyance or transfer dies before the commencement of the proceedings therefor under this chapter, or before the completion of the conveyance or transfer, any person entitled to succeed to his rights in the contract, or the executor or administrator of such decedent, may, for the benefit of the person so entitled, commence such proceedings or prosecute any already commenced, and the conveyance or transfer must be so made as to vest the property in the person or persons entitled thereto, or in the executor or administrator, for their benefit. **Kerr's Cyc. Code Civ. Proc., § 1606.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1845.

Idaho. Code Civ. Proc. 1901, sec. 4233.

Montana. Code Civ. Proc., sec. 2759.

Oklahoma. Rev. Stats. 1903, sec. 1711.

South Dakota. Probate Code 1904, § 263.

Utah. Rev. Stats. 1898, sec. 3939.

Washington. Pierce's Code, § 1301.

Wyoming. Rev. Stats. 1899, sec. 4824.

§ 610. Decree may direct possession to be surrendered. The decree provided for in this chapter may direct the possession of the property therein described to be surrendered to the person entitled thereto, upon his producing a certified copy of the decree, when, by the terms of the contract, possession is to be surrendered. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 502), § 1607.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1846.

Idaho. Code Civ. Proc. 1901, sec. 4234.

Montana. Code Civ. Proc., sec. 2760.

Oklahoma. Rev. Stats. 1903, sec. 1712.

South Dakota. Probate Code 1904, § 264.

Utah. Rev. Stats. 1898, sec. 3940.

EXECUTORY CONTRACTS OF DECEASED. SPECIFIC PERFORMANCE.

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| 1. Contracts of decedent to convey real estate.
(1) Scope and validity of statute.
(2) Jurisdiction. Probate courts and equity.
(3) Petition.
(4) Specific performance may be enforced when.
(5) Specific performance cannot be enforced when.
(6) Nunc pro tunc orders. Costs.
(7) Appeal. Law of the case. | 2. Enforcement of other contracts made by decedent.
(1) Obligation to perform contracts of deceased.
(2) What contracts may be enforced.
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3. Contracts to make a will.
(1) When enforceable.
(2) When not enforceable.
(3) Parties. Misjoinder. |
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1. Contracts of decedent to convey real estate.

(1) **Scope and validity of statute.** The power of the legislature over the succession and conveyance of land is unlimited. Hence it may authorize an executor or administrator to convey land pursuant to the contract of his intestate: *Adams v. Lewis*, 5 Saw. 229; Fed. Cas., No. 60. And this special statutory remedy, conferring upon the probate court administering the estate jurisdiction to grant specific performance in cases where the right of petitioner in the premises is free from doubt, would seem to be a wise provision; it evidently tends to save the expenses and delay that would follow a separate action in equity for a specific performance. At any rate, the remedy in California seems to be complete, and it is clearly within the power of the legislature to prescribe such remedy. In several of the states, a summary special proceeding is allowed, in which a contract may be enforced without suit, as a step in the settlement of the deceased vendor's estate. In such case the statutory method may be followed, and the probate court having jurisdiction may authorize the administrator or executor of the decedent to make the conveyance which the vendor himself should have made had he been alive: *Estate of Garnier*, 147 Cal. 457, 459; 82 Pac. Rep. 68. The statute does not authorize the probate court to direct an executor or administrator to perform specifically a contract for the conveyance of land made by his intestate unless such contract was in writing: *Cory v. Hyde*, 49 Cal. 469, 473; *Wadleigh v. Phelps* (Cal.), 87 Pac. Rep. 93. The statute has no reference to a suit to compel an executor or administrator to reconvey certain property to his testator by an absolute deed intended as a mortgage: *Wadleigh v. Phelps* (Cal.), 87 Pac. Rep. 93, 100. Neither is the statute applicable to a contract involving property which was not subject to administration: *Estate of Healy*, 137 Cal. 474, 478; 70 Pac. Rep. 455. The statute of Washington providing that the title of a decedent in realty shall, without any decree of distribution, vest in the heirs, subject to his debts, does

not impliedly repeal the statute which provides that, on the death of an owner who had contracted to convey real estate, the court may direct his representative to convey to the purchaser, etc. In that state, where the owner of land has made a contract to convey, he can leave to his heirs only the interest owned at the time of his death, which is virtually but the right to the proceeds, the holder of the contract being entitled to have the land conveyed to him upon paying the purchase price. In such cases the courts treat the property, for purposes of administration, as personal rather than real: *Griggs Land Co. v. Smith* (Wash.), 89 Pac. Rep. 477, 479. Section 1042 of the Washington Code of Procedure, which provides "that actions for the recovery of any property, real or personal, or for the possession thereof, and of actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates," applies to all persons who have contracted in writing to convey real property, whether they have died testate or intestate, and without regard to the conditions of a will: *Hyde v. Heller*, 10 Wash. 586; 39 Pac. Rep. 249.

(2) **Jurisdiction. Probate courts and equity.** The statute provides, in effect, that when a person bound by a contract in writing to make a conveyance of real estate shall die before making the conveyance, in a case where, if the decedent were living, a court of equity would compel him to make such conveyance, the probate court may decree it; but, as the contract must be in writing, it was not intended to confer upon the probate court equity powers in that large class of cases founded on a part performance of verbal contracts for the sale and conveyance of land: *Cory v. Hyde*, 49 Cal. 469, 472, 473. The proceeding provided for by the statute is one for a specific performance of a contract in the probate court, but it was not the intention of the statute to vest in the probate court more extensive power than was administered by a court of equity: *Estate of Corwin*, 61 Cal. 160, 163. A specific performance is essentially a branch of equity jurisdiction. Under the statute, many deeds have been made in this state by executors and administrators upon orders made by the probate court, and the titles thereby attempted to be made have been acted upon and recognized as valid. Yet the compelling of an executor or administrator, representing a deceased person, who was bound by contract in writing, to execute his deed is a case in equity: *Rosenberg v. Frank*, 58 Cal. 387, 416. But, while the probate court has power to decree specific performance of certain written contracts, it has no power, on the petition of an executor, to order him, on the receipt of money loaned, to reconvey real estate conveyed to his testator by a deed absolute on its face, but intended as a mortgage: *Anderson v. Fisk*, 41 Cal. 308, 309, 310. The probate court has power to compel an administrator, as administrator, to

convey to himself as an individual: *Estate of Garnier*, 147 Cal. 457, 458; 82 Pac. Rep. 68.

(3) **Petition.** The petition asking for a decree compelling the executor or administrator to convey must state that the contract was in writing, in order to give the probate court jurisdiction. As the probate court has no jurisdiction to decree a conveyance, except when the contract is in writing, the jurisdictional fact must appear on the face of the petition: *Cory v. Hyde*, 49 Cal. 469, 470. An executor or administrator of an estate has the same right, under the provisions of the code, to present a petition for the conveyance of real estate, or for a transfer of personal property, as any other party. If an executor or administrator petitions for a specific performance, the court, by analogy, may appoint a separate attorney to represent the estate, though he is not required to do it if the heirs appear and oppose the petition. However that may be, an executor or administrator, under the law, has the same right as an outside party, whether his claim be a money demand, or for the performance of a written contract to transfer property, and the law does not require that he should first resign his position as executor or administrator in order to have his claim allowed or enforced against the estate: *Estate of Garnier*, 147 Cal. 457, 460; 82 Pac. Rep. 68. Under the statute of Montana, the petition must also show that the agreement was in writing. This fact is jurisdictional. If the petition fails to show that the contract was in writing, the court is without power to proceed, and its order is not effective for any purpose. There can be no presumption that the contract was in writing: *Bullerdick v. Hermes*, 32 Mont. 541; 81 Pac. Rep. 334, 336.

(4) **Specific performance may be enforced when.** If the probate court dismisses a petition to compel an executor or administrator to convey lands in accordance with the terms of the contract executed by his decedent, the superior court has jurisdiction of the action, and may decree a specific performance of the contract of the sale and purchase of such lands: *Hall v. Rice*, 64 Cal. 443, 444. A specific performance of a decedent's contract may be decreed upon the petition of the executor or administrator: *Estate of Garnier*, 147 Cal. 457; 82 Pac. Rep. 68. In Oregon, where two partners made a verbal contract to convey certain real property, and a portion of the purchase price was paid, but both members of the firm died subsequently to entering into the contract, the purchaser from the firm is entitled to a title free from litigation before he can be required to accept it and to pay the balance of the purchase price: *Wollenberg v. Rose*, 45 Or. 615; 78 Pac. Rep. 751, 753. A partially executed contract to convey land for a valuable consideration can be enforced by or against the estate of the deceased vendor. Thus where a son received property as heir of his father's estate, and thereafter occu-

pied and cultivated a tract of land that the testate had received as part consideration of his contract to convey certain other lands to which it is found he had no title, the agreement of the son with the vendees therein, made after becoming the owner, by purchase, of the last-named land, to carry out the terms of the contract, is based on a sufficient consideration and is enforceable: *Janes v. Holanden*, 7 Kan. App. 811; 52 Pac. Rep. 913.

(5) **Specific performance cannot be enforced when.** No specific performance of the contract of a decedent to convey can be enforced unless the contract is in writing: *Cory v. Hyde*, 49 Cal. 469, 470; *Bullerdick v. Hermsemeyer*, 32 Mont. 541; 81 Pac. Rep. 334, 336. Nor can specific performance of such contract be decreed unless it is found that the intestate had contracted to convey the particular lands described in the complaint. The decedent's agreement to exchange "some" of his city lots will not be enforced, where no particular lot is described: *Ferris v. Irving*, 28 Cal. 645, 648. Under the statute of Utah, there can be no specific performance of a written contract of a deceased husband as against his wife. "The buyer's right," said the court, quoting from 6 Pomeroy's Equity Jurisprudence, 3d ed., sec. 834, "to specific performance, with compensation, is subject to certain limitations; as, when it conflicts with the intervening rights of third parties, an instance of which is the case of the right of a wife to be protected in her dower interest. Where the wife of the vendor refuses to convey her inchoate dower interest in the land which the vendor has contracted to sell, equity, in many jurisdictions, denies specific performance with compensation, against the vendor for the deficiency, viz., the dower interest, on the ground that compulsion upon the husband would tend to cause him to procure his wife's conveyance of dower against her will. For that reason, the buyer must be satisfied to take less than he contracted for, by the amount of the dower interest, or abandon the contract." The court will not order a defendant to procure a conveyance or release by his wife, or require him to furnish indemnity against her right of dower unless in cases of clear fraud. Hence a suit for the specific performance of a contract between plaintiff and defendant's ancestors to convey land is open to the defense that the contract is not enforceable, because of the law in relation to dower. And in that state, unless a petition is filed or a claim is made in a court for specific performance within the time limited to file other claims, the claim for specific performance must be held to be waived or abandoned, unless, as in other cases, good cause is shown why it could not be filed within the time allowed for claims to be filed; and such application must be made before the administration of the estate is closed and distribution is made, where the applicant knew of the death of the person against whom he holds a claim, and of the administration of his estate: *Free v. Little* (Utah), 88 Pac. Rep. 407, 411, 414. In Washington, it

is error for the court to decree the specific performance of a decedent's contract to convey real estate, where no copy of the petition or notice was served on the executor or administrator; where the hearing was had at a time later than that fixed in the notice, and to which no adjournment had been taken; and where the conveyance was ordered to be made before the expiration of the time allowed for appeal: *Sander-Boman Real Estate Co. v. Yesler's Estate*, 2 Wash. 429; 27 Pac. Rep. 269, 270. Under the statute of Montana, requiring the contract to be in writing, before specific performance thereof can be decreed, the probate court has no jurisdiction to direct the specific performance of a verbal contract whereby the deceased in his lifetime agreed to convey certain water rights to his wife: *Bullerdick v. Hermsmeyer*, 32 Mont. 541; 81 Pac. Rep. 334, 336. Where the decedent was bound by contract to convey real estate, but died before making the conveyance, and a petition is filed for a decree to compel the executor to make the conveyance, and the right to specific performance is doubtful, such petition will be dismissed: *Hartshorn v. Smith* (S. D.), 104 N. W. Rep. 467, 468. If the decree of a probate court for the specific performance of a written contract of a decedent to convey is void for want of jurisdiction in the court at the time of its rendition, a subsequent act of the legislature validating judicial sales by executors and administrators can give such decree no validity: *Bullerdick v. Hermsmeyer*, 32 Mont. 541; 81 Pac. Rep. 334, 337.

(6) **Nunc pro tunc orders. Costs.** In a proceeding which seeks the specific performance of a contract for the sale and conveyance of land made by deceased with petitioner, and where the judgment is advisedly silent as to costs, the court has no power, at a subsequent time, to enter a judgment nunc pro tunc so as to include costs. The object of entering judgments and decrees as of some previous date is to supply matters of evidence and to rectify clerical misprisions, but not to enable the court to correct judicial errors. If the court has not rendered a judgment that it might or should have rendered, or if it has rendered an imperfect or improper judgment, it has no power to remedy such errors by ordering an amendment nunc pro tunc of a proper judgment: *Estate of Potter*, 141 Cal. 424, 426; 75 Pac. Rep. 850.

(7) **Appeal. Law of the case.** An order directing, or refusing to direct, a conveyance of real estate, by an executor or administrator, under the statute relative to the conveyance of real estate and transfer of personal property by executors and administrators in certain cases, is appealable: *Estate of Corwin*, 61 Cal. 160, 163. If the court decrees specific performance of a contract for the sale and conveyance of land, made by deceased with petitioner, and the decree is silent as to costs, but the court afterwards makes an unauthorized

amendment and modification of the decree so as to include costs, an appeal will lie, if taken within sixty days from such judgment: *Estate of Potter*, 141 Cal. 350; 74 Pac. Rep. 986; 141 Cal. 424; 75 Pac. Rep. 850. The rule of the "law of the case," where the specific performance of the contract of a decedent is sought, is applicable only where the same matters which were determined in the previous appeal are involved in the second appeal: *Flood v. Templeton* (Cal.), 92 Pac. Rep. 78, 83.

2. Enforcement of other contracts made by decedent.

(1) **Obligation to perform contracts of deceased.** Executors are answerable on all the contracts of the testator broken in his lifetime, and there is only one exception with regard to their liability upon contracts broken after his death; and that is, that they are not answerable in those cases where personal skill or taste is required. Executors and administrators, as representatives of the deceased, are charged with the duties of performing his contracts where they involve no special skill or taste. If the complaint alleges that the deceased was the holder of a large tract of land adjacent to and surrounding the land of plaintiff, on which a house was erected, "and was desirous of improving and building up said neighborhood, for the purpose of attracting purchasers for his said land"; and, with this inducement, he agreed to improve the lands of plaintiff, to superintend the house erected by the expenditure of plaintiff's money, and to guarantee him a certain profit on the investment,—all that required any peculiar skill, taste, or judgment was done by deceased in his lifetime, and the contract and right of action upon it survived: *Janin v. Browne*, 59 Cal. 37, 45.

(2) **What contracts may be enforced.** Where the contract of the deceased is of an executory nature, and the personal representative can fairly and sufficiently execute all the deceased could have done, he may do so, and enforce the contract. E converso, the personal representative is bound to complete such a contract, and if he does not, may be made to pay damages out of the assets. But where an executory contract is of a strictly personal nature, the death of the party by whom work is to be done before its completion determines the contract, unless what remains to be executed can be certainly done to the same purpose by another: *Janin v. Browne*, 59 Cal. 37, 44; *McCann v. Pennie*, 100 Cal. 547, 551; 35 Pac. Rep. 158. A cause of action for personal services performed in a foreign country for a person afterwards deceased is transitory in its nature, and may be maintained in any jurisdiction wherein the executor or the administrator of the deceased may be served with process, without reference to where the contract was made or was to be performed: *McCann v. Pennie*, 100 Cal. 547, 552; 35 Pac. Rep. 158. As to the conclusiveness, upon administrators and heirs, of decedent's contract to transfer certain

bonds, see *Jones v. Tallant*, 90 Cal. 386; 27 Pac. Rep. 305. Where a will authorizes the executor to sell land of the testator, and such representative enters into an executory contract for the sale, specific performance of such contract may be enforced in equity at the suit of the purchaser: *Ingham v. Ryan*, 18 Col. App. 347; 71 Pac. Rep. 899, 900.

(3) **What contracts cannot be enforced.** An executory contract, which involves personal service, terminates with death, and no action will lie against his executor or representative to enforce it: *Janin v. Browne*, 59 Cal. 37, 44. So with the contract of a decedent which requires skill or taste: *Janin v. Browne*, 59 Cal. 37, 45. The contract against a decedent is not enforceable unless it bound decedent in his lifetime. Thus where an agent of the owner entered into a written contract for the sale of real estate, upon the express condition that it was to be subject to the approval of the owner, but the owner died before approving such contract, it cannot be enforced against his personal representative: *Estate of Dick*, 74 Cal. 284, 286; 15 Pac. Rep. 837. Support, which a daughter and son-in-law are already bound to give to the surviving widow of a decedent can hardly form a consideration for the assignment of property by her to them: *Estate of Casner*, 1 Cal. App. 145, 147; 81 Pac. Rep. 991.

3. Contracts to make a will.

(1) **When enforceable.** Contracts providing for the disposition of property by will are clearly enforceable, but the same general principles of equity apply that must be present in the enforcement of contracts to convey during the lifetime of the parties; there must be an adequate consideration; the contract must be just and reasonable as to the party against whom it is to be enforced; the other parties must not have practised fraud or undue influence in securing the contract; it must be certain and definite, not within the statute of frauds; and its enforcement must not involve an invasion of the legal or equitable rights of an innocent third party: *Stewart v. Smith* (Cal. App.), 91 Pac. Rep. 667, 669. A contract to leave a will in favor of certain parties, in consideration of a conveyance of certain property to the testator by the proposed beneficiaries under the will, which contract had been fully performed on the part of such beneficiaries, is not open to attack under the statute of frauds: *Stewart v. Smith* (Cal. App.), 91 Pac. Rep. 667, 670-672. When a definite contract to leave property by will has been clearly and certainly established, and there has been performance by the party asking its enforcement, equity will grant relief, provided the case is free from objection on account of inadequacy of consideration, and there are no circumstances or conditions rendering the claim inequitable: *Anderson v. Anderson* (Kan.), 88 Pac. Rep. 743, 745. A decedent, having a right to dispose of his property as he pleases, his contract to dispose

of it, when free from fraud, imposition, or surprise, and being reasonable and moral, will be carried out and enforced by a court of equity: *Burns v. Smith*, 21 Mont. 251; 53 Pac. Rep. 742, 748. The contract of a decedent to leave the plaintiff a child's share of deceased at his death, if clearly shown, cannot be avoided by the heirs on the ground that the plaintiff had not performed her portion of the contract, where no objection had been made by the deceased prior to his death, and no fraud, imposition, or surprise is shown, and the contract was not rescinded: *Burns v. Smith*, 21 Mont. 251; 53 Pac. Rep. 742, 748. Where a decedent, for an adequate consideration, had agreed to leave a will giving all of his estate to plaintiff, but died intestate, the decedent's failure to leave the will as agreed by him works a fraud upon plaintiff; and, where he cannot be placed in statu quo, the agreement will be enforced in equity by declaring the heirs constructive trustees, where the granting of such equitable relief will work no injustice to innocent third parties: *McCabe v. Healy*, 138 Cal. 81, 85; 70 Pac. Rep. 1008. Specific performance will be decreed where there is present the element of peculiar personal services fully performed under the contract, which are incapable of compensation in money: *Owens v. McNally*, 113 Cal. 444; 45 Pac. Rep. 710; 33 L. R. A. 369; *McCabe v. Healy*, 138 Cal. 81; 70 Pac. Rep. 1008. A contract by which a party agrees to leave all property of which he dies possessed in a particular manner is not invalid as a sale, although it may include property having neither an actual nor a potential existence at the time: *Stewart v. Smith* (Cal. App.), 9½ Pac. Rep. 667, 670.

REFERENCES.

Specific performance of contracts against estate of decedent: See note 14 L. R. A. 860. Specific performance of contract to make will, or to leave property, in consideration of services to continue during the promisor's lifetime, as affected by brevity of period before the promisor's death: See note 9 L. R. A. (N. S.) 157, 158. Right to recover for services rendered beyond statutory period of limitation upon breach of parol contract to make provision by will: See note 6 L. R. A. (N. S.) 703, 704. Enforceability of contract to give a child a share of estate in consideration of the surrender of the child to the promisor, as affected by non-compliance with a statute prescribing the mode of adoption: See note 8 L. R. A. (N. S.) 1130-1132.

(2) **When not enforceable.** An alleged contract to dispose of property in a particular manner by will cannot be enforced in equity, when there is no evidence to sustain an allegation of the existence of such contract: *Ostrom v. De Yoe*, 4 Cal. App. 326, 332; 87 Pac. Rep. 811. Equity will not enforce specific performance of an alleged agreement to leave property in a particular manner by will, unless the agreement is established by clear and convincing evidence: *Richardson v. Orth*, 40 Or. 252; 66 Pac. Rep. 925, 931. Before the contract

to dispose by will of a part or the whole of the promisor's estate in a particular manner will be enforced in equity, it must be definite, certain, and founded on a valuable consideration. The delivery of a life-insurance policy to the promisor, to which he is already entitled, is not such a consideration: *Schaadt v. Mutual Life Ins. Co.*, 2 Cal. App. 715, 718-719; 84 Pac. Rep. 294. A promise to make a gift of property by will cannot be enforced after the death of the party making the promise. Proof of some return or consideration for such promise is necessary to make it enforceable: *Mitchell v. Pirie*, 38 Wash. 691; 80 Pac. Rep. 774. Although one may make a valid agreement, binding himself to dispose of his property in a particular way by will, and equity will enforce such agreement, in proper cases, yet no agreement may be enforced the terms of which are not sufficiently certain to make the precise act to be done clearly ascertainable. The terms of the agreement must not only be fair, but they must also be free from doubt: *Russell v. Agar*, 121 Cal. 396, 398; 53 Pac. Rep. 926; 66 Am. St. Rep. 35. Specific performance of a contract to leave property by will may be decreed when no other adequate relief is available, but where the complaint in an action against an executor to compel specific performance of an alleged contract with the testator shows that no services were performed, but, at most, that plaintiff forbore to press a fixed money demand, the failure of the deceased to deed plaintiff the property, upon his death, according to promise, constitutes a breach of his promise, for which the plaintiff may be compensated by money in an action at law, and hence he is not in a position to apply to a court of equity for specific relief: *Flood v. Templeton*, 148 Cal. 374; 83 Pac. Rep. 148. Equity, in proper cases, will decree specific performance of a contract to convey property by will; but it does so only upon clear proof of fairness, justness, and adequacy, and where the rights of innocent third parties are not imperiled; and further, where the plaintiff cannot be compensated in money: *Flood v. Templeton*, 148 Cal. 374, 378; 83 Pac. Rep. 148. See *Flood v. Templeton* (Cal.), 92 Pac. Rep. 78.

(3) Parties. Misjoinder. In an action for the specific performance of a contract to make a will in favor of the plaintiff, the executor of a will made in violation of the contract is not a necessary party: *Stewart v. Smith* (Cal. App.), 91 Pac. Rep. 667, 669. Nor is the administrator of a decedent, who dies intestate, a necessary party to such an action: *McCabe v. Healy*, 138 Cal. 81, 89; 70 Pac. Rep. 1008. In an action for the specific performance of a contract to devise property, there is no misjoinder of parties when all are interested in the same subject of enforcing the contract, though all may not be interested to the same extent: *Stewart v. Smith* (Cal. App.), 91 Pac. Rep. 667, 669.

PART IX.

MORTGAGES AND LEASES OF REAL ESTATE.

CHAPTER I.

MORTGAGES AND LEASES.

- § 611. Mortgage of real property of decedent, minor, etc. Lease.
- § 612. Proceedings to obtain order to mortgage.
- § 613. Form. Petition for leave to mortgage realty.
- § 614. Form. Order to show cause on petition to mortgage.
- § 615. Form. Order authorizing mortgage.
- § 616. Form. Mortgage of decedent's real estate.
- § 617. Proceedings to obtain order to lease realty.
- § 618. Form. Petition for leave to lease realty.
- § 619. Form. Order to show cause on petition to lease realty.
- § 620. Form. Affidavit of publication of order to show cause.
- § 621. Form. Order authorizing lease.
- § 622. Form. Lease of decedent's real estate.

MORTGAGES AND LEASES.

- | | |
|---|---|
| 1. Mortgages. | (8) Foreclosure. Title of purchaser. |
| (1) Construction and validity of statute. | 2. Leases. |
| (2) Authority to mortgage. Jurisdictional facts. | (1) Power of executor or administrator to lease. |
| (3) Purpose to be shown. | (2) Validity of lease. |
| (4) Sufficiency of petition. | (3) Power of court to revoke or modify order authorizing lease. |
| (5) Validity of mortgage. | (4) Power of representative to alter or modify existing lease. |
| (6) Presumptions. Creditor's right. | |
| (7) Procedure. Practice. Collateral attack. Appeal. | |

§ 611. Mortgage of real property of decedent, minor, etc. Lease. Whenever, in any estate now being administered, or that may hereafter be administered, it shall appear to the superior court, or a judge thereof, to be for the advantage of the estate to raise money, upon a note or notes, to be secured by a mortgage of the real property of any decedent,

or of a minor, or an incompetent person, or any part thereof, or to make a lease of said realty, or any part thereof, the court or judge, as often as occasion therefor shall arise in the administration of any estate, may, on a petition, notice, and hearing, as provided in this article, authorize, empower, and direct the executor or administrator, or guardian of such minor or incompetent person, to mortgage such real estate, or any part thereof, and to execute a note or notes to be secured by such mortgage, or to lease such real estate, or any part thereof. **Kerr's Cyc. Code Civ. Proc.**, § 1577.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1816.

Colorado. 3 Mills's Ann. Stats., secs. 2083a, 4729, 4750.

Kansas. Gen. Stats. 1905, § 3410.

Montana. Code Civ. Proc., sec. 2720.

New Mexico. Comp. Laws 1897, sec. 2065.

North Dakota. Rev. Codes 1905, §§ 8074, 8153.

Oklahoma. Rev. Stats. 1903, sec. 1645.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1195.

South Dakota. Probate Code 1904, §§ 240, 408.

Utah. Rev. Stats. 1898, sec. 3908.

Washington. Pierce's Code, § 2565.

§ 612. **Proceedings to obtain order to mortgage.** To obtain an order to mortgage such realty, the proceedings to be taken and the effect thereof shall be as follows:

[**What petition must show.**] First. The executor or administrator of any estate, or guardian of any minor or incompetent person, or any person interested in the estates of such decedents, minors, or incompetent persons, may file a verified petition showing:

[**Particular purpose.**] 1. The particular purpose or purposes for which it is proposed to make the note or notes and mortgage, which shall be either to maintain the ward and his family or to maintain and educate the ward when a minor, or to pay the debts, legacies, or charges of administration, or to pay, reduce, extend, or renew some lien or mortgage already subsisting on said realty or some part thereof; or, if the application be made by the guardian of

any minor or incompetent person, to erect, alter or repair buildings or other structures upon, or otherwise to improve, the realty proposed to be mortgaged, or some part thereof.

[Statement of facts, etc.] 2. A statement of the facts and circumstances showing the insufficiency of the income of the estate under guardianship to maintain the ward and his family or to maintain and educate the ward when a minor and the debts, legacies, charges of administration, liens or mortgages to be paid, reduced, extended, or renewed, as the case may be; or, if the application be made by the guardian of any minor or incompetent person for the purpose of improving the realty or some part thereof, the condition and value of all the real and personal property then belonging to the estate, a statement of all debts and obligations secured or unsecured outstanding against the estate, and the character and estimated cost of the buildings, structures or other improvements proposed to be erected, altered or repaired with the proceeds of the mortgage.

[Advantages that may accrue.] 3. The advantage that may accrue to the estate from raising the required money by note or notes and mortgage or providing for the payment, reduction, extension, or renewal of the subsisting liens or mortgages, as the case may be; or, if the application be made by the guardian of a minor or incompetent person for the purpose of improving the realty belonging to the estate or some part thereof, the advantage that will accrue to the estate by the making of such improvements.

[Amount to be raised.] 4. The amount to be raised, with a general description of the property proposed to be mortgaged; and,

[Names of legatees.] 5. The names of the legatees and devisees, if any, and of the heirs of the deceased, or of the minor, or of the incompetent person, as the case may be, so far as known to the petitioner.

[Order to appear.] Second. Upon filing such petition, an order shall be made by the court or judge, requiring all persons interested in the estate to appear before the court or judge, at a time and place specified, not less than four nor more than ten weeks thereafter, then and there to show

cause why the realty (briefly indicating it), or some part thereof, should not be mortgaged for the amount mentioned in the petition (stating such amount), or such lesser amount as to the court or judge shall seem meet, and referring to the petition on file for further particulars.

[Service of order.] Third. The order to show cause may be personally served on the persons interested in the estate, at least ten days before the time appointed for hearing the petition, or may be published for four successive weeks in a newspaper of general circulation, published in the county.

[Hearing of petition.] Fourth. At the time and at the place appointed in the order to show cause, or at such other time and place to which the hearing may be postponed (the power to make all needful postponements being hereby vested in the court or judge), having first received satisfactory proof of personal service or publication of the order to show cause, the court or judge must proceed to hear the petition and any objections that may be filed or presented thereto.

[Testimony of witnesses. Order of court directing loan.] Upon such hearing, witnesses may be compelled to attend and testify, in the same manner, and with like effect, as in other cases; and if, after a full hearing, the court or judge is satisfied that it will be for the advantage of the estate to mortgage the whole or any portion of the real estate, an order must be made authorizing, empowering, and directing the executor or administrator, or the guardian of such minor or incompetent person, to make such mortgage, and a promissory note or notes to the lender, for the amount of the loan, to be secured by said mortgage; the order may direct that a lesser amount than that named in the petition be borrowed, and may prescribe the maximum rate of interest and period of the loan, and may direct in what coin or currency it shall be paid, and require that the interest and the whole or any part of the principal be paid, from time to time, out of the whole estate or any part thereof, and that any buildings on the premises to be mortgaged shall be insured for further security of the lender, and the premiums paid from such income.

[Duty of executor, administrator, etc.] Fifth. After the making of the order to mortgage, the executor, administrator, or guardian of a minor or of an incompetent person shall execute and deliver a promissory note or notes for the amount and period specified in the order, and shall execute, acknowledge, and deliver a mortgage of the premises, setting forth in the mortgage that it is made by authority of the order, and giving the date of such order. A certified copy of the order shall be recorded in the office of the county recorder of every county in which the encumbered land, or any portion thereof, lies. The note or notes and mortgage shall be signed by the executor, administrator, or guardian as such, and shall create no personal liability against the person so signing.

[Effect of such note and mortgage.] Sixth. Every note or notes and mortgage so made shall be effectual to mortgage and hypothecate all the right, title, interest, and estate which the decedent, minor, or incompetent person had in the premises described therein at the time of the death of such decedent, or at the time of the appointment of the guardian of such minor or of such incompetent person, or prior thereto, had any right, title, or interest in said premises acquired by the estate of such decedent, minor, or incompetent person, by operation of law or otherwise, since the time of the death of such decedent, or the appointment of the guardian of such minor or incompetent person.

Jurisdiction of the court to administer the estate of such decedent, minor, or incompetent person shall be effectual to vest such court and judge with jurisdiction to make the order for the note or notes and mortgage, and such jurisdiction shall conclusively inure to the benefit of the mortgagee named in the mortgage, his heirs and assigns. No irregularity in the proceedings shall impair or invalidate the same or the note or notes and mortgage given in the pursuance thereof, and the mortgagee, his heirs and assigns, shall have and possess the same rights and remedies on the note or notes and mortgage as if it had been made by the decedent prior to his death, the minor after reaching the

age of maturity, or the incompetent person when legally competent;

[When proceeds are insufficient to satisfy mortgage.] Provided, however, that upon any foreclosure, if the proceeds of the encumbered property are insufficient to pay the note or notes, and mortgage, no judgment or claim for any deficiency or such proceeds to satisfy the note or notes and mortgage, or the costs or expenses of sale, shall be had or allowed, except in cases where the note or notes and mortgage were given to pay, reduce, extend, or renew a lien or mortgage subsisting on the realty, or some part thereof, at the time of the death of the decedent, and the indebtedness secured by such lien or mortgage was an allowed and approved claim against his estate, or a lien upon the interest of the minor in said real estate at the time it vested in him, or upon the estate of the incompetent at the time the incompetency of the incompetent person was so declared by the court;

[How unsatisfied indebtedness is to be paid.] And provided also, that in cases affecting the estate of the deceased persons, the part of the indebtedness remaining unsatisfied must be classed and paid with other demands against the estate, as provided in article three, chapter ten, of title eleven, part three, of this code, with respect to mortgages subsisting at the time of death. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 498), § 1578.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, pars. 1817-1823.

Colorado. 3 Mills's Ann. Stats., secs. 2083b, 2083e, 2083h, 4751-4753, 4755, 4758, 4759, 4761, 4767.

Kansas. Gen. Stats. 1905, §§ 3411, 3416, 4159, 4160, 4161, 4169.

Montana. Code Civ. Proc., sec. 2721.

New Mexico. Comp. Laws 1897, secs. 1913, 2066-2068, 2070, 2071, 2073, 2076, 2078, 2082.

North Dakota. Rev. Codes 1905, §§ 8153, 8154.

Oklahoma. Rev. Stats. 1903, sec. 1646.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1195.

South Dakota. Probate Code 1904, §§ 240, 241, 409.

Utah. Rev. Stats. 1898, secs. 3908, 3909.

Washington. Pierce's Code, §§ 2565-2568, 2570, 2572-2574.

§ 613. Form. Petition for leave to mortgage realty.

[Title of court.]

[Title of proceeding.]

{ No. ____¹ Dept. No. ____.
[Title of form.]To the Honorable the ____ Court of the County ² of ____.

The petition of ____ respectfully shows:

That he is, and has been since the ____ day of ____, 19____, the duly qualified and acting administrator ³ of the estate of ____, deceased; and

That the inventory and appraisement of said estate have been duly made and filed herein, —

Wherefore petitioner hereby asks leave of the court to borrow money, and to make a note or notes and mortgage, on the real property of said estate hereinafter described; and the particular purpose or purposes for which it is proposed to make said note or notes and mortgage are as follows: ____.⁴

That the following is a statement of the debts, ____,⁵ which are to be paid with the proceeds of said proposed mortgage;⁶

That the advantages that may accrue to the estate by raising the required money by note or notes and mortgage are as follows: ____;⁷

That the amount which petitioner proposes so to raise by mortgage is ____ dollars (\$____); and a general description of the property proposed to be mortgaged is as follows: ____;⁸

That the names of the heirs ⁹ of said deceased, so far as known to petitioner, are as follows: ____.¹⁰

Wherefore petitioner prays that an order be made requiring all persons interested in said estate to appear and show cause, at a time and place therein fixed, why the realty herein described should not be mortgaged for the amount herein specified; and that, after due notice and hearing, an order be made authorizing and directing petitioner as such administrator ¹¹ to make such note or notes and mortgage, and for such other and further order as may be meet in the premises.

____, Petitioner.

____, Attorney for Petitioner.

[Add usual verification.]

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Or, executor of the will, or guardian, etc. 4. Set forth particular purposes, which must be those prescribed by statute. 5. Or, legacies or expenses of administration, etc.; or, in case of guardianship, the facts and circumstances showing the insufficiency of the income to maintain the ward, etc. 6. In case of guardianship, if the application be made for the purpose of improving realty, the condition and value of all real estate must be stated, with a statement of the debts outstanding, etc., and the character, cost, etc., of the proposed improvements, and all matters required by statute. 7. Set forth the advantages expected to accrue. 8. Give description of property sought to be mortgaged, and interest therein. 9. And of the devisees and legatees, if any. 10. Give names. 11. Or, executor, or guardian.

§ 614. Form. Order to show cause on petition to mortgage.

[Title of court.]

[Title of proceeding.]

{ No. ____¹ Dept. No. ____
[Title of form.]

____, administrator² of the estate of _____, deceased,³ having filed herein his petition, duly verified by affidavit, praying for an order of this court authorizing, empowering, and directing him, as such administrator,⁴ to mortgage the real property of said deceased therein, and hereinafter described, for the purpose set forth in said petition; and it appearing that it will be of advantage to said estate that said mortgage be made, —

It is ordered by the court, That all persons interested in the estate of _____, deceased, do appear before this court on the ____ day of _____, 19____, at ____ o'clock in the forenoon⁵ of said day, then and there to show cause, if any they have, why the real property of said estate, described below, or some part thereof, should not be mortgaged for the sum of ____ dollars (\$____), as prayed for in the petition of _____, the administrator,⁶ this day filed, or for such lesser amount as to the court shall seem meet. Reference is made to said petition for further particulars. Said real estate, the property to be mortgaged, is situated in the county⁷ of _____, state of _____, and is more particularly described as follows, to wit: ____.⁸

It is further ordered, That this order to show cause be published once a week for four successive weeks before the day of hearing, in —, a newspaper of general circulation, published in said county⁹ of —.

Dated this — day of —, 19—, —, Judge.

Explanatory notes. 1. Give file number. 2. Or, executor of the last will; or, guardian of the estate, etc. 3. Or, minor or incompetent person. 4. Or, executor, or guardian. 5. Or, afternoon. 6. Or, executor, or guardian. 7. Or, city and county. 8. Give description of property, and interest therein. 9. Or, city and county.

§ 615. Form. Order authorizing mortgage.

[Title of court.]

[Title of estate.]

{ No. —¹ Dept. No. —.
/ [Title of form.]

Comes now —, the administrator² of the estate of said deceased, by Mr. —, his attorney, and presents his petition for authority to mortgage the real estate of said deceased, and proves to the satisfaction of the court that the order herein made, requiring all persons interested to show cause why said estate should not be mortgaged, has been duly and personally served on all persons interested in said estate at least ten days before the time appointed for this hearing,³ and the matter coming on regularly this day to be heard,⁴ the court thereupon proceeds to hear the said petition, and, after hearing the evidence, the court being satisfied that the same is for the advantage of said estate, grants said petition.

It is therefore ordered by the court, That said —, as administrator⁵ of the estate of said deceased, be, and he is hereby, authorized to borrow the sum of — dollars (\$—), and to execute his promissory note therefor, and a mortgage in form as mentioned in said petition, to secure the payment thereof, on the property hereinafter described, said notes to be payable —⁶ from date, in gold coin of the United States, and to bear interest from date, not exceeding — per cent per annum,⁷ and attorneys' fees not exceeding — per cent on principal, if suit is brought to foreclose said mortgage, and the buildings on said property shall be insured for the further security of the lender.

The property to be mortgaged is situated in the county⁸ of _____, state of _____, and is described as follows, to wit: _____,⁹ _____, Judge of the _____ Court.

Dated _____, 19____.

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Or, was duly published four successive weeks before the time appointed for this hearing, in a newspaper of general circulation, published in said county. 4. Or, if the matter has been continued, say, "and the matter having been regularly postponed by the court to this time." 5. Or, executor. 6. State time. 7. The said interest to be paid solely out of the income of said property; or as otherwise directed. 8. Or, city and county. 9. Describe the property, and interest therein.

§ 616. Form. Mortgage of decedent's real estate.

This indenture, Made on the _____ day of _____, 19____, between _____, the duly appointed, qualified, and acting administrator¹ of the estate of _____, deceased, and _____, both parties being of the county² of _____, state of _____, —

Witnesseth: That the _____ court of the county³ of _____, state of _____, having, on the _____ day of _____, 19____, made an order, which is now on file and of record in said court, and a certified copy of which order is duly recorded in the office of the county recorder of the county of _____, and which is hereby referred to and made a part hereof, the same as if incorporated herein, authorizing, empowering, and directing the said administrator⁴ to mortgage certain realty of said estate; and that said administrator⁵ has, under and by virtue of said order, agreed to mortgage the said real estate to said _____ to secure the sum of _____ dollars (\$_____), which said _____ has agreed to loan to the said administrator⁶ for the use and benefit of said estate, —

The said administrator,⁷ in consideration of said loan, hereby mortgages to said _____ all that certain real property situated in the county⁸ of _____, state of _____, particularly described as follows, and which is the same land as that described in said order, to wit: _____; ⁹ said mortgage being given as security for the payment, on the _____ day of _____, 19____, to said mortgagee, of the said sum of _____ dollars

(\$——), gold coin of the United States of America, with interest thereon from date hereof until paid.¹⁰

It is agreed between the mortgagor and the mortgagee, that the former shall keep the buildings upon said land insured for the sum of —— dollars (\$——), and will have the policies of insurance made payable to the mortgagee, for the latter's further security.

In witness whereof, The said mortgagor hereunto sets his hand and seal this —— day of ——, 19——.

——, Administrator,¹¹ etc.

[Seal]

Explanatory notes. 1. Or, executor of the last will, etc. 2, 3. Or, city and county. 4-7. Or, executor. 8. Or, city and county. 9. Insert description. 10. If it is deemed desirable to provide against default in the payment of principal or interest, or both, etc., proceed as in an ordinary mortgage. If the mortgage is given to secure the payment of a note given by the administrator or executor, as such, insert copy thereof, as, "said mortgage being given as security for the payment of the promissory note of ——, given and signed by him as administrator [or executor] of the estate of ——, deceased, and in the words and figures as follows, to wit: ——." 11. Or, executor of the last will, etc.

§ 617. Proceedings to obtain order to lease realty. To obtain an order to lease the realty, the proceedings to be taken and the effect thereof shall be as follows:

[Petition.] First. The executor, administrator, guardian of a minor or of an incompetent person, or any person interested in the estate of such decedents, minors, or incompetent persons, may file a verified petition showing:

[Requirements.] 1. The advantage or advantages that may accrue to the estate from giving a lease.

2. A general description of the property proposed to be leased.

3. The term, rental, and general conditions of the proposed lease.

4. The names of the legatees and devisees, if any, and of the heirs of the deceased, or of the minor, or of the incompetent person, so far as known to the petitioner.

[Order to show cause.] Second. Upon filing such petition an order shall be made by the court or judge requiring all

persons interested in the estate to appear before the court or judge, at a time and place specified, not less than two nor more than four weeks thereafter, then and there to show cause why the realty (briefly indicating it) should not be leased for the period (stating it), at the rental mentioned in the petition (stating it), and referring to the petition on file for further particulars.

[Service of order.] Third. The order to show cause may be personally served on the persons interested in the estate at least ten days before the time appointed for hearing the petition, or it may be published for two successive weeks in a newspaper of general circulation in the county.

[Hearing. Witnesses. Appraisers. Minimum rental.] Fourth. At the time and place appointed to show cause, or at such other time and place to which the hearing may be postponed (the power to make all needful postponements being hereby vested in the court or judge), the court or judge having first received satisfactory proof of personal service or publication of the order to show cause, must proceed to hear the petition, and any objections that may have been filed or presented thereto. Upon such hearing, witnesses may be compelled to attend and testify in the same manner and with like effect as in other cases, and the court may, in its discretion, appoint one or more, not exceeding three, disinterested persons to appraise the rental value of the premises, and direct that a reasonable compensation for the services, not exceeding five dollars per day, be paid by the estate. If, after a full hearing, the court or judge is satisfied that it will be for the advantage of the estate to lease the whole or any portion of the real estate, an order must be made authorizing, empowering, and directing the executor, administrator, or the guardian to make such lease. The order may prescribe the minimum rental to be received for the premises, and the period of the lease, which must in no case be longer than for ten years, and may prescribe the other terms and conditions of such lease.

[Conditions of lease.] Fifth. After the making of the order to lease, the executor, administrator, or guardian of a minor or of an incompetent person shall execute, acknowl-

edge, and deliver a lease of the premises for the term and period and with the conditions specified in the order, setting forth in the lease that it is made by authority of the order, and giving the date of such order. A certified copy of the order shall be recorded in the office of the county recorder of every county in which the leased land or any portion thereof lies.

[Effect of lease. Errors and omissions.] Sixth. Every lease so made shall be effectual to demise and let, at the rent, for the term, and upon the conditions therein prescribed, the premises described therein. Jurisdiction of the court to administer the estate of the decedent, the minor, or of the incompetent person shall be effectual to vest such court and judge with jurisdiction to make the order for the lease, and such jurisdiction shall conclusively inure to the benefit of the lessee, his heirs and assigns. No omission, error, or irregularity in the proceedings shall impair or invalidate the same, or the lease made in pursuance thereof. **Kerr's Cyc. Code Civ. Proc.**, § 1579.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1824.

Colorado. 3 Mills's Ann. Stats., sec. 4729.

Kansas. Gen. Stats. 1905, §§ 3411, 4159, 4160-4169.

Montana. Code Civ. Proc., sec. 2722.

New Mexico. Comp. Laws 1897, secs. 1445, 1446, 2065-2068, 2070, 2071, 2073, 2076, 2079, 2082.

North Dakota. Rev. Codes 1905, § 8074.

Utah. Rev. Stats. 1898, secs. 3908, 3909.

§ 618. Form. Petition for leave to lease realty.

[Title of court.]

[Title of proceeding.]	{ No. ____ ¹ Dept. No. ____ [Title of form.]
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To the Honorable the ____ Court of the County ² of ____.

The petition of ____ respectfully shows:

That he is, and has been since the ____ day of ____, 19____, the duly qualified and acting guardian ³ of the estate of ____, a minor;⁴ and

That the inventory and appraisement of the said ward has been duly made and filed, —

Wherefore petitioner hereby asks leave of the court to execute, on behalf of said ward, a lease on the real estate of his ward hereinafter described; and shows that the advantages that may accrue to said ward and his estate therefrom are as follows: ____.⁵

That the property of said ward proposed to be leased is described as follows: ____;⁶

That the term, rental, and general conditions of the proposed lease are as follows: ____;⁷

That the names of the heirs⁸ of said ward are: ____.⁹

Wherefore petitioner prays that an order be made requiring all persons interested in said estate to appear and show cause, at a time and place to be fixed in said order, then and there to show cause why the realty above described should not be leased as above proposed; and that, after due notice and hearing, an order be made authorizing and directing your petitioner, as guardian as aforesaid, to execute a lease of the above-described premises, at the rental, for the period, and on the terms and conditions above set forth; and for such other or further order as to the court shall seem meet.

____, Attorney for Petitioner.

____, Petitioner.

[Add usual verification.]

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Or, administrator of the estate, or executor of the last will of ____ , deceased. 4. Or, an incompetent person. 5. Set forth the advantages. 6. Give description of property, and interest of ward. 7. State duration, rental, and general conditions of the proposed lease. 8, 9. Give names of heirs of ward, or names of heirs and of devisees and legatees, if any, of deceased.

§ 619. Form. Order to show cause on petition to lease realty.

[Title of court.]

[Title of proceeding.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

____, the guardian² of the estate of ____ , a minor,³ having this day filed a verified petition for authority to lease the real property belonging to said estate hereinafter described, for the period and at the rental hereinafter stated, and it

appearing that the giving of said lease will be advantageous to said estate, —

It is ordered, That all persons interested in said estate be, and they are hereby, required to appear before this court on —, ⁴ the — day of —, 19—, at — o'clock, — m., at the court-room of said court, then and there to show cause, if any they have, why an order should not be made authorizing and directing said —, as such guardian, ⁵ to execute a lease of the real property belonging to said estate herein-after described for the period of — ⁶ years, at the — ⁷ rental of — dollars per —, as mentioned in said petition.

Said real property is situated in the county ⁸ of —, state of —, and is described as follows: —. ⁹

For further particulars, reference is hereby made to the above petition on file.

It is further ordered, That a copy of this order be published once a week for two successive weeks in —, a newspaper of general circulation in said county. ¹⁰

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, administrator of the estate; or, executor of the last will of —, deceased. 3. Or, an incompetent person. 4. Give day of week. 5. Or, administrator or executor. 6. Give period of proposed lease. 7. Give rental as stated in petition. 8. Or, city and county. 9. Give description of property, and interest therein. 10. Or, city and county. Authority may be given to lease land located in another county: See *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1295. Persons interested may be required to show cause why the administrator should not be authorized to lease the building he proposes to construct on the property belonging to the estate of said deceased, and situated in the county of —, for a term of — years from and after the full completion of said building, in accordance with certain plans, and tendering possession thereof to the lessee; such lessee to pay a rental, based so that the estate of said deceased derive — per cent per annum upon all the moneys that may be expended in the construction of the said building, plus the value of the real estate fixed, at — dollars (\$—), such annual rental to be paid in — equal monthly instalments, commencing at the date of the completion of said building, the lessee also to pay the premiums on the fire insurance for said building, taxes, and all costs and expenses of keeping said building in good and

substantial repair during the term of the lease; the rental and covenants of the lessee to be guaranteed by a bond not exceeding in amount one year's rental, "as will fully appear by reference to the petition on file herein, for full particulars," where such is the nature of the petition. Or, persons interested may be required to show cause why an order should not be granted to the said executors, authorizing them to lease for one to three years, with or without temporary improvements, such parts or portions of said real estate as may be to the benefit and advantage of said estate, at the best rental they can obtain, but not below the minimum, to be named by the court.

§ 620. Form. Affidavit of publication of order to show cause.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.] }

State of _____,
County ² of _____, } ss.

_____, of the said county ³ and state, having been first duly sworn, deposes and says:

That he is, and at all times embraced in the publication herein mentioned was, the principal clerk ⁴ of the printers and publishers of the _____, a newspaper of general circulation, printed and published daily (Sundays excepted) in said county; ⁵

That deponent, as such clerk, during all times mentioned in this affidavit has had, and still has, charge of all the advertisements in said newspaper; and

That an order to show cause, of which the annexed is a true printed copy, was published in the above-named newspaper on the following dates, to wit, _____, ⁶ being as often as said newspaper was published during said period; and further deponent saith not.

Subscribed and sworn to before me this _____ day of _____, 19____. _____, Notary Public, etc.⁷

Explanatory notes. 1. Give file number. 2, 3. Or, City and County. 4. Or, the printer; or, the foreman of the printer: See Estate of Melone, 141 Cal. 331, 334; 74 Pac. Rep. 991. 5. Or, city and county. 6. Put in each date. 7. Or other officer taking the oath.

§ 621. Form. Order authorizing lease.

[Title of court.]

[Title of estate.]

{	No. ____ ¹	Dept. No. ____
	[Title of form.]	

Now comes _____, the administrator² of said _____, by Mr. _____, his attorney, and presents his petition for authority to let, lease, and demise certain real estate of said deceased; and, having proved to the satisfaction of the court that the order herein made requiring all persons interested to show cause why said real estate should not be leased has been duly and personally served on all persons interested in said estate at least ten days³ before the time appointed therein for this hearing,⁴ the court thereupon proceeds to the hearing of said petition, and, after hearing the evidence, the court, being satisfied that the same is for the advantage of the estate, grants said petition as follows, to wit:—

It is ordered by the court, That _____, as administrator⁵ of the estate of _____, be authorized, empowered, and directed to make a lease of the land herein described for a period not less than _____⁶ nor more than _____,⁷ at a rental of not less than _____ dollars (\$____) per _____⁸ nor more than _____ dollars (\$____) per _____,⁹ and upon the terms and conditions following, to wit: _____.¹⁰

Said real property is described as follows, to wit: _____.¹¹

Entered _____, 19____.

_____, County Clerk.

By _____, Deputy.¹²

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Or, was published in a newspaper of general circulation in this county [or city and county] for two successive weeks. 4. If the matter has been continued, say, "and the hearing having been regularly postponed to this time"; and if objections are made, say, "and _____ having appeared and filed objections to the granting of said petition." 5. Or, executor. 6, 7. Months or years. 8, 9. Month or year. 10. State terms and conditions of petition, or other terms and conditions, if any. 11. Describe the land. 12. Orders need not be signed: See note, § 77, ante.

§ 622. Form. Lease of decedent's real estate.

This indenture, Made on the _____ day of _____, 19____, between _____, the duly appointed, qualified, and acting Probate -- 63

administrator¹ of the estate of —, deceased, and —, both parties of the county² of —, state of —, —

Witnesseth: That the — court of the county³ of —, state of —, having, on the — day of —, 19—, made an order, which is now on file and of record in said court, and a certified copy of which order was duly recorded in the office of the county recorder of the county of — on the — day of —, 19—, and which is hereby referred to and made a part hereof, the same as if incorporated herein, authorizing, empowering, and directing the said administrator⁴ to lease certain realty of said estate; and that said administrator⁵ has, under and by virtue of said order, agreed to lease the said real estate, on the terms and conditions hereinafter stated, to the said — for the term of — years;

That said administrator,⁶ in consideration of the premises, has demised and let, and by these presents does demise and let, unto the said —, that certain real property situated in the county⁷ of —, state of —, particularly described as follows, and which is the same land as that described in said order, to wit: —; with the appurtenances, for the term of —⁸ from the — day of —, 19—, at the —⁹ rental or sum of — dollars (\$—), payable in gold coin of the United States of America, in advance, on the — day of each and every month during said term.¹⁰

In witness whereof, The said parties have hereunto set their hands and seals the day and year first above written.

—, Administrator,¹¹ etc.

[Seal]

—, Lessee. [Seal]

Explanatory notes. 1. Or, executor of the last will, etc. 2, 3. Or, city and county. 4-6. Or, executor. 7. Or, city and county. 8. Years or months. 9. Yearly or monthly. 10. As to any further agreements, follow the form of an ordinary lease. 11. Or, executor of the last will, etc.

MORTGAGES AND LEASES.**1. Mortgages.**

- (1) Construction and validity of statute.
- (2) Authority to mortgage. Jurisdictional facts.
- (3) Purpose to be shown.
- (4) Sufficiency of petition.
- (5) Validity of mortgage.
- (6) Presumptions. Creditor's right.
- (7) Procedure. Practice. Collateral attack. Appeal.

(8) Foreclosure. Title of purchaser.**2. Leases.**

- (1) Power of executor or administrator to lease.
- (2) Validity of lease.
- (3) Power of court to revoke or modify order authorizing lease.
- (4) Power of representative to alter or modify existing lease.

1. Mortgages.

(1) **Construction and validity of statute.** The court has, undoubtedly, in a proper case, power to authorize the mortgaging of estates of decedents; and, within the limitations placed by law upon the power to sell to pay charges against the estate, if the law existed at the decedent's death, the court may, on cause shown, as required by the statute, authorize such mortgage, whether the decedent died before or after passage of the act of 1887, the time at which sections 1577 and 1578 of the Code of Civil Procedure of California were originally enacted: *Murphy v. Farmers etc. Bank*, 131 Cal. 115, 120; 63 Pac. Rep. 368; *Howard v. Bryan*, 133 Cal. 257, 259; 65 Pac. Rep. 462. To authorize the mortgaging of such property for the express purpose of raising money with which to pay charges or liens resting upon it is but to change the form of the lien, and adds no new burden not already borne by the property, or to which the property may be subjected under the law as it existed when the testator died; and even if the mortgage, under the statute, may bear a greater rate of interest than the legacies may bear, that fact does not affect the question of power, nor can it reasonably be said to be a new burden, as the increased rate of interest allowed by law is but an incident of the power by which the burden or lien already on the property may be changed by changing the form of the statutory burden to a mortgage lien: *Murphy v. Farmers etc. Bank*, 131 Cal. 115, 119; 63 Pac. Rep. 368. For cases where probate mortgages given under said sections 1577 and 1578 have been upheld, see *Thomas v. Parker*, 97 Cal. 456; 32 Pac. Rep. 562; *Stow v. Schiefferly*, 120 Cal. 609; 52 Pac. Rep. 1000; *Weinreich v. Hensley*, 121 Cal. 647; 54 Pac. Rep. 254; *Fast v. Steele*, 127 Cal. 202; 59 Pac. Rep. 585. The authority of the court to order a mortgage for the purpose of paying liens on the realty of a decedent's estate, or to pay debts, legacies, or expenses of administration, is expressly given by the provision of the statute; and it is not essential to the jurisdiction of the court that the order shall include the payment of all debts: *Estate of Freud*, 131 Cal. 667, 674;

82 Am. St. Rep. 407; 63 Pac. Rep. 1080; *Stambach v. Emerson*, 139 Cal. 282, 285; 72 Pac. Rep. 991. The statute of Oregon does not, in express terms, authorize the borrowing of money with which to redeem real property, belonging to the decedent's estate, that may have been sold under a decree or judgment; but, as a lien of this character is an indebtedness against said estate, the right to borrow money for the purpose of funding such indebtedness necessarily carries with its exercise a grant of power to borrow money to be used in redeeming real property from such sale: *Lawrey v. Sterling*, 41 Or. 518; 69 Pac. Rep. 460, 462. The statute of Oregon authorizing an executor or administrator to borrow money upon any property belonging to the estate of his decedent for the purpose of funding the indebtedness against the estate is not unconstitutional because of the title of the act containing more than one subject. The subject of the act is the granting of power, by the county court to an executor or administrator to borrow money, and the incident to the exercise of such power is the right to use the money so borrowed in paying the indebtedness against the estate of a decedent, including the redemption of the real property, though that may be sold under a decree or judgment. The purpose for which the money may be used is properly connected with an exercise of the power to borrow it: *Lawrey v. Sterling*, 41 Or. 518; 69 Pac. Rep. 460, 462.

(2) **Authority to mortgage. Jurisdictional facts.** A mortgage or sale of the real estate of a deceased person is in derogation of the common law, and is authorized, if at all, by statute. And when authorized by statute, the statute must, in substance at least, be complied with: *Wallace v. Grant*, 27 Wash. 170; 67 Pac. Rep. 578, 579. In the statute of Washington the basis of the statutory provision is the exhaustion of the personal estate in the hands of the executor or administrator, and it is only when the personal estate in the hands of the executor or administrator shall be insufficient to pay the debts of the administration that the executor or administrator may sell or mortgage the real estate. There must be a showing that the personal property is insufficient to pay the expenses of the estate: *Wallace v. Grant*, 27 Wash. 170; 67 Pac. Rep. 578, 579. The foundation of jurisdiction in cases of this sort is the petition filed by the applicant for leave to mortgage; and the essential fact to be found by the court, under the present statute of California, as the basis of its order is, that it will be for the advantage of the estate to raise money by a loan, and the statute prescribes the matters which must be set forth in the petition as a basis for the judgment of court: *Howard v. Bryan*, 133 Cal. 257, 260, 263; 65 Pac. Rep. 462. Where a petition to mortgage real estate was not verified, and failed to show that the personal estate was exhausted, or that the same was insufficient to pay the debts of the administration, the probate court would not acquire jurisdiction to make an order to mortgage: *Wallace v. Grant*, 27 Wash. 170; 67 Pac. Rep. 578, 580.

(3) **Purpose to be shown.** The first requisite of the petition is that it must disclose the particular purpose for which the money is to be used. And, in the case of a minor's estate, that purpose must be either to pay debts or charges of administration, or to pay, reduce, extend, or renew some lien or mortgage already subsisting on the realty which it is proposed to mortgage: *Howard v. Bryan*, 133 Cal. 257, 263; 65 Pac. Rep. 462. A petition which shows that the purpose is to obtain the money wherewith to pay a debt of the deceased sufficiently shows a purpose authorized by statute to clothe the court with jurisdiction to make the order. The language of the statute, providing that the petition shall state the particular purposes, and which enumerates them, was intended simply to designate the various objects for which a mortgage, binding the property of the estate, may be given, to the end that the court should not impose a lien for some purpose not included within the proper functions of the administration of the estate. It is necessary, before there can be any final distribution of the realty, that the expenses of administration, debts of deceased, and legacies be paid. It was to confine the authority to mortgage to these general purposes that the language of the statute was used, and subdivision one of section 1578 of the Code of Civil Procedure of California should be read precisely as if the word "the" were omitted, and the statute was, "which shall be either to pay debts, legacies, or charges of administration": *Stambach v. Emerson*, 139 Cal. 282, 284; 72 Pac. Rep. 991.

(4) **Sufficiency of petition.** To mortgage the land of a decedent, a verified petition, in substantial conformity with the statute, must be filed to give the court jurisdiction to proceed. The omission to file it would be more than a mere irregularity; and the petition must disclose the particular purpose for which the money is to be used: *Howard v. Bryan*, 133 Cal. 257, 263, 265; 65 Pac. Rep. 462; *Stambach v. Emerson*, 139 Cal. 282, 284; 72 Pac. Rep. 991. In the state of Washington the petition to mortgage the realty of a decedent is insufficient unless it shows that there is not enough personal property to pay the expenses of the estate, and such petition must be verified by the oath of the party presenting the same: *Wallace v. Grant*, 27 Wash. 170; 67 Pac. Rep. 578, 579, 580. The county court in Oregon, in the administration of estates, exercises its powers by means of an affidavit, or the verified petition or statement of a party, and this applies to an application for an order to mortgage the real estate of a decedent: *Lawrey v. Sterling*, 41 Or. 518; 69 Pac. Rep. 460, 463.

(5) **Validity of mortgage.** The power to borrow money, conferred upon an executor or administrator by the statute of Oregon, evidently carries with it, by implication, authority to execute promissory notes evidencing the loan, expressing the rate of interest stipulated for, and fixing the day of payment, and also the right to execute an

instrument in common form, and containing the provisions in common use. It is the common practice, in that state, to include in a promissory note a stipulation for the payment of such sum as the court may adjudge reasonable for attorneys' fees in case suit or action is instituted to collect the sum specified in the note, or any part thereof; and this being so, the executor or administrator is authorized to include such a promise in the note: *Lawrey v. Sterling*, 41 Or. 518; 69 Pac. Rep. 460, 464. A power to mortgage, given in general terms, without specifying what provisions the deed shall contain, includes the power to make it in the form and with the provisions customarily used within the state or county where the land is situated: *Lawrey v. Sterling*, 41 Or. 518; 69 Pac. 460, 464. Under the California statute, no irregularity in the proceedings impairs or invalidates the note or notes, or the mortgage given in pursuance thereof. Hence, if the executor follows the statute, and executes a promissory note for the money borrowed, though the order made by the court omitted the direction to execute a promissory note, such omission is a mere irregularity, whether such irregularity consists in the omission of the court to direct the execution of the note, or in the action of the executor in giving it. In any event, no injury is done, and the proceedings are not affected by such irregularity. Neither does the fact that the note and mortgage were made payable on or before one year after their date, while the order directed that the mortgage should be made payable "on or before two years" after its date "impair or invalidate" the note or mortgage. Such departure from the order is a mere irregularity. Nor will an oral direction of the judge to the executor to pay, or individually secure to the mortgagee the whole of the interest which was to become due on the note, which was to be secured by the mortgage, and that the executor, in order to secure to the mortgagee one year's interest, assigned to him his commissions as executor to the extent of one year's interest, affect the rights of the mortgagee. He is charged with notice of all that the order contains, but is not bound by such oral direction of the judge to the executor: *Fast v. Steele*, 127 Cal. 202, 205; 59 Pac. Rep. 585. A mortgage is sufficient to show that it was intended as a mortgage of property belonging to the estate of which the mortgagor was administrator, and was executed by him in his character as administrator in pursuance of law, and the order of the court directing its execution, where it refers to the order of the court authorizing its execution, and recites that "the said mortgagor, pursuant to the order," mortgages to the mortgagee, etc.: *Thomas v. Parker*, 97 Cal. 456, 457; 32 Pac. Rep. 562. Where a testator has given his executors certain directions to be observed in carrying out the provisions of his will, such directions are nugatory, to the extent that they are inconsistent with law. The executors, as such, are not trustees of an express trust in such a case, and the authority which the testator gives them creates only such a trust as pertains to the office of executor, where he has not

conferred upon them the power to make any sale or disposition of his estate other than that they "shall have the property sold" at the expiration of two years after his death, and shall distribute the proceeds among his designated beneficiaries. The sale which is thus directed is to be made by them as executors of his will, and as a part of their administration of the estate, and not as the trustees of an express trust, and will be ineffective without a confirmation by the court. In such a case, a mortgage, by them, of the property of the estate will not be effective unless made by an order of the court as prescribed by the statute. Otherwise they would be able to transfer the estate without the approval of the court, and thus to do indirectly what they are forbidden to do directly, since the right to mortgage includes a right in the mortgagee to have a sale of the remainder in satisfaction of the obligation for which the mortgage was given: *Estate of Pforr*, 144 Cal. 121, 125; 77 Pac. Rep. 825. The law cannot be construed to authorize the mortgage of a minor's estate to pay any debt but his own. It must be such a mortgage as he can discharge by paying what he is individually bound for, and such as will admit of a redemption by the payment of that which is due from him on his own account. Hence, if a court authorizes a mortgage of the interest of five minors to secure a sum in excess of their aggregate indebtedness, or to mortgage their separate interests for their aggregate debt, it exceeds its jurisdiction, however advantageous it may seem to pursue that course. The proceeding cannot be sustained without establishing a dangerous precedent, from which serious abuses would be certain to flow: *Howard v. Bryan*, 133 Cal. 257, 264; 65 Pac. Rep. 462. No bond is required as a condition to the making of a mortgage upon the estate of a decedent: *Howard v. Bryan*, 133 Cal. 257, 265; 65 Pac. Rep. 462.

(6) **Presumptions. Creditor's right.** In examining the record of a mortgage authorizing the sale of a decedent's property, the same presumptions are indulged in view of the regularity and validity of the proceeding as those which govern the construction of the record in an ordinary action: *Howard v. Bryan*, 133 Cal. 257, 262; 65 Pac. Rep. 462. Presumably the mortgaged property has a market value greater than the mortgage debt, for the lender would rarely lend up to the full cash value. But the mortgage is not a sale, and the creditors may at any time petition to sell, and pay the mortgage, and they will thus have an opportunity to realize the margin of value above the mortgage debt; and if a sale cannot be made for an amount in excess of the loan, it will show that the estate has realized on the mortgage all the property is worth in the market, and creditors would have no cause of complaint, for no deficiency judgment can be entered. The mortgagee must look alone to the property: *Murphy v. Farmers etc. Bank*, 131 Cal. 115, 120; 63 Pac. Rep. 368.

(7) **Procedure. Practice. Collateral attack. Appeal.** An order to show cause why the real estate of a decedent should not be mortgaged, having been duly published, is not insufficient because it does not direct or require personal service on minor heirs: *Thomas v. Parker*, 97 Cal. 456, 458; 32 Pac. Rep. 562. And the non-appointment of a guardian ad litem is merely an irregularity. The statute does not require any guardian ad litem to be appointed, and provides that if the court has jurisdiction to administer the estate of decedent, it has jurisdiction to make the order for the mortgage: *Thomas v. Parker*, 97 Cal. 456, 458; 32 Pac. Rep. 562. In making an order directing that the estate of a decedent shall be mortgaged, the interest of one who is seeking to acquire title to the property adversely to the estate cannot be considered: *Estate of Freud*, 133 Cal. 667, 674; 82 Am. St. Rep. 407; 63 Pac. Rep. 1080. If, by mistake, the court authorizes a mortgage to be given on property which is subject to a probate homestead, such mortgage should be paid out of moneys realized from the sale of other property belonging to the estate, where it is solvent: *Estate of Shively*, 145 Cal. 400, 402; 78 Pac. Rep. 869. The statute controls the probate court in the exercise of its jurisdiction in the matter of the payment of debts of the estate, and a disregard thereof would be error reviewable on appeal taken by any person interested. But the court has jurisdiction to make an order erroneously preferring one creditor to another, and its action in so doing is only error in the exercise of jurisdiction, and cannot be collaterally attacked. If the effect of an order authorizing the mortgage of decedent's property is to prefer erroneously certain creditors of the estate, the action of the court can be reviewed only on appeal from the order: *Stambach v. Emerson*, 139 Cal. 282, 284; 72 Pac. Rep. 991. In a collateral attack upon an order authorizing the estate of a decedent to be mortgaged, only those facts and matters appearing upon the face of the record are to be considered; and if they show no excess or defect of jurisdiction, no mere error of the court in the exercise of its jurisdiction, or irregularity in the proceeding, will invalidate the order: *Howard v. Bryan*, 133 Cal. 257, 262; 65 Pac. Rep. 462.

(8) **Foreclosure. Title of purchaser.** Where an order authorizing the mortgaging of a decedent's property declares that it was made and entered upon a verified petition, it will be presumed, if a verification to the petition was essential to jurisdiction, that such verification appeared upon the original as filed. The court must assume the fact to be as stated in the complaint and in the order, although the verification does not appear on the exhibit. It is not necessary to a good complaint, that all the proceedings leading to the mortgage should be set out in the complaint. It is only necessary to set forth the mortgage in *hæc verba* or in substance; it is not necessary to set out the petition or order; both of these exhibits may be wholly

disregarded, and there will remain a good complaint: *Stone v. Schiefferly*, 120 Cal. 609, 612; 52 Pac. Rep. 1000. If the purpose of the mortgage authorized is to pay an indebtedness of the estate, but such mortgage is executed in part for a private debt of the executor or administrator, and in part for money loaned to the estate, the title obtained by the mortgagee under foreclosure is not void, but the application of the mortgage-money to pay the personal debt of the executor or administrator is a breach of trust on the part of the representative, and if the mortgagee became a party to the violation of the trust, such mortgagee acquired no right to the money received from the representative, so far as a minor heir is concerned, and the minor heir's right to the money is unaffected by the mortgage, or by the payment to the representative: *Murphy v. Farmers etc. Bank*, 131 Cal. 115, 118; 63 Pac. Rep. 368.

2. Leases.

(1) **Power of executor or administrator to lease.** An executor or administrator of the estate of the deceased person has authority to lease the real property of the estate during the period of administration; but any lease for a term definite is subject to be terminated by final distribution of the estate and the discharge of the representative: *Doolan v. McCauley*, 66 Cal. 476; 6 Pac. Rep. 130. A resident of Ohio, owning, in Kansas, a farm that had never been used for other than agricultural purposes, executed a will in Ohio, providing that the executor and trustee should take charge of said premises, and "lease and maintain the same in repair and good condition, with a view to obtaining the best income therefrom without permitting the same to deteriorate in value or quality." It was held that the executor and trustee was not, by said will, authorized to execute an oil and gas lease granting to the lessee all the oil and gas under said premises and bind the legatees thereby. Where an executor and trustee, without having sufficient authority under the will to bind the legatees thereby, executed an oil and gas lease on a farm that had never been used for other than agricultural purposes; but, prior to the execution of the lease, he had individually acquired the interest of one of the legatees in the premises, and soon thereafter acquired the interest of another of the legatees, he is estopped, in an action of partition, under such circumstances, from denying that the interest acquired by him was not subject to the lease: *Lanyon Zinc Co. v. Freeman*, 68 Kan. 691; 75 Pac. Rep. 995.

REFERENCES.

Power of executor to make oil and gas lease: See note 1 Am. & Eng. Ann. Cas. 406. Right to rents on lease of intestate's property: See note 40 L. R. A. 321-345.

(2) **Validity of lease.** Under the statutes of Utah, requiring a lease for more than one year to be in writing, if one of six duly

qualified executors of the estate of a decedent, having no written authority from the others, or any of them, who are all within that jurisdiction, and free from any disability, executes a lease for more than one year, such lease is not valid, where the statute requires the act of a majority, if there are more than two executors or administrators: *Utah L. & T. Co. v. Garbutt*, 6 Utah, 342; 33 Pac. Rep. 758. The proceedings to obtain an order to lease the realty of a decedent, in Montana, are set out at length in *State v. Second Jud. Dist. Court*, 24 Mont. 1; 60 Pac. Rep. 489, 491. In that state, the order may prescribe the minimum rental to be received for the premises, and the period of the lease, which must in no case be longer than for five years, and may prescribe the other terms and conditions of such lease. The notice to be given must contain mention of the term and rental contemplated by the proposed lease. The lease may also be conditioned upon the furnishing of security for the faithful performance thereof, as there may be circumstances indicating that rents will fluctuate during the term, and it may fix a rental for the time being, with provisions for the payment of a greater or less amount upon the happening of certain contingencies, but never a less amount than a specified minimum. A verified petition by some authorized person, and notice to all parties interested, cannot be dispensed with. It has no power to authorize the execution of a lease to parties who are not before it, and where no one is petitioning for them. If the court could grant them the lease, it could, of its own motion, without any application, or notice, or hearing, grant a lease to any person making it known that a lease was desired. This the court cannot do: *State v. Second Jud. Dist. Court*, 24 Mont. 1; 60 Pac. Rep. 489, 493.

(3) Power of court to revoke or modify order authorizing lease. Under the statute of Montana, the court has power to make an order modifying its former order authorizing a lease, where the lessees and executors agree to the modification; and it is also the duty of the court to refuse to revoke an order authorizing a lease, without the consent of the lessees, after they have accepted its terms, and complied with them on their part. After this has been done, the court has no authority to revoke it: *State v. Second Jud. Dist. Court*, 24 Mont. 1; 60 Pac. Rep. 489, 493.

(4) Power of representative to alter or modify existing lease. The representative of a deceased lessor has no power to alter or modify a lease, which would be, in effect, making a new lease, without an order of the probate court under proceedings had for that purpose; nor can he compromise or reduce the rent provided for in the lease without the approval of the probate court, on a showing that it is for the best interest of the estate, or that the lessee is not abundantly able to pay the full sum stipulated in the lease as rent: *Brosnan v. Kramer*, 135 Cal. 36, 40; 66 Pac. Rep. 979.

PART X.

POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS, AND MANAGEMENT OF ESTATES.

CHAPTER I.

POWERS, DUTIES, AND MANAGEMENT.

- § 623. Executors to take possession of entire estate.
- § 624. Form. Petition for a patent.
- § 625. Representative may sue and be sued.
- § 626. May maintain actions for waste, conversion, or trespass.
- § 627. May be sued for waste or trespass of decedent.
- § 628. Surviving partner to settle up business. Appraisalment. Accounting.
- § 629. Form. Petition that surviving partner render an account.
- § 630. Form. Alternative order that surviving partner account to administrator, or show cause.
- § 631. Form. Order for attachment to compel surviving partner to render an account.
- § 632. Action on bond of one administrator may be brought by another.
- § 633. What executors are not parties to actions.
- § 634. May compound.
- § 635. Form. Petition for authority to compromise debt.
- § 636. Form. Order approving administrator's agreement to compromise with debtor.
- § 637. Recovery of property fraudulently disposed of by testator.
- § 638. When executor to sue, as provided in preceding section.
- § 639. Form. Creditors' application that suit be brought to recover property fraudulently disposed of by decedent.
- § 640. Form. Order that administrator bring suit to recover property fraudulently disposed of by decedent.
- § 641. Disposition of estate recovered.
- § 642. Pending settlement, court may order moneys to be invested.
- § 643. Form. Petition for leave to invest moneys of estate in United States bonds.
- § 644. Form. Order directing publication of notice of petition for leave to invest.

- § 645. Form. Notice of hearing of petition for leave to invest moneys of estate.
- § 646. Form. Order directing investment of moneys of estate in United States bonds.

POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS.
ACTIONS. MANAGEMENT OF ESTATES.
PARTNERSHIP ESTATES.

I. Powers and Duties of Executors and Administrators.

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|--|--|
| 1. Title to property. | (8) Not to purchase estate. |
| 2. Become trustees when. | (9) Cannot do what. |
| 3. Executors de son tort. | (10) With respect to leases and mortgages. |
| 4. Duties of executors and administrators. | (11) Cannot litigate what claims. |
| 5. Power of executors and administrators. | (12) In judicial proceedings. |
| (1) In general. | 6. Joint administrators and co-executors. |
| (2) To dispose of personal property. | (1) In general. |
| (3) To compound or compromise, in general. | (2) Obligations and liability. Bond. |
| (4) Same. Restrictions. Approval of court. | (8) Same. Foundation of liability. |
| (5) Same. Distinction. | 7. Foreign and ancillary administration. |
| (6) To bind estate. | (1) Foreign administration. |
| (7) Not to purchase claims against estate. | (2) Same. Ancillary administration. |

II. Actions by Executors or Administrators.

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|---|---|
| 1. In general. | 20. Gifts. |
| 2. Abatement. Discontinuance. | 21. For injunction. |
| 3. Parties. | 22. For life insurance, and sick benefits. |
| 4. By ancillary administrators. | 23. On mortgages. |
| 5. By foreign executors. | 24. Partition. |
| 6. Executor or administrator as representative. | 25. To quiet title, or to determine adverse claims. |
| 7. By a co-executor. | 26. Replevin. |
| 8. Substitution. Revival of action. | 27. To set aside fraudulent conveyances. |
| 9. Pleading. | (1) In general. |
| 10. Evidence. | (2) May be brought by special administrator when. |
| 11. Judgment. | (8) May be brought by creditor when. |
| 12. Costs. | (4) Elements necessary to maintain. |
| 13. On contracts. | 28. Set-off and counterclaim. |
| 14. Conversion. | 29. For trespass on land. |
| (1) In general. | 30. Unlawful detainer. |
| (2) What is a conversion. | 31. Limitation of actions. |
| (3) Suits in individual capacity. | 32. Termination of right to sue. |
| (4) Action must fail when. | |
| 15. For damages in causing death. | |
| 16. Ejectment. | |
| 17. To enforce trusts. | |
| 18. To recover excessive fees charged. | |
| 19. On foreign judgments. | |

III. Actions against Executors or Administrators.

1. In general.
2. Parties.
3. By distributees.
4. Against foreign executor or administrator.
5. Pleadings.
6. Evidence. Stipulations.
7. Judgments.
 - (1) In general.
 - (2) Must be payable in course of administration.
 - (3) Foreign judgments.
 - (4) Void if made after termination of office.
8. Costs.
9. Actions on accounts.
10. Attachment.
11. Suits on contracts.
 - (1) On contracts by decedent.
 - (2) On contracts by executor or administrator.
12. For conversion.
13. To recover deposit on void sale.
14. Ejectment.
15. Eminent domain.
16. To enforce trust.
 - (1) In general.
 - (2) Presentation of claims.
 - (3) Action by creditors.
 - (4) Collateral attack.
17. For fraud.
18. On mortgages.
19. To quiet title.
20. Replevin.
21. For torts.
 - (1) Acts done by the executor or administrator.
 - (2) Acts commenced before decedent's death.
22. Unlawful detainer.
23. To vacate sale.
24. For waste.
25. On street assessments.
26. Limitation of actions.
27. Appeals.

IV. Management of Estates.

1. In general.
2. Discovery of assets.
3. Advances by administrator.
4. Making improvements.
5. Investment of funds.
6. Effect of chattel mortgage.
7. Paying off liens. Redemption.
8. Other questions relating to mortgages.
9. Continuing business of decedent.
 - (1) In general.
 - (2) Exception to the rule.
 - (3) Individual liability.
 - (4) Liability created by court.
 - (5) Administrator's report and account.
10. Advice and instructions.

V. Estates where Partnership Existed.

1. Interest of deceased partner. Assets of estate.
2. Presentation of claims.
3. Jurisdiction. Probate court. Equity.
4. Bequest of interest in firm. Payment of partnership debts.
5. Authority of executor or administrator.
6. Surviving partner as executor or administrator.
7. Surviving partner. Rights and powers.
8. Surviving partner. Settlement of partnership affairs.
9. Surviving partner. Completion of executory contracts.
10. Surviving partner. Accounting.
 - (1) In general.
 - (2) Court may compel accounting.
 - (3) Actions for accounting.
11. Accounts of executors may be settled, regardless of order.
12. Actions by or against surviving partners, and by or against executors or administrators.
 - (1) Actions by or against surviving partners.
 - (2) Actions by or against executors or administrators.
13. Purchase of deceased partner's interest.
14. New partnership. Carrying on decedent's business.
15. Conveyances by one partner to another. Death before payment.

§ 623. **Executors to take possession of entire estate.** The executor or administrator must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the estate. For the purpose of bringing suits to quiet title, or for partition of such estate, the possession of the executors or administrators is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator, for the purposes of administration, as provided in this title. **Kerr's Cyc. Code Civ. Proc.**, § 1581.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1825.
Colorado. 3 Mills's Ann. Stats., sec. 4721.
Idaho.* Code Civ. Proc. 1901, sec. 4211.
Kansas. Gen. Stats. 1905, § 2936.
Montana.* Code Civ. Proc., sec. 2730.
Nevada. Comp. Laws, sec. 2950.
New Mexico. Comp. Laws 1897, sec. 1995.
North Dakota. Rev. Codes 1905, § 8159.
Oklahoma. Rev. Stats. 1903, sec. 1691.
South Dakota. Probate Code 1904, § 242.
Utah. Rev. Stats. 1898, secs. 3912, 3913.
Washington. Pierce's Code, § 2616.
Wyoming.* Rev. Stats. 1899, sec. 4693.

§ 624. **Form. Petition for a patent.**

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
 [Title of form.]

To the Commissioner of Patents, Washington, D. C.

Your petitioner, —, administrator² of the estate of —, deceased, as will more fully appear by reference to the duly certified copy of letters of administration³ hereto annexed, prays that letters patent may be granted to him for the invention of the said —,⁴ set forth in the annexed specification.

—, Petitioner.

Explanatory notes. 1. Give file number. 2. Or, executor of the last will, etc. 3. Or, of letters testamentary. 4. Deceased.

§ 625. Representative may sue and be sued. Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates. **Kerr's Cyc. Code Civ. Proc., § 1582.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.** Rev. Stats. 1901, par. 1826.
- Colorado.** 3 Mills's Ann. Stats., secs. 4721, 4731, 4815 i.
- Idaho.** Code Civ. Proc. 1901, sec. 4212.
- Montana.** Code Civ. Proc., sec. 2731.
- Nevada.** Comp. Laws, sec. 2951.
- North Dakota.** Rev. Codes 1905, § 8160.
- Oklahoma.** Rev. Stats. 1903, sec. 1692.
- South Dakota.** Probate Code 1904, § 243.
- Utah.*** Rev. Stats. 1898, sec. 3914.
- Washington.*** Pierce's Code, § 2617.
- Wyoming.** Rev. Stats. 1899, sec. 4694.

§ 626. May maintain actions for waste, conversion, or trespass. Executors and administrators may maintain actions against any person who has wasted, destroyed, taken, or carried away, or converted to his own use, the goods of their testator or intestate, in his lifetime. They may also maintain actions for trespass committed on the real estate of the decedent in his lifetime. **Kerr's Cyc. Code Civ. Proc., § 1583.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1827.
- Colorado.** 3 Mills's Ann. Stats., secs. 4731, 4815 i.
- Idaho.*** Code Civ. Proc. 1901, sec. 4214.
- Montana.** Code Civ. Proc., sec. 2732.
- Nevada.*** Comp. Laws, sec. 2952.
- North Dakota.** Rev. Codes 1905, § 8162.
- Oklahoma.** Rev. Stats. 1903, sec. 1693.
- South Dakota.*** Probate Code 1904, § 244.
- Utah.*** Rev. Stats. 1898, sec. 3915.
- Washington.*** Pierce's Code, § 2618.
- Wyoming.*** Rev. Stats. 1899, sec. 4695.

§ 627. **May be sued for waste or trespass of decedent.** Any person or his personal representatives may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person. **Kerr's Cyc. Code Civ. Proc., § 1584.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1828.
- Colorado.** 3 Mills's Ann. Stats., secs. 4731, 4815 i.
- Idaho.*** Code Civ. Proc. 1901, sec. 4215.
- Montana.*** Code Civ. Proc., sec. 2733.
- Nevada.*** Comp. Laws, sec. 2953.
- Oklahoma.** Rev. Stats. 1903, sec. 1694.
- South Dakota.*** Probate Code 1904, § 245.
- Utah.*** Rev. Stats. 1898, sec. 3916.
- Washington.*** Pierce's Code, § 2619.
- Wyoming.*** Rev. Stats. 1899, sec. 4696.

§ 628. **Surviving partner to settle up business. Appraisal. Accounting.** When a partnership exists between the decedent, at the time of his death, and any other person, the surviving partner has the right to continue in possession of the partnership, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory, and be appraised as other property. The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. Upon the application of the executor or administrator, the court, or a judge thereof, may, whenever it appears necessary, order the surviving partner to render an account, and in case of neglect or refusal may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the decedent could have maintained. **Kerr's Cyc. Code Civ. Proc., § 1585.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, secs. 790-792, p. 308; secs. 795, 796, p. 309.
Arizona. Rev. Stats. 1901, par. 1829.
Idaho.* Code Civ. Proc. 1901, sec. 4216.
Kansas. Gen. Stats. 1905, §§ 2906, 2908.
Montana. Code Civ. Proc., sec. 2734.
Nevada.* Comp. Laws, sec. 2954.
North Dakota. Rev. Codes 1905, §§ 8075, 8163.
Oklahoma. Rev. Stats. 1903, sec. 1695.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 1128, 1130, 1133, 1134.
South Dakota. Probate Code 1904, § 246.
Utah. Rev. Stats. 1898, sec. 3918.
Washington. Pierce's Code, §§ 2482, 2483, 2486, 2487.
Wyoming. Rev. Stats. 1899, sec. 4697.

§ 629. Form. Petition that surviving partner render an account.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
 { [Title of form.]

To the Honorable the ____² Court of the County³ of ____,
 State of ____.

The undersigned, ____, administrator⁴ of the estate of
 ____, deceased, respectfully represents:

That, at the time of the death of said deceased, to wit, on
 the ____ day of ____, 19____, and for a long time prior
 thereto, there was a partnership existing between deceased
 and ____, who were doing business, in said county⁵ and
 state, as wholesale liquor dealers, under the firm name and
 style of ____;

That the surviving partner, the said ____, continued in
 possession of the effects of the said partnership, and is still
 in such possession, for the purpose of settling up the busi-
 ness thereof;

That the interest of the decedent in the partnership prop-
 erty was included in the inventory heretofore filed herein,
 and was appraised as other property, and that more than
 ____ months have elapsed since the said inventory was
 filed, but that said surviving partner has neglected and
 refused, and still neglects and refuses, to account⁶ with said
 administrator,⁷ or to give any information as to the affairs

of the said partnership, and has never paid over any such balances as may, from time to time, have been payable to said administrator ⁸ in right of the decedent;

That the deceased owed many debts, and that it has become essential to determine the value of said partnership interest in order to determine whether a sale of real estate is necessary to pay said debts, and the debts, expenses, and charges of administration.

Wherefore your petitioner prays for an order directed to the said —, requiring him to render an account of the said partnership, and of his dealings with the same, showing a full statement of its affairs, property, and effects at the time of and since the death of the deceased, including a statement of the true value and condition of the interest of said deceased, and of the moneys, if any, due and owing to your petitioner as the administrator ⁹ of said estate.

—, Administrator ¹⁰ and Petitioner.

—, Attorney for Administrator ¹¹ and Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4. Or, executor of the last will and testament of —, deceased. 5. Or, city and county. 6. Or, that said surviving partner has promised to account, but has neglected and refused, and still neglects and refuses to do so. If he has rendered an unsatisfactory account, say, "that said surviving partner has rendered to your petitioner what purports to be a full account of the affairs of said partnership, but your petitioner is informed and believes that said account does not exhibit a full, true, and particular statement of all the affairs, property, effects, and assets of said partnership, and of such surviving partner's dealings therewith; that it does not show the true value and condition of decedent's interest at and subsequent to the time of his death; and that it does not contain a full and true statement of all moneys due and owing to petitioner as administrator, or executor, of said estate." 7-11. Or, executor.

§ 630. Form. Alternative order that surviving partner account to administrator, or show cause.

[Title of court.]

[Title of estate.] (No. —¹ Dept. No. —
} [Title of form.]

It being shown by the application of —, administrator ² of the estate of —, deceased, filed herein, that —, the surviving partner of said deceased, has delayed,

and is delaying, settlement of the partnership affairs, and neglects and refuses to render an account to said administrator,³ —

It is ordered, That —, the said surviving partner, be cited to render an account of the partnership existing at the time of the death of said deceased, and to file the same herein⁴ within —⁵ days from this date, or show cause, within that time, why he should not account.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, executor of the last will, etc. 3. Or, executor. 4. Or, render to, and serve the same upon, the administrator, or executor. 5. As fixed by the court.

§ 631. Form. Order for attachment to compel surviving partner to render an account.

[Title of court.]

[Title of estate.]

{ No. —¹ Dept. No. —
[Title of form.]

It appearing to the court that —, surviving partner of deceased, has neglected to make settlement of the partnership affairs, and to account with the administrator² of said estate; that a citation has been issued requiring the said — to appear and show cause why an attachment should not issue to compel him to render an account of the affairs of the partnership existing between him and the deceased at the time of the latter's death; that said citation has been served and returned in the form and manner provided by law; and that the said — has failed to appear and render said account, or to show cause why an attachment should not issue as directed in said citation, —

It is ordered, That a warrant of attachment issue, and that said — be arrested and brought before this court to show cause why he should not be committed for contempt of court in disobeying said citation.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, executor.

§ 632. Action on bond of one administrator may be brought by another. An administrator may, in his own name, for

the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor, or of any former administrator of the same estate. **Kerr's Cyc. Code Civ. Proc.**, § 1586.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 788, p. 308.
- Arizona.*** Rev. Stats. 1901, par. 1830.
- Colorado.** 3 Mills's Ann. Stats., sec. 4731.
- Idaho.*** Code Civ. Proc. 1901, sec. 4217.
- Montana.*** Code Civ. Proc., sec. 2735.
- Nevada.** Comp. Laws, sec. 2955.
- New Mexico.** Laws 1907, sec. 10, p. 159.
- North Dakota.** Rev. Codes 1905, § 8164.
- Oklahoma.*** Rev. Stats. 1903, sec. 1696.
- South Dakota.*** Probate Code 1904, § 247.
- Utah.*** Rev. Stats. 1898, sec. 3919.
- Washington.*** Pierce's Code, § 2620.
- Wyoming.*** Rev. Stats. 1899, sec. 4700.

§ 633. **What executors are not parties to actions.** In actions by or against executors, it is not necessary to join those as parties to whom letters were issued, but who have not qualified. **Kerr's Cyc. Code Civ. Proc.**, § 1587.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1831.
- Idaho.*** Code Civ. Proc. 1901, sec. 4218.
- Montana.*** Code Civ. Proc., sec. 2736.
- Nevada.** Comp. Laws, sec. 2956.
- Oklahoma.*** Rev. Stats. 1903, sec. 1697.
- South Dakota.*** Probate Code 1904, § 248.
- Utah.** Rev. Stats. 1898, sec. 3920.
- Wyoming.*** Rev. Stats. 1899, sec. 4701.

§ 634. **May compound.** Whenever a debtor of the decedent is unable to pay all his debts, the executor or administrator, with the approbation of the court, or a judge thereof, may compound with him and give him a discharge, upon receiving a fair and just dividend of his effects. A compromise may also be authorized when it appears to be just, and for the best interest of the estate. **Kerr's Cyc. Code Civ. Proc.**, § 1588.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 871, p. 324.
Arizona.* Rev. Stats. 1901, par. 1832.
Colorado. 3 Mills's Ann. Stats., sec. 4742.
Idaho.* Code Civ. Proc. 1901, sec. 4219.
Kansas. Gen. Stats. 1905, §§ 2937, 2942.
Montana.* Code Civ. Proc., sec. 2737.
Nevada.* Comp. Laws, sec. 2957.
North Dakota. Rev. Codes 1905, § 8176.
Oklahoma.* Rev. Stats. 1903, sec. 1698.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1211.
South Dakota.* Probate Code 1904, § 249.
Utah.* Rev. Stats. 1898, sec. 3921.
Washington. Pierce's Code, § 2621.
Wyoming.* Rev. Stats. 1899, sec. 4702.

§ 635. Form. Petition for authority to compromise debt.

[Title of court.]

[Title of estate.]

{	No. ____ ¹	Dept. No. ____
	[Title of form.]	

To the Honorable the ____² Court of the County³ of ____,
 State of ____.

The undersigned, your petitioner, respectfully represents:

That he is the duly appointed, qualified, and acting administrator⁴ of the estate of ____, deceased;

That there is owing from ____ a debt to said estate, of the sum of ____ dollars (\$____), which debt was appraised at said amount in the inventory and appraisement on file herein;

That said debtor declines to pay said debt in full, but does offer to pay ____⁵ thereof in liquidation of the whole demand; that, in view of all the circumstances that would surround the enforcement of such demand, the said offer appears to be just; and that it is for the best interest of said estate that such offer be accepted.

Your petitioner therefore prays that he may be authorized to compromise said debt by accepting the said amount in liquidation of the whole sum due.

____, Attorney for Petitioner. ____, Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4. Or, executor. 5. State what part or percentage.

§ 636. Form. Order approving administrator's agreement to compromise with debtor.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

It being shown to this court² by ____, administrator³ of the estate of ____, deceased, that there is owing from ____ a debt to said estate, of the sum of ____ dollars (\$____), which debt was appraised at said amount in the inventory and appraisement on file herein; that said debtor is unable to pay all his debts; that he has made an assignment of all his property, in manner and form provided by law, for the benefit of creditors; that said administrator⁴ has accepted a payment of ____ dollars (\$____) in satisfaction of said debt due said estate; that other creditors of the said ____ have agreed to accept a like amount in satisfaction of their respective demands; and that it is not probable that any greater amount can be obtained on said debt, due the estate from said ____, as aforesaid, —

The court hereby approves of the aforesaid compounding of said debt, and orders that the said ____, as administrator⁵ of said estate, give the said ____ a discharge in full of said debt.

Dated ____, 19____, ____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2. Or, to the judge of this court. 3-5. Or, executor.

§ 637. Recovery of property fraudulently disposed of by testator. When there is a deficiency of assets in the hands of an executor or administrator, and when the decedent, in his lifetime, has conveyed any real estate, or any rights or interests therein, with intent to defraud his creditors, or to avoid any right, debt, or duty of any person, or has so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same; and may recover for the benefit of the creditor all such real estate so fraudulently conveyed;

and may also, for the benefit of the creditors, sue and recover all goods, chattels, rights, or credits which have been so conveyed by the decedent in his lifetime, whatever may have been the manner of such fraudulent conveyance. **Kerr's Cyc. Code Civ. Proc.**, § 1589.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, secs. 856, 857, p. 321.
- Arizona.*** Rev. Stats. 1901, par. 1833.
- Colorado.** 3 Mills's Ann. Stats., sec. 4731.
- Idaho.*** Code Civ. Proc. 1901, sec. 4220.
- Montana.*** Code Civ. Proc., sec. 2738.
- Nevada.** Comp. Laws, sec. 2958.
- North Dakota.*** Rev. Codes 1905, § 8173.
- Oklahoma.*** Rev. Stats. 1903, sec. 1699.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., §§ 1196, 1197.
- South Dakota.*** Probate Code 1904, § 250.
- Utah.*** Rev. Stats. 1898, sec. 3922.
- Washington.*** Pierce's Code, § 2622.
- Wyoming.*** Rev. Stats. 1899, sec. 4703.

§ 638. When executor to sue, as provided in preceding section. No executor or administrator is bound to sue for such estate, as mentioned in the preceding section, for the benefit of the creditors, unless on application of creditors, who must pay such part of the costs and expenses of the suit, or give such security to the executor or administrator therefor, as the court, or a judge thereof, shall direct. **Kerr's Cyc. Code Civ. Proc.**, § 1590.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, secs. 856, 857, p. 321.
- Arizona.*** Rev. Stats. 1901, par. 1834.
- Idaho.*** Code Civ. Proc. 1901, sec. 4221.
- Montana.*** Code Civ. Proc., sec. 2739.
- Nevada.** Comp. Laws, sec. 2959.
- North Dakota.*** Rev. Codes 1905, § 8174.
- Oklahoma.*** Rev. Stats. 1903, sec. 1700.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., §§ 1196, 1197.
- South Dakota.*** Probate Code 1904, § 251.
- Utah.*** Rev. Stats. 1898, sec. 3923.
- Washington.*** Pierce's Code, § 2623.
- Wyoming.*** Rev. Stats. 1899, sec. 4704.

§ 639. Form. Creditors' application that suit be brought to recover property fraudulently disposed of by decedent.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

This, the application of the undersigned, respectfully shows:

That they are creditors of said estate; that their respective claims have been duly presented, allowed, approved, and filed; and that the aggregate amount of said claims is ____ dollars (\$____);

That there is a deficiency of assets in the hands of the administrator² of said estate to pay the claims of applicants, as is shown by a copy of the inventory and appraisement on file herein, marked "Exhibit A," and by a copy of the account of the administrator³ of said estate filed herein, marked "Exhibit B," which said copies and exhibits are hereby referred to, and made a part of this application, the same as if the originals of said papers were incorporated herein;

That decedent, in his lifetime, was possessed of the following described real estate, particularly described as follows, to wit, ____; and also of certain goods and chattels, particularly described as follows, to wit, ____;

That said decedent, in his lifetime, to wit, on the ____ day of ____, 19__, conveyed all of the property hereinbefore described to ____; and your applicants are informed and believe, and therefore allege the fact to be, that said conveyance was made by the said ____, now deceased, with intent to defraud his creditors; and that said conveyance was accepted by the said ____⁴ wilfully, knowingly, and fraudulently, and with intent, both on the part of the grantor and of the grantee, to defraud the creditors of ____, now deceased, and to hinder and delay said creditors from collecting the amounts justly due them;

That, in law and in equity, said property should now be in the hands of the administrator⁵ of said deceased, to be applied toward payment of the debts aforesaid;

That said applicants have requested said administrator⁶ to sue for the property hereinbefore described for the benefit of creditors of said estate, and have offered, and now offer, to pay such part of the costs and expenses of such suit, or to give security to the administrator⁷ therefor, as this court shall direct, but that said administrator⁸ has wholly neglected and refused, and now neglects and refuses, to bring such suit.

Said applicants therefore pray that a citation issue to said administrator,⁹ requiring him to show cause why he should not bring said suit upon payment by applicants of costs as aforesaid, or giving security therefor.

____ } Applicants.
 _____ }

____, Attorney for Applicants.

Exhibit A.

[Give copy of inventory and appraisalment.]

Exhibit B.

[Give copy of administrator's account.]

Explanatory notes. 1. Give file number. 2, 3. Or, executor.
 4. Grantee. 5-9. Or, executor.

§ 640. Form. Order that administrator bring suit to recover property fraudulently disposed of by decedent.

[Title of court.]

[Title of estate.]

{ No. ____.¹ Dept. No. ____
 [Title of form.]

It appearing from the application of ____ and ____, filed herein, that said decedent, in his lifetime, fraudulently disposed of certain property, hereinafter described, with intent to defraud his creditors, and that said ____ and ____ have heretofore applied to the said administrator² to bring suit to recover said property for the benefit of creditors of said estate, but that said administrator³ has neglected and refused, and still neglects and refuses, to do so; and it further appearing that a citation has issued to said administrator⁴ requiring him to show cause why he should not bring

such suit, and the matter now coming regularly on for hearing at the time and place appointed in said citation to show cause, —

The court proceeds to hear the proofs adduced, and, after such hearing, finds that said citation was served and returned as required by law; that said applicants are creditors of the estate of said deceased; that the assets in the hands of said administrator⁵ are not sufficient to pay the debts due to said applicants; and that the allegations of said application as to the fraudulent disposition of said property by decedent are true.

It is therefore ordered, That said administrator⁶ forthwith institute suit to recover said property, and that he prosecute the same to final decree.

It is further ordered, That said applicants give to said administrator⁷ a bond, to be approved by this court,⁸ in the sum of _____ dollars (\$_____), conditioned that they will, from time to time, pay to said administrator,⁹ on his demand, a sum sufficient to pay the costs and expenses of such suit, and save said administrator¹⁰ and said estate harmless from all expense by reason of said suit; and that, in the event of a recovery of said property, said administrator¹¹ will refund to said applicants, out of the property so recovered, all costs and expenses of suit, which may have been paid by them.

The property hereinbefore referred to, and which the said administrator¹² is ordered to bring suit to recover, is particularly described as follows, to wit: _____.¹³

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2-7. Or, executor. 8. Or, a judge thereof. 9-12. Or, executor. 13. Give description.

§ 641. **Disposition of estate recovered.** All real estate so recovered must be sold for the payment of debts, in the same manner as if the decedent had died seised thereof, upon obtaining an order therefor from the court; and the proceeds of all goods, chattels, rights, and credits so recovered must be appropriated in payment of the debts of the dece-

dent in the same manner as other property in the hands of the executor or administrator. The remainder of the proceeds, after all the debts of the decedent have been paid, must be paid to the person from whom such property was recovered. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 501), § 1591.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 858, p. 321.

Arizona. Rev. Stats. 1901, par. 1835.

Idaho. Code Civ. Proc. 1901, sec. 4222.

Montana. Code Civ. Proc., sec. 2740.

Nevada. Comp. Laws, sec. 2960.

North Dakota. Rev. Codes 1905, § 8175.

Oklahoma. Rev. Stats. 1903, sec. 1701.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1198.

South Dakota. Probate Code 1904, § 252.

Utah. Rev. Stats. 1898, sec. 3924.

Washington. Pierce's Code, § 2624.

Wyoming. Rev. Stats. 1899, sec. 4705.

Note.—At first blush the last sentence of this section seems to place a premium upon fraud; and one might be inclined, without due consideration, to imagine that the section is unconstitutional, on the ground that it takes the property of the heirs without due process of law, that is, without giving them their day in court.

But a man may do what he will with his own property, and, unless his heirs take by will or the law of succession, they have no interest in it, and they cannot take in either way where the ancestor has conveyed it. If the conveyance was fraudulent, it could be fraudulent only as to creditors, for no one else was, at the time, interested. And it is only the executor or administrator, who can attack the deed as fraudulent, and even this must be for the benefit of the creditors. No other person is authorized to sue. As said in *Campbell v. Whitson*, 68 Ill. 240; 18 Am. Rep. 553: "It is well settled and familiar doctrine, that, although voluntary conveyances are or may be void, as to existing creditors, yet they are valid and effectual as between the parties, and cannot be set aside by the grantor if he should become dissatisfied with the transaction; the law regards it as his own folly to have made such a conveyance, and leaves him to bear the consequences without means of redress. 'They are,' says Story, 'not only valid as to the grantor, but also as to his heirs, and all other persons claiming under him in privity of the estate with notice of the fraud. A conveyance of this sort (it has been said

with great truth and force), is void only as against creditors, and then only to the extent in which it may be necessary to deal with the conveyed estate for their satisfaction. To this extent, and to this only, it is treated as if it had not been made. To every other purpose it is good. Satisfy the creditors, and the conveyance stands: 1 Story's Eq. Jur., § 371, and cases cited in notes."

If a grantor, since deceased, conveyed his property in fraud of creditors, and the assignee of money demands against his estate brings suit to have the deed declared fraudulent as against the plaintiff "the judgment", said McFarland, J., in *Emmons v. Barton*, 109 Cal. 662, 668, "should be that the property fraudulently conveyed, or so much thereof as is necessary, be applied to the satisfaction of the debts, and that the residue, if any, go to the grantee. It is not to go into the assets of the estate for any purpose other than the payment of the debts. The residue does not go to the heir; for he stands in the shoes of the fraudulent grantor." See, also, *Tully v. Tully*, 137 Cal. 60, 66; *Burtch v. Elliott*, 3 Ind. 99, 101; showing that the residue after satisfying creditors, goes to the grantee or the latter's heirs. Where the invalidity of a mortgage has been established, as to creditors, the surplus, if any, may be paid to the mortgagee: *Fleischner v. First Nat. Bank*, 36 Or. 553; 61 Pac. Rep. 345, 346. In case of a gift fraudulent as to creditors, the surplus, upon settlement of the donor's estate, goes to the donee, not to the heirs: *Abbott v. Tenney*, 18 N. H. 109, 114; *Williams v. Avent*, 40 N. C. 47. A conveyance, though fraudulent as to creditors, passes title to the grantee against all except such creditors: *Mellen v. Ames*, 39 Iowa 283, 286.

§ 642. Pending settlement, court may order moneys to be invested. Pending the settlement of any estate, on the petition of any person interested therein, and upon good cause shown therefor, the court may order any moneys in the hands of the executors or administrators to be invested for the benefit of the estate in securities of the United States or of this state. Such order can only be made after publication of notice of the petition for not less than ten days in some newspaper, to be designated by the court or a judge thereof. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 501), § 1592.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1874.

Colorado. 3 Mills's Ann. Stats., sec. 4728.

Idaho. Code Civ. Proc. 1901, sec. 4223.

Montana. Code Civ. Proc., sec. 2798.

North Dakota. Rev. Codes 1905, § 8202.

Oklahoma. Rev. Stats. 1903, sec. 1738.

South Dakota. Probate Code 1904, § 290.

Utah. Rev. Stats. 1898, sec. 3925.

§ 643. Form. Petition for leave to invest moneys of estate in United States bonds.

[Title of court.]

[Title of estate.]

{ Department No. ____
[Title of form.]

To the Honorable the ____¹ Court of the County² of ____,
State of ____.

The petition of ____ and ____, executors of the last will and testament of ____, deceased, respectfully represents:

That said executors now have on deposit in the ____, a commercial bank of said county,³ over forty thousand dollars (\$40,000) of the moneys belonging to said estate; that said moneys are not drawing any interest, nor producing any revenue or income to said estate; that all of said moneys are not required for the ordinary expenses and disbursements of said estate, and that said executors deem it for the best interest of said estate that, pending the settlement thereof, the sum of thirty-five thousand dollars (\$35,000), or thereabouts, or such other sum as may be advised, be invested for the benefit of said estate, in bonds of the government of the United States, pursuant to ____.⁴

Wherefore the said executors pray that, upon the filing of this petition, an order be made fixing a day for the hearing thereof, and for the publication of notice thereof for not less than ten (10) days in some newspaper to be designated in said order by the court, or a judge thereof; and that after such hearing the court make an order authorizing said executors to invest said sum of thirty-five thousand dollars (\$35,000), or such other sum as this honorable court may determine upon, for the benefit of said estate, in bonds of the government of the United States, pending the settlement

of said estate; and that such other and further order be made in the premises as is meet and proper.

Dated —, 19—. —, Executor.

—, Executor.

—, Attorney for Executor —.⁵

—, Attorney for Executor —.⁶

Explanatory notes. 1. Title of court. 2, 3. Or, city and county. 4. Section of code authorizing such investment. 5, 6. Give names, where two or more executors are represented by different attorneys.

§ 644. Form. Order directing publication of notice of petition for leave to invest.

[Title of court.]

[Title of estate.] { No. —.¹ Dept. No. —
[Title of form.]

— and —, executors of the last will and testament of —, deceased, having this day filed their petition for an order authorizing them to invest moneys of the above-entitled estate in bonds of the government of the United States, and good cause appearing therefor, —

It is hereby ordered, That notice of such petition be given by publishing said petition in the —, a daily newspaper published in the county² of —, state of —, for — days previous to the hearing thereof.

—, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, city and county.

§ 645. Form. Notice of hearing of petition for leave to invest moneys of estate.

[Title of court.]

[Title of estate.] { No. —.¹ Dept. No. —
[Title of form.]

— and —, executors of the last will and testament of —, deceased, having this day filed their petition for an order authorizing them to invest moneys of the above-entitled estate in bonds of the government of the United States, —

The hearing of said petition is hereby set for —, 19—, at the court-room of said court,² at the hour of —

o'clock in the forenoon³ of said day, at which time and place objections, if any, may be interposed to the making of such order.

Dated —, 19—.

[Seal] —, Judge of the — Court.⁴

Explanatory notes. 1. Give file number. 2. State location of court-room. 3. Or, afternoon. 4. Or, clerk of the court.

§ 646. Form. Order directing investment of moneys of estate in United States bonds.

[Title of court.]

[Title of estate.]

{ No. —¹ Dept. No. —
[Title of form.]

Now come — and —, executors of the last will and testament of —, deceased, and show to the court that on the — day of —, 19—, they filed a petition for an order authorizing them to invest moneys of the above-entitled estate in bonds of the government of the United States; that publication of notice of such petition has been made as required by law and the order of this court; and that due and legal notice of the time and place of the hearing of said petition has been given; and it appearing that there is a large amount of money, to wit, the sum of — dollars (\$—), now on deposit in the — bank of this county,² which is not drawing any interest; and that it will be for the benefit of such estate that such money be invested in bonds of the government of the United States, —

It is therefore ordered, That said money be invested in —³ bonds of the United States.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, city and county. 3. Designate the kind of bonds; as, three-per-cent, etc.

POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS. ACTIONS. MANAGEMENT OF ESTATES. PARTNERSHIP ESTATES.

I. Powers and Duties of Executors and Administrators.

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| 1. Title to property. | (8) Not to purchase estate. |
| 2. Become trustees when. | (9) Cannot do what. |
| 3. Executors de son tort. | (10) With respect to leases and mortgages. |
| 4. Duties of executors and administrators. | (11) Cannot litigate what claims. |
| 5. Power of executors and administrators. | (12) In judicial proceedings. |
| | 6. Joint administrators and co-executors. |
| (1) In general. | (1) In general. |
| (2) To dispose of personal property. | (2) Obligations and Liability. Bond. |
| (3) To compound or compromise, in general. | (3) Same. Foundation of liability. |
| (4) Same. Restrictions. Approval of court. | 7. Foreign and ancillary administration. |
| (5) Same. Distinction. | (1) Foreign administration. |
| (6) To bind estate. | (2) Same. Ancillary administration. |
| (7) Not to purchase claims against estate. | |

II. Actions by Executors or Administrators.

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|---|---|
| 1. In general. | 20. Gifts. |
| 2. Abatement. Discontinuance. | 21. For injunction. |
| 3. Parties. | 22. For life insurance, and sick bene- |
| 4. By ancillary administrators. | 1:3. |
| 5. By foreign executors. | 23. On mortgages. |
| 6. Executor or administrator as representative. | 24. Partition. |
| 7. By a co-executor. | 25. To quiet title, or to determine adverse claims. |
| 8. Substitution. Revival of action. | 26. Replevin. |
| 9. Pleading. | 27. To set aside fraudulent conveyances. |
| 10. Evidence. | (1) In general. |
| 11. Judgment. | (2) May be brought by special administrator when. |
| 12. Costs. | (3) May be brought by creditor when. |
| 13. On contracts. | (4) Elements necessary to maintain. |
| 14. Conversion. | |
| (1) In general. | 28. Set-off and counterclaim. |
| (2) What is a conversion. | 29. For trespass on land. |
| (3) Suits in individual capacity. | 30. Unlawful detainer. |
| (4) Action must fail when. | 31. Limitation of actions. |
| 15. For damages in causing death. | 32. Termination of right to sue. |
| 16. Ejectment. | |
| 17. To enforce trusts. | |
| 18. To recover excessive fees charged. | |
| 19. On foreign judgments. | |

III. Actions against Executors or Administrators.

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| 1. In general. | 14. Ejectment. |
| 2. Parties. | 15. Eminent domain. |
| 3. By distributees. | 16. To enforce trust. |
| 4. Against foreign executor or administrator. | (1) In general. |
| 5. Pleadings. | (2) Presentation of claims. |
| 6. Evidence. Stipulations. | (3) Action by creditors. |
| 7. Judgments. | (4) Collateral attack. |
| (1) In general. | 17. For fraud. |
| (2) Must be payable in course of administration. | 18. On mortgages. |
| (3) Foreign judgments. | 19. To quiet title. |
| (4) Void if made after termination of office. | 20. Replevin. |
| 8. Costs. | 21. For torts. |
| 9. Actions on accounts. | (1) Acts done by the executor or administrator. |
| 10. Attachment. | (2) Acts commenced before decedent's death. |
| 11. Suits on contracts. | 22. Unlawful detainer. |
| (1) On contracts by decedent. | 23. To vacate sale. |
| (2) On contracts by executor or administrator. | 24. For waste. |
| 12. For conversion. | 25. On street assessments. |
| 13. To recover deposit on void sale. | 26. Limitation of actions. |
| | 27. Appeals. |

IV. Management of Estates.

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| 1. In general. | 9. Continuing business of decedent. |
| 2. Discovery of assets. | (1) In general. |
| 3. Advances by administrator. | (2) Exception to the rule. |
| 4. Making improvements. | (3) Individual liability. |
| 5. Investment of funds. | (4) Liability created by court. |
| 6. Effect of chattel mortgage. | (5) Administrator's report and account. |
| 7. Paying off liens. Redemption. | 10. Advice and instructions. |
| 8. Other questions relating to mortgages. | |

V. Estates where Partnership Existed.

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| 1. Interest of deceased partner. Assets of estate. | 7. Surviving partner. Rights and powers. |
| 2. Presentation of claims. | 8. Surviving partner. Settlement of partnership affairs. |
| 3. Jurisdiction. Probate court. Equity. | 9. Surviving partner. Completion of executory contracts. |
| 4. Bequest of interest in firm. Payment of partnership debts. | 10. Surviving partner. Accounting. |
| 5. Authority of executor or administrator. | (1) In general. |
| 6. Surviving partner as executor or administrator. | (2) Court may compel accounting. |
| | (3) Actions for accounting. |

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| 11. Accounts of executors may be settled, regardless of order. | (2) Actions by or against executors or administrators. |
| 12. Actions by or against surviving partners, and by or against executors or administrators. | 13. Purchase of deceased partner's interest. |
| (1) Actions by or against surviving partners. | 14. New partnership. Carrying on decedent's business. |
| | 15. Conveyances by one partner to another. Death before payment. |

I. POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS.

1. **Title to property.** At common law, the legal title to all personal property of the deceased is vested in the executor or administrator, with absolute power to dispose of it: *Weider v. Osborn*, 20 Or. 307; 25 Pac. Rep. 715. The real estate descends directly to the heirs of the deceased, subject to the payment of the debts of the deceased. The administrator has no title or interest in the real estate, except the rents thereof, and then only when it becomes necessary to have recourse to the real estate to pay the debts of the deceased: *Adams v. Slattery* (Col.), 85 Pac. Rep. 87, 88. The right of possession of pre-empted land to which the title is inchoate, passes, on the death of the pre-emptor to his administrator: *Burch v. McDaniel*, 2 Wash. Ter. 58; 3 Pac. Rep. 586.

2. **Become trustees when.** In a general sense, every executor is a trustee for the legatees and next of kin: *In re Roach's Estate* (Or.), 92 Pac. Rep. 118, 121. One who qualifies as trustee under a will becomes the trustee of an express trust: *Fox v. Tay*, 89 Cal. 339, 349; 23 Am. St. Rep. 474; 24 Pac. Rep. 855; 26 Pac. Rep. 897. If an administrator, by false representations, procures the heir of his estate to convey to him all of the heir's interest in the estate, the administrator becomes an involuntary trustee of the property conveyed for the benefit of the heir, though such representations were not made with a fraudulent intent: *Wingerter v. Wingerter*, 71 Cal. 105; 11 Pac. Rep. 853, 855. If an executor or administrator purchases real property from the funds of the estate in his hands, a trust in the property results to the heirs, though the representative added funds of his own to the purchase-money: *Merket v. Smith*, 33 Kan. 66; 5 Pac. Rep. 394, 396. And an administrator who becomes a trustee cannot defeat heirs by afterwards becoming a guardian: *Merket v. Smith*, 33 Kan. 66; 5 Pac. Rep. 394, 396. The right of possession of pre-empted land, acquired by an administrator, is subject to a trust which requires the administrator to proceed to effect title in favor of the heirs, provided there are heirs, and the estate is in such a condition as to enable him to do so, and the interest of the heirs, all things considered, so demand: *Burch v. McDaniel*, 2 Wash. Ter. 58; 3 Pac. Rep. 586, 588.

3. **Executors de son tort.** There is no such office recognized under the probate practice of California as an executor de son tort: *Bowdon v. Pierce*, 73 Cal. 459, 463; 14 Pac. Rep. 302; 15 Pac. Rep. 64. Such an executor was regarded by the common law as an intermeddler and a wrongdoer. He had no rights, but there is no doubt that his acts, for some purposes, were regarded as valid: *De la Guerra v. Packard*, 17 Cal. 182, 192. It was formerly considered that if an individual interfered with the property of the deceased, he thereby made himself an executor in his own wrong, or, as it is generally termed, an executor de son tort. This rule has long been modified, if not abolished, by the statute; and whoever intermeddles with an estate, without rightful authority so to do, is answerable to the rightful executor or administrator. The statutory change, however, produced some important consequences. It takes away the remedy the creditor before had to charge the intermeddler as an executor de son tort. He can no longer proceed against him in that character, but must procure the appointment of an administrator, and have suit instituted in his name to recover the property from such person, who has converted it to his own use. In a word, he is merely sent to the rightful representative of the estate, and cannot pursue his action against an executor de son tort. The rightful executor or administrator is constituted the trustee of the assets of the deceased, whose duty it is to receive and hold them in his hands as a fund to be disposed of in the best manner for the benefit of creditors. The person who intermeddles with the goods of the deceased, is now answerable only to the rightful executor or administrator, in an action brought by the representative. The fiction of office may be gone, but the unauthorized act of intermeddling remains to be dealt with judicially, according to the principles of right and justice as applied by the law in such a case: *Rutherford v. Thompson*, 14 Or. 236; 12 Pac. Rep. 382, 383. Under our system, there is probably no such thing as an executor de son tort; at all events, no man can be executor de son tort in regard to land: *Pryor v. Downey*, 50 Cal. 388, 399; 19 Am. Rep. 656.

REFERENCES.

Executors de son tort: See notes 98 Am. St. Rep. 190-205; 85 Am. Dec. 423-427; 17 Am. Dec. 561-562.

4. **Duties of executors and administrators.** An executor or administrator, while he must act in the utmost good faith, and must strictly perform his official duties, is bound to perform only such duties as are imposed upon him by statute: *Royce v. Hampton*, 16 Nev. 25; but he is presumed to have done his duty until the contrary appears: *Territory v. Mix*, 1 Ariz. 52. An executor or administrator is not clothed, under the statute, with discretion in any case to determine whether or not it is necessary and proper that he should take posses-

sion of the real estate. It is his duty to take charge of the entire estate of the deceased: *Balch v. Smith*, 4 Wash. 497; 30 Pac. Rep. 648, 650. The measure of an administrator's duty is to act with fidelity and with that degree of prudence and diligence which a man of ordinary judgment would be expected to bestow upon his own affairs of a like nature: *Elizalde v. Murphy*, 4 Cal. App. 114, 117; 87 Pac. Rep. 245, 246; and it is his duty to settle and to distribute the estate with as little delay as possible: *McNabb v. Wixom*, 7 Nev. 163, 171. The duties of an executor or administrator are active, and not passive. He cannot be permitted to neglect those things which are plainly required at his hands, by law or the order of the court, and when complaint is made of such neglect, excuse himself by alleging that such delay or omission was for the benefit of the estate: *In re Holladay's Estate*, 18 Or. 168; 22 Pac. Rep. 750. The duties of the executor are to preserve the estate, pay the indebtedness of the deceased, the charges of administration, and to put the estate in such condition that distribution may be had to those entitled to it under the will; and they have no right to go outside of their duties: *Estate of Willey*, 140 Cal. 238, 241; 73 Pac. Rep. 998; *O'Neile v. Ternes*, 32 Wash. 528; 73 Pac. Rep. 692, 696. It is the duty of the executor to give the decedent a decent burial, and he cannot be absolutely limited in the performance of such duty by the provisions of a will: *Estate of Galland*, 92 Cal. 293, 295; 28 Pac. Rep. 287. Under the provisions of a will, directing that the body of the testator be buried in a certain cemetery, and that a monument be erected over the grave, the executor is obliged to erect a monument over the place of burial, though the body has been removed: *Estate of Kopikus*, 1 Cal. App. 84; 81 Pac. Rep. 732, 733. The doctrine that officers and directors of a corporation are trustees of the stockholders applies only in respect to their acts relating to the property or business of the corporation. It does not extend to their private dealings with stockholders or others, though in such dealings they take advantage of knowledge gained through their official position. Hence where corporate stock has been bequeathed, as a specific legacy, by the terms of a will, the legatee has the right to sell it to whomsoever he pleases, and the executor or administrator has the right to purchase it; and the executor is under no duty to give to the legatee information as to the value of corporate stock bequeathed to such legatee and bought by the executor: *O'Neile v. Ternes*, 32 Wash. 528; 73 Pac. Rep. 692, 696. If an executrix holds a mortgage on the estate, it is her duty to list her mortgage interest for assessment, and not to allow the land to be taxed in the same manner as if there were no mortgage thereon. The taxes consequently levied on that interest would therefore be her individual debt, and not the debt of the estate; and if the debt is greater than the value of the land, there can be no excess on which the estate could be taxed. The mortgage

debt would cover it all. Equity will regard that done which ought to have been done, and the matter must be adjusted by requiring her to bear the burden of the taxes which she should have paid, as fully as she would have borne it had she listed her mortgage interest for taxation, as she ought to have done: *Estate of McDougald*, 146 Cal. 196, 198; 79 Pac. Rep. 875. And it is her duty to pay taxes on the estate, though she is not in possession: *Stanford v. San Francisco*, 131 Cal. 34, 36; 63 Pac. Rep. 145. It is the duty of an executor to retain moneys received by him until they can be applied and distributed in the order and mode provided by law: *Magraw v. McGlynn*, 26 Cal. 420, 429.

REFERENCES.

Duty of executor or administrator to retain from his distributive share of estate the amount of his debt to the estate: See note 6 Am. & Eng. Ann. Cas. 810.

5. Power of executors and administrators.

(1) **In general.** Where the statute does not expressly require the administrator to personally sign the notice to creditors, he may authorize his attorney to sign it in his name and in his behalf: *Meikle v. Cloquet*, 44 Wash. 513; 87 Pac. Rep. 841, 843. One who is not qualified as an executor is free to make contracts with the executor or administrator, although they redound to his benefit: *Bowden v. Pierce*, 73 Cal. 459; 14 Pac. Rep. 302, 304. If an executrix is also a residuary devisee, and does not appear and contest a petition by legatees for partial distribution, except in her capacity as executrix only, she is as fully concluded, with respect to her rights as devisee in such proceeding, as are the other devisees. Her appearance as executrix gives her no standing to claim rights which she possesses solely as devisee. As such devisee, she must, under such circumstances, be considered as one who has suffered default: *Estate of Murphy*, 145 Cal. 464; 78 Pac. Rep. 960, 962. After the distribution of an estate, the persons appointed as executors have a discretion to increase an annuity out of the estate of the residuary legatee, where such discretion has been vested in the executors, although they have also been appointed guardians of the estate of the testator's minor child, a residuary legatee under the will: *Elmer v. Gray*, 73 Cal. 283; 14 Pac. Rep. 862. The code provides for an appeal from an order of revocation of the probate of a will and of letters testamentary, and therefore the statute keeps alive, ad interim, appellant's character as executor for the purposes of appeal. But, in all other respects, the powers and functions of the other executor are suspended when the revocation is entered: *Estate of Crozier*, 65 Cal. 332; 4 Pac. Rep. 109, 110. An agreement, by an administrator, to delay the collection of a debt due the estate for years, simply to see if a contingent right of set-off in the defendant,

which had not been presented as a claim, would become absolute, is unwarranted, and does not bind the heirs or those interested in enforcing collection of the debt: *Maddock v. Russell*, 109 Cal. 417, 424; 42 Pac. Rep. 139. A person nominated as executor by a will probated in the state of Utah, and appointed as such in that state, and afterwards appointed administrator with the will annexed in this state, represents said estate in both jurisdictions, and occupies the same position with reference to all controversies and suits by or against said estate, and in that respect, and to that extent, is the same person for both states: *Hilton v. Stewart* (Ida.), 96 Pac. Rep. 579. If the administrator of an estate desires to donate his fees for services as such to a third party, the execution and delivery of a written assignment thereof is a delivery of the property itself: *Luther v. Hunter*, 7 N. D. 544; 75 N. W. Rep. 916. An executor or administrator, if empowered by the will, may, after the distribution of an estate, increase the annuity of a residuary legatee: *Elmer v. Gray*, 73 Cal. 283, 284; 14 Pac. Rep. 862.

REFERENCES.

Administrators pendente lite: See note 6 Am. & Eng. Ann. Cas. 263. Appointment and powers of administrators de bonis non: See note 24 Am. Dec. 379-390. Care and skill required of executors and administrators: See note 12 Am. St. Rep. 311-316. Common-law powers of executors: See note 78 Am. St. Rep. 171-207. Powers and duties of ancillary administrators, and necessity for ancillary administration: See note 35 Am. Dec. 483-490. Power of executor or administrator to revive debts: See note 12 Am. Dec. 659-661. Power of executors: See note 55 Am. Dec. 436-439. Powers and duties of executors and administrators respecting property outside of the state: See note 45 Am. St. Rep. 664-674. Collateral attack on right of acting executor or administrator: See note 81 Am. St. Rep. 535-562. Letters of administration are void for want of jurisdiction when: See note 33 Am. Dec. 239-243.

(2) **To dispose of personal property.** At common law, the legal title to all personal property of the estate vested in the executor or administrator, with absolute power to dispose of it, and, in the absence of fraud or collusion between him and the person to whom he transferred it, the creditors or next of kin could not follow it into the hands of the alienee. But, under the statutes of Oregon, the power is not conferred on the executor or administrator to sell or to dispose of visible, tangible personal property, except by an order of the probate court, either at public or private sale, as may be provided therein. The administrator's power of disposition, however, over his intestate's choses in action remains unaffected by legislation. An executor or administrator is, with respect to choses in

action, vested with power and authority to sell and to dispose of them by indorsement to another, or to a distributee, without an order of the probate court. Such transfer is valid, and passes the title, so as to enable the transferee or distributee to maintain an action thereon, and the payers or makers of them, in the absence of fraud or collusion between the administrator and the person to whom he transfers them, cannot abate the action on the ground of the want of authority to make such transfer: *Weider v. Osborn*, 20 Or. 307; 25 Pac. Rep. 715, 717. The right of possession of pre-empted land, to which the title is inchoate, passes, on the death of the pre-empter, to his administrator, subject to a trust requiring the administrator to proceed to perfect the title in favor of the heirs, provided there are any, but, aside from this trust, he is free to dispose of the possession to the best advantage of the estate: *Burch v. McDaniel*, 2 Wash. Ter. 58; 3 Pac. Rep. 586, 588.

REFERENCES.

Deposit of trust funds in bank by an executor or administrator:
See note 98 Am. St. Rep. 371-377.

(3) **To compound or compromise, in general.** Executors and administrators have the legal right to compound and discharge debts due to their testator or intestate: *Moulton v. Holmes*, 57 Cal. 337, 343; *Estate of Dunne*, 58 Cal. 543; *Denney v. Parker*, 10 Wash. 218; 38 Pac. Rep. 1018; *Estate of Irvine*, 102 Cal. 606; 36 Pac. Rep. 1013. The authorities are to the effect that an administrator has authority to compound or compromise with a debtor of his decedent when it is to the interest of the estate, irrespective of any statutory power conferred upon him: *Mulville v. Pacific Mut. L. Ins. Co.*, 19 Mont. 95; 47 Pac. Rep. 650, 652. This right exists independently of the statute, the object of which is to afford executors and administrators additional protection, when acting in good faith in the exercise of their common-law powers. Although they may compromise a claim or compound a debt without the aid of the statute, still they may perhaps be held answerable for any serious error in judgment in so doing. The statute enables them to obtain the sanction of the judgment of the probate court in addition to their own, and thus affords them additional protection, if their conduct is fair and honest: *Moulton v. Holmes*, 57 Cal. 337, 344. Such a power belongs to all trustees for the benefit of the trust estate, and they have the right to assume the responsibility of judging of the necessity for its exercise. The circumstances which may render it necessary are presumably better known to them than to any one else. Executors and administrators have therefore never been required to obtain preliminary authority for that purpose from the probate court, although the judgment must be ultimately approved by the court, when they come to render an account of their trust: *Moulton v. Holmes*, 57 Cal. 337, 343. Con-

ceding that executors and administrators have the legal right to compromise and discharge debts due the estates which they represent without the approbation of the court, or a judge thereof, when it appears to them to be just and for the best interest of the estate, still it has been held in California that a payment of a part of the amount due upon a money judgment under an agreement that it shall operate as a satisfaction in full will not discharge the judgment, and that an agreement to discharge a judgment for a sum less than the amount for which it was rendered is void. Hence an agreement on the part of an administratrix to accept a note to take the place of and to be a substitute for a judgment, where the amount of the note is for a sum less than the amount for which the judgment was rendered, and where the attempted compromise was never authorized or approved by the probate court, or a judge thereof, is null and void, especially where the note was executed without any special consideration therefor: *Siddall v. Clark*, 89 Cal. 321, 323; 26 Pac. Rep. 829. Where an executor claims that certain money is an asset of the estate, and trustees claim that it is not, it is the duty of the executor to get it for the estate, and he has no right to compromise the claim of the estate by consenting that the trustees shall have the money, provided they shall pay the debts and expenses of administration out of it; and if he has been permitted to inventory the money as assets of the estate, and administer it as such, the executor cannot return the surplus to the trustees, as this would be to assume the responsibility of maintaining the title of the trustees against the estate, and the executor is not at liberty to assume such a position: *Estate of Burdick*, 112 Cal. 387, 392; 44 Pac. Rep. 734. At common law, the executor or administrator has an absolute power of disposal over the whole of the personal effects of the decedent, with full power to compromise or accept any composition, or otherwise settle any debt, claim, or thing whatsoever: *Olston v. Oregon etc. Ry. Co. (Or.)*, 96 Pac. Rep. 1095, 1096. In Oregon, the powers of an administrator, as to an unliquidated claim for damages, remain the same as at common law, and he may liquidate and accept settlement of such a claim without special authority from the county court: *Olston v. Oregon etc. Ry. Co. (Or.)*, 96 Pac. Rep. 1095, 1096.

REFERENCES.

Release of debt by one of several executors or administrators: See note 14 Am. Dec. 157, 158. Compromise or release by personal representative of claim due the estate: See note 14 L. R. A. 414-417.

(4) **Same. Restrictions. Approval of court.** An executor, without the advice of the court, has no right to make a compromise of a suit pending against the estate: *Lucich v. Medin*, 3 Nev. 93. Under the present statute of California, the right of an executor or adminis-

trator to compound with a debtor, and to give him a discharge, is subject to the approbation of the probate court, or a judge thereof: *Hartigan v. Southern Pac. Co.*, 86 Cal. 142, 144; 24 Pac. Rep. 851. In Kansas, the provisions of the statute are held to restrict the powers of administrators under the common law, and do not simply afford them additional protection in the exercise of those powers; and it is there held that no authority is given administrators to do anything in the way of compromising claims, debts, or demands belonging to the estate of an intestate, and accruing in the lifetime of such intestate, without the order or consent of the probate court: *Ætna Life Ins. Co. v. Swayze*, 30 Kan. 118; 1 Pac. Rep. 36, 38, 40. In that state, an administrator has no authority to accept less than the full amount of a demand in satisfaction thereof, where such demand accrued in the lifetime of his decedent, except by the consent of the probate court: *Van Dusen v. Topeka Woolen Mill Co.* (Kan.), 87 Pac. Rep. 74. In Nevada, an executor may pay money to compromise a suit pending against an estate; but he cannot lawfully make such payment without the previous consent of the probate court: *Lucich v. Medin*, 3 Nev. 93. An executor has authority, with the approval of the probate court, to compromise an action for damages for injuries resulting in the wrongful death of his testator: *Hartigan v. Southern Pac. Co.*, 86 Cal. 142, 144; 24 Pac. Rep. 851. In Montana, a public administrator, as well as a general administrator, may be authorized to compromise an action brought to recover the amount of an accident-insurance policy, when it is to the interest of the estate to do so: *Mulville v. Pacific Mut. L. Ins. Co.*, 19 Mont. 95; 47 Pac. Rep. 650, 652.

(5) **Same. Distinction.** In Washington, a distinction is drawn between the compromise of a claim out of court and the conduct of a litigated claim in court. The statutes of that state require the action of the representative of an estate, in compromising claims in favor of or against the estate, to be subject to the approval of the probate court, but it is said that, in the conduct of a litigated case in court, the representative is often called upon to act at once, and without any opportunity of consulting the probate court, and that his action, once taken, and acted upon by the court in which the action is pending, is generally beyond recall, should the probate court thereafter disapprove of the course taken; and that it must follow, from the very necessities of the case, that such representative has to act without consulting the probate court; that, under such circumstances, his action will be final without its approval; and that if, during the progress of the trial, an opportunity to compromise is offered, the representative should have power to act in reference thereto without the consent of the probate court. "It may well happen, in the conduct of the case, that a favorable compromise will be offered to the

representative of the estate; and to give it the benefit of the compromise, he must reject or accept it at once, and if he has not the power to act until he can consult with the probate court, the opportunity to accept the advantageous compromise may be entirely lost. The interests of the estate are necessarily committed almost entirely to the administrators, so far as they may be affected by issues joined in an action; and, within those issues, he should be given full power to adjust matters as between the estate and the other party to the action. By his neglect of the interests of the estate, in the prosecution or defense of the action, his rights could be lost beyond the power of the probate court to save them, and as its rights can be affected by the negative action of the administrator in the case, there is no reason why he should not have the right to effect them by his positive action as to such matter in litigation. Taking into consideration all of our statutes in reference to the settlement of an estate, we feel compelled to hold, in an action prosecuted in good faith by a representative thereof, that he has power to adjust its rights with the contending parties so far as they might be affected in the action, if prosecuted to judgment. And we can see no good reason for limiting such rights to cases not involving real estate. If the power to compromise exists, it should only be limited by the issues made by the pleadings": *Denney v. Parker*, 10 Wash. 218; 38 Pac. Rep. 1018, 1019.

(6) **To bind estate.** The rule is, that executors and administrators cannot, by virtue of their general powers as such, make any contract which will bind the estate and authorize a judgment *de bonis decedentis*: *Remwick v. Garland*, 1 Cal. App. 237, 238; 82 Pac. Rep. 89. But on contracts made by them on necessary matters relating to the estate, they are personally liable, and must see to it that they are reimbursed out of the assets: *Sterrett v. Barker*, 119 Cal. 492, 495; 51 Pac. Rep. 695, citing *Schouler on Executors and Administrators*, sec. 256; *Miller & Lux v. Gray*, 136 Cal. 261, 264; 68 Pac. Rep. 770. There are doubtless exceptions to this rule, such as funeral expenses, clerks' fees, etc.; but neither an executor nor an administrator can borrow money on the credit of the estate. He cannot, except when expressly authorized by the will or statute, create an obligation which will give a right of action against the estate: *Sterrett v. Barker*, 119 Cal. 492, 495; 51 Pac. Rep. 695; *Miller v. Gray*, 136 Cal. 261, 264; 68 Pac. Rep. 770. An executor or administrator cannot, without authority of the court, bind the estate by agreeing to delay the collection of a debt due the estate for a period of years in order to determine whether a contingent right of set-off shall become absolute, when such contingent right has not been presented or allowed as a claim against the estate: *Maddock v. Russell*, 109 Cal. 417, 424; 42 Pac. Rep. 139. Nor has he any authority to

pledge the personal property of the estate as surety for money borrowed by him for the purpose of paying debts against the estate: *Parks v. Mockenhaupt*, 133 Cal. 424, 425; 65 Pac. Rep. 875. Without any showing of authority by the will or otherwise, the executor of the estate of a deceased person will not be held authorized to bind the estate by a new contract for the completion of a building, for the erection of which the deceased had contracted, but the executor, being also an heir, and interested in the property, may bind himself personally by any contract he authorizes: *Lumber Co. v. Tomlinson*, sub nom. *Chicago Lumber Co. v. Tomlinson*, 54 Kan. 770; 39 Pac. Rep. 694. There is no privity between the administrator of one state and a foreign administrator; and an administrator has no authority to act or bind the estate outside of the jurisdiction of his own state: *Braithwaite v. Harvey*, 14 Mont. 208; 36 Pac. Rep. 38. The estate of a decedent is not answerable for a tort committed by an administrator or executor: *Sterrett v. Barker*, 119 Cal. 492, 494; 51 Pac. Rep. 695. Authority to an administrator to execute a trust deed does not authorize him to stipulate therein for the payment of an attorney's fee, in case such deed is foreclosed: *Pershing v. Wolfe*, 6 Col. App. 410; 40 Pac. Rep. 856, 860.

(7) **Not to purchase claims against estate.** The statute forbids an administrator from purchasing a claim against the estate he represents, but a mortgage lien is not a "claim" against the estate: *Fallon v. Butler*, 21 Cal. 24, 32; 81 Am. Dec. 140. Nor is the lien of a mechanic a "claim" against an estate: *Booth v. Pendola*, 88 Cal. 36, 44; 23 Pac. Rep. 200; 25 Pac. Rep. 1101. The term "claim," as used in the code, in reference to estates of deceased persons, has reference to such demands or debts against the decedent as existed, and, if due, might have been enforced against him in his lifetime by proper action. The liabilities of the administrator or executor, included in the management of the estate or in administering the trust, stand upon a different footing: *Stuttmeister v. Superior Court*, 72 Cal. 487, 489; 14 Pac. Rep. 35. If the executor or administrator, for the purpose of protecting the estate, advances money of his own to secure the transfer of a mortgage upon decedent's land, where he has no funds of the estate in his hands, and procures the assignment to be made either to himself or to a third party for the purpose of enabling him to protect the property from a sacrifice by foreclosure at suit of the mortgagee, he is acting within the line of his authority as representative, and his act is not to be construed as a "purchase" of the claim for his own benefit, in violation of the statute: *Burnett v. Lyford*, 93 Cal. 114, 118; 28 Pac. Rep. 855; *Estate of McDougald*, 146 Cal. 191, 192; 79 Pac. Rep. 878. The contract between an executrix and third persons, who have full knowledge of the facts, whereby such third persons are to purchase personal prop-

erty, at a probate sale thereof for the benefit of such executrix, she agreeing to advance the purchase price, and to guarantee the buyers against loss or damage and to give them possession of the goods until other security is furnished, and to pay them interest on the amount advanced, is an unlawful and void transaction, because it is in aid of an act expressly prohibited by law, and because it is contrary to the policy of express law, for the reason that it is indirectly a purchase by the executrix of the property of the estate she represented: *Jones v. Hanna*, 81 Cal. 507, 508, 509; 22 Pac. Rep. 883. In Nevada, the purchase, by an executor or an administrator, of a claim against the estate which he represents is not absolutely void. Hence if he purchases a mortgage in good faith, and with no design to injure the estate, the purchase will be sustained, where the estate has been benefited by the delay in foreclosure: *Furth v. Wyatt*, 17 Nev. 180; 30 Pac. Rep. 828, 829. A surety on an administrator's bond is not precluded from purchasing claims against the estate; and, when the estate is insolvent, and pays only a percentage of the claims against it, and when this percentage was received by such bondsman on a claim which he undertook to purchase, but did not in fact own, and an action is brought against him by the true owner for money had and received, the recovery must be limited to the amount actually received: *Luther v. Hunter*, 7 N. D. 544; 75 N. W. Rep. 916.

(8) **Not to purchase estate.** An executor or administrator of an estate of a deceased person has no authority to bid in for the estate, at execution sale, real or personal property levied upon to satisfy an execution issued upon a judgment in favor of the estate: *Sedgwick v. Sedgwick* (Cal.), 4 Pac. Rep. 570. A statute which expressly declares that no executor shall, directly or indirectly, purchase any property of the estate he represents, and which prohibits him from being interested in any sale, simply declares, in the case of executors and administrators, an already existing rule in equity, to wit, that contracts in which a trustee both buys and sells to himself are void. But a contract to purchase the interest of an heir in an estate by an executor does not come within the letter or spirit of either the statute or this equitable rule. The executor has no authority, as such, to sell the interest of an heir in the estate. Such interest is not, in any sense, property of the estate; it is the property of the heir, and he alone can sell it. Owing to the advantage that might be taken of heirs by executors or administrators, the court would, if it were called upon to pass upon such a sale, where the heir was claiming that he had been overreached or wronged, scrutinize the matter, and, if unfair in its terms, would not hesitate to set such contract aside, but not because it is in violation of the statute referred to. In other words, these sales by an heir to an executor are not within the statute at all. If they are fair in themselves, they

should be upheld, the same as other contracts: *Haight v. Pearson*, 11 Utah, 54; 39 Pac. Rep. 479, 480. After one has ceased to be an administrator, and the administration has been closed, he has a perfect right to purchase from the purchaser at a probate sale, and there is nothing on the face of the business that is irregular or improper: *Burris v. Adams*, 96 Cal. 664, 668; 31 Pac. Rep. 565.

(9) **Cannot do what.** An executor or administrator, being a representative of the estate, cannot represent a claimant against the estate: *In re Hobson's Estate* (Col.), 91 Pac. Rep. 929, 931. He has no power to receive, in full satisfaction of a judgment in favor of the estate, an amount less than that due thereon: *Siddall v. Clark*, 89 Cal. 321; 26 Pac. Rep. 829, 830. He has no power to relieve a bank, which is an involuntary trustee, of money belonging to the estate, from its trust relation to the estate: *First Nat. Bank v. Wakefield*, 148 Cal. 558; 83 Pac. Rep. 1076, 1077. He has no power to bind the heirs by consenting to the laying out of a highway across the estate, whereby such heirs are divested of their estate in the land: *Rush v. McDermott*, 50 Cal. 471, 473. He has no power to convey a part of the estate to an attorney as a contingent fee for his services in recovering it: *Estate of Page*, 57 Cal. 238, 241. He is not authorized to loan funds of the estate, as that, of itself, would be a breach of trust: *Estate of Clark*, 53 Cal. 355, 357. He is not authorized to extend the time of payments to the estate: *Maddock v. Russell*, 109 Cal. 417, 424; 42 Pac. Rep. 139. Whenever an executor or administrator undertakes to go beyond the strict line of his duty, he acts upon his own responsibility: *Estate of Rose*, 80 Cal. 166, 172; 22 Pac. Rep. 86; *Estate of Knight*, 12 Cal. 200, 208; 73 Am. Dec. 531. An executor or administrator cannot convey the estate he represents to pay his own debts. Such a conveyance would be a misappropriation and waste of the property of the estate: *Horton v. Jack*, 126 Cal. 521; 58 Pac. Rep. 1051. Executors or administrators are not authorized to erect a dwelling-house with the funds or assets of the estate to be occupied by one of them; nor can they involve the estate by borrowing money with which to pay for material and labor performed in the construction of such house: *Rolfson v. Cannon*, 3 Utah, 232; 2 Pac. Rep. 205. An executor or administrator cannot give a right of lien against the property he represents, without an order of court: *San Francisco Pav. Co. v. Fairfield*, 134 Cal. 220, 224; 66 Pac. Rep. 255; *Fish v. McCarthy*, 96 Cal. 484; 31 Am. St. Rep. 237; 31 Pac. Rep. 529; *Chappius v. Blankman*, 128 Cal. 362; 68 Pac. Rep. 925. An executor, not authorized by the will, cannot pay a mortgage indebtedness on property conveyed by the testator to another: *Estate of Wells* (Cal. App.), 94 Pac. Rep. 856, 858. An executor or administrator has no power to sign a petition for the opening of a street fronting the property of the estate he represents,

unless authorized by the law under which he is acting: *Kahn v. Board of Supervisors*, 79 Cal. 388, 398; 21 Pac. Rep. 849. An executor or administrator cannot, where the estate is insolvent, retain money thereof for a debt due to himself: *De la Guerra v. Packard*, 17 Cal. 182, 192. An executor cannot, in any case, litigate the claim of one legatee as against the others at the expense of the estate: *Estate of Marrey*, 65 Cal. 287; 3 Pac. Rep. 896.

(10) **With respect to leases and mortgages.** In Colorado, the lands of an intestate descend to the heirs, and not to the administrator. The title vests immediately in the heirs; and the administrator has no control over, or right, title, or interest in, the lands, except the power to harvest growing crops, and to lease, mortgage, or sell in certain contingencies, and under proper order of the court having probate jurisdiction. By special statute, he is empowered to take possession of, sue for, and recover the rents of real property belonging to the estate, but this statute does not give any further power or authority over, or in connection with, the realty, other than the receipt and collection of the rents. It does not direct nor authorize the administrator to take possession of the lands or tenements. It does not empower him to execute a lease. Neither can the administrator, by virtue of any authority given him in such statute, terminate an existing lease, of his own volition: *Rupp v. Rupp*, 11 Col. App. 36; 52 Pac. Rep. 290, 291. The administrator cannot, without being duly authorized by the probate court, assign to the principal creditor, a mortgage given to the deceased in his lifetime to indemnify the latter as surety: *Pierce v. Batten*, 3 Kan. App. 396; 42 Pac. Rep. 924. An estate cannot be estopped from pleading the illegality of a mortgage executed thereon by a prior administrator, unless it is shown that the estate was actually the recipient of the money obtained by the administrator: *Wallace v. Grant*, 27 Wash. 170; 67 Pac. Rep. 578, 580. Where an administrator had given a mortgage to his intestate on certain lots, the administrator has no power to cancel or release, from the lien of the mortgage due to the estate, a portion of the property covered by such mortgage for the purpose of enabling him individually to borrow money thereon. His attempt to do so constitutes a fraud upon the estate, particularly where he does not use the money to make payment of the debt owing by him to the estate: *Eastham v. Landon*, 17 Wash. 48; 48 Pac. Rep. 729, 740. An administrator receiving, as assets of the estate of his decedent, a promissory note secured by mortgage, and having obtained a judgment on the note, and a decree of foreclosure, may bid in the land at the foreclosure sale, as administrator, in satisfaction of the indebtedness, wholly or in part, and the sheriff's deed will pass the title to him as administrator: *Briggs v. Chicago etc. R. R. Co.*, 56 Kan. 526; 43 Pac. Rep. 1131.

(11) **Cannot litigate what claims.** Executors and administrators cannot litigate the claims of one heir against those of another: *Goldtree v. Thompson*, 83 Cal. 420, 422; 23 Pac. Rep. 383; *Roach v. Coffey*, 73 Cal. 281; 14 Pac. Rep. 840. An executrix cannot litigate the claims of one set of legatees against the others at the expense of the estate, where she has no interest, in her representative capacity, in the matters involved: *Estate of Murphy*, 145 Cal. 464; 78 Pac. Rep. 960, 961.

(12) **In judicial proceedings.** An action for divorce is a purely personal action, and where the plaintiff obtained a decree, but died afterwards, his executor has no power to consent to the setting aside of the decree: *Dwyer v. Nolan*, 40 Wash. 459; 82 Pac. Rep. 746, 747. Where judgment was recovered on a note against the testator, who was not in *pari delicto* with the assignees of the note, his executors are not precluded from denying the validity of the judgment thereon as a claim against his estate: *McColgan v. Muirland*, 2 Cal. App. 6, 9; 82 Pac. Rep. 1113.

6. Joint administrators and co-executors.

(1) **In general.** Joint administrators stand on the same footing, and are invested with the same authority, in respect to the administration of the estate, as co-executors, and, like them, are regarded in law as one person, and consequently the acts of one of them, in respect to the administration, are deemed to be the acts of all, inasmuch as they have a joint and entire authority over the whole property: *Willis v. Farley*, 24 Cal. 490, 501. Each is chargeable with the full amount of the assets which may come into his hands, and is entitled to be credited with all disbursements legally made on behalf of the estate. Each may keep a separate account, and present the same for final settlement. They are entitled to share and share alike only where their liabilities and services have been equal: *Hope v. Jones*, 24 Cal. 89, 93. If one of two executors is absent from the state, the other can administer: *Wheeler v. Bolton*, 54 Cal. 302. Where it appears from various paragraphs of the will that the intention of the testatrix was simply to make a designated person the attorney and counselor of the executrix, and not to commit to him the administration of the estate, he is not entitled to be appointed as co-executor with the executrix: *Estate of Ogier*, 101 Cal. 381, 387; 40 Am. St. Rep. 61; 35 Pac. Rep. 900.

(2) **Obligations and liability. Bond.** The obligations of co-executors arise from their contract, and are several. Although one may, in some cases, make himself liable by placing the other in a position to do wrong, or by aiding him in his acts of misfeasance, the liability is still the several liability of each. And this is so, even if it be

conceded that the devisees and legatees may, under some circumstances, claim both to be liable. If an executor stands by and sees a breach of trust committed, or about to be committed, by a co-executor, and does nothing to protect the estate, or to call the defaulting executor to account, he is liable. When an executor is guilty of neglect with reference to assets in the possession of his co-executor, he is not made liable upon the theory that the assets are in the possession of both, which in fact they are not, but for his neglect to deliver them to his co-executor without good cause, or in not seeing to it that they were taken out of the possession of the co-executor, or were not by him misapplied or lost: *Estate of Sanderson*, 74 Cal. 199, 211, 213; 15 Pac. Rep. 753. The extent of the liability of an executor for the acts of his co-executor will depend very much on the circumstances of each case: *Estate of Sanderson*, 74 Cal. 199, 212; 15 Pac. Rep. 753. The fact that the testator misplaced his confidence in one executor does not operate to the prejudice of the other: *Estate of Sanderson*, 74 Cal. 199, 212; 15 Pac. Rep. 753. If one executor merely permits his co-executor to take possession of assets without going further, and does not concur in any misapplication of them, he does not render himself answerable for the receipt of his co-executor: *Estate of Sanderson*, 74 Cal. 199, 212; 15 Pac. Rep. 753. When two or more persons are appointed executors or administrators, the court must require a separate bond from each of them; and each is chargeable in his account with the whole of the estate which may come into his hands. But when executors give a joint and several bond, the effect is to make them jointly and severally liable on such bond for the misconduct of each: *Estate of Sanderson*, 74 Cal. 199, 213; 15 Pac. Rep. 753.

(3) **Same. Foundation of liability.** A wrongful act or omitted duty lies at the foundation of an executor's liability. He has the right to assume, in all cases, that his co-executor is an honest man. The testator, by his appointment, recommended him as such, and the fact that he is insolvent should create no suspicion upon which to base a want of confidence. An honest executor who is poor is as worthy of confidence and trust as an honest executor who is rich. But where the estate, or part of it, has been lost through the failure of the executors to perform some duty required of them by the trust, such as to collect debts before the statute of limitations has barred an action thereon to preserve the estate, to prevent waste, etc., they are liable, jointly and severally: *Estate of Osborn*, 87 Cal. 1, 5; 25 Pac. Rep. 157; 11 L. R. A. 264. An executor who has money of the estate in his hands, and turns it over to his co-executor, or who actively assists to put it into the hands of his co-executor, is generally answerable for any misapplication of it by the latter. There are exceptions to this general rule; but to avoid liability in such cases,

it must appear that good reasons existed for turning over the money to the co-executor, and that, in allowing him to keep, control, and disburse it, he acted in good faith, without notice of any purpose to misapply it, and with reasonable prudence and discretion: *Estate of Osborn*, 87 Cal. 1, 4; 25 Pac. Rep. 157; 11 L. R. A. 264. When an executor discovers that there is a shortage in the estate, that his co-executor is not doing right, and is in failing circumstances, it is his duty to the beneficiaries and to himself to report the facts to the court, and to procure a settlement of the estate. This would determine the liability of each, and put all concerned upon their guard. An executor must be held answerable when it is apparent that only his own neglect and mistaken idea as to his liability have occasioned loss: *Estate of Osborn*, 87 Cal. 1, 10; 25 Pac. Rep. 157; 11 L. R. A. 264. Each co-executor is equally entitled to the possession of the estate: *Abila v. Burnett*, 33 Cal. 658, 667. An executor who allows his co-executor to handle the money of the estate, because such co-executor is a lawyer, and knows more about the business, is still jointly and severally answerable with him to the heirs, if, through his inexcusable neglect, he permits such co-executor to lose the estate: *Hewlett v. Beede*, 2 Cal. App. 561; 83 Pac. Rep. 1086, 1087. A co-executor is properly charged with interest upon a sum which he appropriates as his commissions prior to the final settlement of his estate: *Estate of Carter*, 132 Cal. 113, 114; 64 Pac. Rep. 123.

REFERENCES.

Co-executors are considered as one person: See note 9 L. R. A. 223-227.

7. Foreign and ancillary administration.

(1) **Foreign administration.** It is the duty of a domiciliary executor to gather in and account for the foreign assets of his testator, so far as he is able to do so: *Estate of Ortiz*, 86 Cal. 306, 315; 21 Am. St. Rep. 44; 24 Pac. Rep. 1034. When a court in a foreign jurisdiction has found, upon the evidence before it, that it has jurisdiction of an estate and of its settlement, and authority to issue letters of administration therein, this finding necessarily implies that the decedent was a resident of that place, if that fact was essential to give such jurisdiction to that court: *Collins v. Maude*, 144 Cal. 289, 293; 77 Pac. Rep. 945. If a foreign executor desires to maintain an action in the courts of California, his first step is to obtain letters of administration from the court in that state. He cannot maintain an action for a claim due the testator, without first having obtained ancillary letters testamentary or of administration: *Lewis v. Adams (Cal.)*, 8 Pac. Rep. 619, 620; but a foreign administrator or executor has a right to sue personally, in that state, on a judgment by him recovered as executor or administrator out of the state: *Lewis v. Adams*, 70 Cal. 403, 408; 59 Am. Rep. 423; 11 Pac. Rep. 833. And when it is not neces-

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sary for a plaintiff to sue as executor or administrator, all averments in his complaint in relation to his official capacity may be rejected. Hence if the plaintiff, who has recovered a judgment as administrator in one jurisdiction, brings an action on the judgment in another, and names himself as administrator in the last action, the averment may be disregarded: *Lewis v. Adams*, 70 Cal. 403, 412; 59 Am. Rep. 423; 11 Pac. Rep. 833. So an administrator who has, within the jurisdiction of his appointment, obtained a judgment against a debtor of a foreign state, or has reduced the personal property of the estate to possession, so as to acquire the legal title thereto, and it is wrongfully taken from him and carried to a foreign state, he may, in such foreign state, maintain an action, not officially, but in his individual capacity, upon such judgment, or to recover such personal property so wrongfully taken from him: *McCully v. Cooper*, 114 Cal. 258, 261; 55 Am. St. Rep. 66; 46 Pac. Rep. 82; 35 L. R. A. 492. If there are no debts owing by the estate in the jurisdiction where the foreign debtor resides, and no ancillary administration has been granted there, the principal administrator may, in such foreign state, receive a voluntary payment from the debtor, which will be a good acquittance to him, even if an ancillary administrator should be subsequently appointed: *McCully v. Cooper*, 114 Cal. 258, 261; 55 Am. St. Rep. 56; 46 Pac. Rep. 82; 35 L. R. A. 492. A certificate of deposit is a negotiable security, and to that extent is on the same footing as promissory notes; and where a domiciliary administrator, appointed in the state of Indiana, is temporarily within the jurisdiction of the courts of California, with the evidence of a simple contract debt, which contract debt is due and owing in California, the California administratrix may recover from such domiciliary administrator a certificate of deposit which is the evidence of such debt: *McCully v. Cooper*, 114 Cal. 258, 260; 55 Am. St. Rep. 66; 46 Pac. Rep. 82; 35 L. R. A. 492.

REFERENCES.

Foreign letters of administration: See note 9 L. R. A. 244-251. Power and duty of administrators or executors as to property outside of the state: See note 45 Am. St. Rep. 664-674.

(2) **Same. Ancillary administration.** The authority of an executor or administrator does not extend beyond the jurisdiction of the state or government under which the representative is invested with authority; and if there be assets in another state than that in which the principal letters are granted, an administration may be obtained there, and such administration will be regarded as ancillary to the administration of the domicile: *McCully v. Cooper*, 114 Cal. 258, 261; 55 Am. St. Rep. 66; 46 Pac. Rep. 82; 35 L. R. A. 492. An ancillary administration is recognized by the laws of California: *Estate of Apple*, 66 Cal. 432, 435; 6 Pac. Rep. 7; *McCully v. Cooper*, 114 Cal.

258; 55 Am. St. Rep. 66; 46 Pac. Rep. 82; 35 L. R. A. 492. Ancillary administration is called such to distinguish it from the administration of the last residence of the deceased, but they are wholly independent of each other. The reason why local administration is provided for is for the protection of local creditors and claimants, and no state should allow property to be taken from its borders until debts to its own citizens have been satisfied. No country will allow a foreign court to exercise its jurisdiction within its borders. For most purposes, a chose in action adheres to the person of the owner, but for the purposes of founding administration, this is not true. For such purpose, the situs is where the debtor resides. The power of a domiciliary executor to assign personal property, which has its situs in another jurisdiction, results from the common-law rule that such assets descend to the personal representative, and not to the heir. That doctrine does not prevail in California. Hence an executor outside of that state has no power, as against an administrator with the will annexed, appointed in the ancillary administration of his property situated in that state, to sell and assign certificates of stock in a national bank located in that state: *Murphy v. Crouse*, 135 Cal. 14, 18, 19; 87 Am. St. Rep. 90; 66 Pac. Rep. 971. The Kansas statute authorizing foreign executors and administrators with the will annexed to convey real estate in pursuance of power contained in the will is constitutional and valid; and such statute is applicable to all wills which were executed and proved in another state or territory prior to its passage, as well as to those executed and proved after its passage: *Calloway v. Cooley* (Kan), 32 Pac. Rep. 372. When an executrix is appointed in another state, on the estate of a person dying outside of the state of Kansas, and no executor, executrix, or administrator thereon is appointed in the state of Kansas, the foreign executrix may file an authenticated copy of her appointment in the probate court of any county in the state of Kansas in which there is real estate of the deceased, and then may be authorized, under an order of the court, to sell the real estate for the payment of debts of the decedent and the charges of administration, in the manner and on the terms and conditions prescribed by the statute of Kansas: *Higgins v. Reed*, 48 Kan. 272; 29 Pac. Rep. 389.

REFERENCES.

Ancillary letters of administration may be granted when: See notes 9 L. R. A. 218, 246. Effect of ancillary appointment after commencement of action by foreign executor or administrator: See note 4 L. R. A. (N. S.), 657, 658.

II. ACTIONS BY EXECUTORS OR ADMINISTRATORS.

1. *In general.* If a decedent, in his lifetime, with full knowledge of his rights, transfers personal property to another for an adequate

consideration, which he received, his administrator and heirs are bound by his act and cannot question the validity of the agreement: *Jones v. Tallant*, 90 Cal. 386, 389; 27 Pac. Rep. 305. An administrator may maintain an action against the executors of a former administrator to recover moneys received by the testator of the defendant estate, while acting as such former administrator, and for which moneys no accounting had ever been made: *Curran v. Kennedy*, 89 Cal. 98, 99; 26 Pac. Rep. 64. A widow, who is also executrix, cannot, as claimant, sue herself in her representative capacity to recover money paid for funeral expenses of decedent: *Phillips v. Phillips*, 18 Mont. 305; 45 Pac. Rep. 221. An administrator, who has been appointed under a void order, cannot recover fees from the estate: *Slate v. Henkle*, 45 Or. 430; 78 Pac. Rep. 325, 326. An estate of a decedent would not be entitled to recover the possession of real property on the ground that a sale thereof was made without the confirmation of the court, without returning, or offering to return to the purchaser, the purchase money, after an accounting which would involve the purchase price: *Richards v. Richards*, 36 Cal. Dec. 369, 380 (Nov. 4, 1908). If an executor, under a mistake of law, makes a payment of money to a beneficiary under a will, he cannot recover the same: *Scott v. Ford (Or.)*, 97 Pac. Rep. 99, 100, 101. In an action of assumpsit by an administrator, the defendant cannot contest the plaintiff's appointment, or collaterally question its validity: *Magoon v. Ami*, 8 Haw. 191, 195.

REFERENCES.

Executor or administrator as real party in interest by whom action must be brought: See note 64 L. R. A. 611. Right of personal representative to bring suit in forma pauperis: See note 1 Am. & Eng. Ann. Cas. 805.

2. Abatement. Discontinuance. The statute of Colorado, which extends the time for bringing actions in favor of executors and administrators upon the happening of certain contingencies, is not applicable to a case brought by decedent in his lifetime, and is not abated nor discontinued by his death, or for any other reason enumerated in the statute: *Barlow v. Hitzler (Col.)*, 90 Pac. Rep. 90, 92.

3. Parties. As the estate is entire, where more than one executor is appointed, they are considered in law as one person, and all of them must join as plaintiffs in bringing an action for an accounting in behalf of the estate; but where no objection was made on account of the non-joinder of two of the executors, and, as they were made defendants in the action in their representative capacity, and remained in the court throughout the proceeding while the accounting was being made, the failure to name them as plaintiffs cannot be

regarded as a fatal objection: *Insley v. Shire*, 54 Kan. 793; 39 Pac. Rep. 713. An executrix of a deceased person is the proper party to sue on a fire-insurance policy issued on the property of deceased, where the death occurred before the loss; and an allegation that she is the duly qualified and acting executrix is sufficient, without alleging the probate of the will: *German Insurance etc. Co. v. Wright*, 6 Kan. App. 611; 49 Pac. Rep. 704. If an administratrix, as an individual, claims adversely to the estate she represents, she cannot properly represent the estate in an action relating to property so claimed, and in any such action it is necessary to make all creditors, as well as all heirs, parties: *Byrne v. Byrne*, 94 Cal. 576, 581; 29 Pac. Rep. 1115; 13 Pac. Rep. 196. An action may be maintained by the plaintiff, both in his individual capacity and in his representative capacity, where he has a personal interest in securing the cancellation of a note made by him, and is therefore entitled to an application, on the original debt and interest thereon, of all payments made by him, and where he has, as the executor of another, a like interest in the application of payments made by such other person; and he is a proper party to such suit: *Epping v. Washington Nat. Bldg. Assoc.*, 44 Or. 116; 74 Pac. Rep. 923. In an action by an administrator of a co-surety to recover from the principal a sum paid by such administrator in discharge of the debt, the fact that there was another co-surety does not make the latter's estate a necessary party to the action: *Townsend v. Sullivan*, 3 Cal. App. 115, 119; 84 Pac. Rep. 435. A bill in equity, by an administrator, to foreclose an equitable interest in lands sold but not conveyed by his intestate, is not objectionable for nonjoinder of heirs, after answer, if the administrator alleges his readiness to furnish a good deed which would have to be executed by the heirs: *Wollenberg v. Rose*, 41 Or. 314; 68 Pac. Rep. 804, 805.

4. By ancillary administrators. An ancillary administrator may maintain an action against a foreign domiciliary administrator, who is temporarily in this jurisdiction, to recover possession of a certificate of deposit belonging to the estate, issued by an insolvent bank in this state, which the receiver of the bank had refused to allow: *McCully v. Cooper*, 114 Cal. 258, 263; 46 Pac. Rep. 82; 55 Am. St. Rep. 66; 95 L. E. A. 492. See also *Murphy v. Cross*, 135 Cal. 14, 19; 66 Pac. Rep. 971; 87 Am. St. Rep. 90.

5. By foreign executors. A foreign executor, who purchased property in his own name as trustee for the estate of which he is an executor, may maintain an action as trustee in respect to such property: *Doe v. Tenino Coal etc. Co.*, 43 Wash. 523; 86 Pac. Rep. 938, 939. Under the law of Kansas, a foreign executor may sue to foreclose a

mortgage in favor of his testator: *Greenwalt v. Bastian*, 10 Kan. App. 101; 61 Pac. Rep. 513. Foreign executors, to whom, as trustees, a note and mortgage were given for assets of the estate received by the mortgagor, may maintain an action to foreclose the mortgage, without taking out letters testamentary in the state where the land is situated: *Fox v. Tay*, 89 Cal. 339, 350; 24 Pac. Rep. 855; 26 Pac. Rep. 897; 23 Am. St. Rep. 474. A corporation which has been regularly appointed an administrator in another state may bring an action as administrator in this state: *Germantown Trust Co. v. Whitney* (S. D.), 102 N. W. Rep. 304. An assignee of foreign executors may sue on a contract by deceased, if it appears that such executors had authority to make the assignment: *Camp v. Simon*, 23 Utah, 56; 63 Pac. Rep. 332, 335. An action may be maintained by an executor in his individual capacity on a judgment recovered by him in a foreign jurisdiction, in his representative capacity: *Lewis v. Adams*, 70 Cal. 403, 411; 11 Pac. Rep. 833; 59 Am. Rep. 423. He may also, in Arizona, maintain such an action in his representative capacity: *Arizona Cattle Co. v. Huber*, 4 Ariz. 69; 33 Pac. Rep. 555. A foreign administrator cannot maintain an action for damages in wrongfully causing the death of the deceased, if the law of the state where he was appointed does not authorize such action by him. The powers of the administrator are limited by the laws of the state of his appointment, and cannot be changed or enlarged by the laws of another state: *Lime-killer v. Hannibal etc. R. R. Co.*, 33 Kan. 83; 5 Pac. Rep. 401, 404, 405. An administrator appointed in one state, not being entitled to the possession of land claimed by his decedent in another state, cannot sue to redeem said land from a mortgage by setting off waste committed by the mortgagee in possession after the death of his intestate; nor to recover damages for trespasses committed by such mortgagee on said land after the death: *Price v. Ward*, 25 Nev. 203; 58 Pac. Rep. 849. Where a resident of Illinois dies intestate in Colorado, leaving promissory notes secured by mortgage on land in Kansas, and general administration is had on his estate in Illinois, and administration is also had in Colorado as to property in that state, but no administration is had in Kansas, and the notes and Kansas mortgage come to the hands of the Colorado administratrix, she cannot maintain suit thereon as administratrix in Kansas: *Moore v. Jordan*, 36 Kan. 271; 13 Pac. Rep. 337, 338. In the state of Washington it is held that if a foreign executor, together with his co-executor and the beneficiaries of the estate, sign a written agreement whereby such foreign executor purchases property in his own name for the benefit of the estate, such purchase has the effect of making him the trustee of an express trust, and that he may, as such trustee, but not as executor, maintain an action in that state concerning the property: *Doe v. Tenino Coal etc. Co.*, 43 Wash. 533; 86 Pac. Rep. 938, 939. In an action by an

executor appointed in a foreign state, all averments in the complaint in relation to the plaintiff's official capacity may be rejected: *Owen v. Frink*, 24 Cal. 171; *Lewis v. Adams*, 70 Cal. 403, 411; 11 Pac. Rep. 833; 59 Am. Rep. 423; *Middle v. Wilkins*, 1 Pet. (U. S.) 686.

REFERENCES.

Assignee of executor or administrator may sue in foreign courts when: See note 88 Am. Dec. 310, 311. Incapacity of foreign executor or administrator to sue: See notes 2 L. R. A. 828; 5 L. R. A. 541-543; 9 L. R. A. 244-245.

6. Executor or administrator as representative. The executors represent both the creditors and the heirs in all suits for the benefit of the estate: *Cunningham v. Ashley*, 45 Cal. 485, 493. The administrator is in privity with and represents both heirs and creditors, and a judgment in ejectment recovered by or against an administrator is an estoppel in favor of or against the heirs and those claiming under them: *Cunningham v. Ashley*, 45 Cal. 485, 493; *McLeran v. Benton*, 73 Cal. 329, 342; 14 Pac. Rep. 879; 2 Am. St. Rep. 814; *Spotts v. Hanley*, 85 Cal. 155, 167; 24 Pac. Rep. 738. An administrator may maintain an action upon a contract made after the death of the intestate, to which he was not, as such administrator, a party, and of which he had no knowledge at the time it was made, where such contract was made for the benefit of the creditors of the estate. The administrator is the agent of the creditors in marshaling the assets of the estate, and accumulating funds to pay their claims, and he is, as well, the legal representative of the estate: *Stewart v. Rogers*, 71 Kan. 53; 80 Pac. Rep. 58, 60.

7. By a co-executor. A special administrator, under the California statute, may maintain an action to recover what he claims to be property of the estate from the defendant, who asserts that such property belongs to him in his individual capacity and that it is not an asset of the estate. If the alleged cause of action is well grounded, and the property in question ought to be decreed to be the property of the estate, the defendant cannot avoid a trial of the merits and hold the property upon the ground that, because he is one of the executors, he cannot be sued. The statute providing that one executor cannot maintain an action against his co-executor for exclusive possession of property of the estate, etc., does not apply to an action where the defendant is sued in his individual capacity, and this phase of the case is not changed by the fact that the defendant has become an executor: *Stohr v. Stohr*, 148 Cal. 180; 82 Pac. Rep. 777, 778. An executor cannot sue his co-executor on a promissory note given by the latter to the former for money due to the estate: *Taylor v. Minton*, 45 Kan. 17; 25 Pac. Rep. 222.

8. Substitution. Revival of action. If an executrix dies and administrators are appointed, who commence an action on a note belonging to the estate, they are the "successors in interest" of the executrix, and may be substituted in her place: *Bunker v. Taylor*, 13 S. D. 433; 83 N. W. Rep. 555, 557. If an executrix dies, and administrators are substituted, it is correct practice to serve a summons showing the death of the original plaintiff, and the substitution of the administrators as plaintiffs: *Bunker v. Taylor*, 13 S. D. 433; 83 N. W. Rep. 555, 559. If an action be brought by an administratrix, and another be substituted in her place pending a suit, in the absence of a showing to the contrary it will be assumed that the substitution was properly made; and an allegation that plaintiff is a stockholder in a designated company is a sufficient allegation that the estate owned stock therein: *Jones v. Pearl Mining Co.*, 20 Col. 417; 38 Pac. Rep. 700, 702. If a party dies pending his appeal from a judgment against him, and his administrator is substituted as appellant, an affirmation of the judgment makes it a judgment against the administrator, and establishes the judgment as a claim against the estate, which should be paid before distribution: *Green v. Taney*, 16 Col. 398; 27 Pac. Rep. 249, 250. Where a judgment has been entered against a party after his death, which is not void on its face, his administrator, subsequently appointed, should procure it to be set aside before applying for mandamus to compel the court to substitute him in the action in place of deceased: *Elliott v. Patterson*, 65 Cal. 109, 110; 3 Pac. Rep. 493. An action brought by a land-owner in his lifetime, against a railroad company, for damages caused by the company in taking his land, should, after plaintiff's death, be revived in the name of his administrator: *Kansas City etc. R. R. Co. v. Menager*, 59 Kan. 687; 54 Pac. Rep. 1043, 1045. Where a plaintiff sues upon a note, having the legal title thereto, but no beneficial interest therein, and upon the death of the real owner executes an assignment of the cause of action to his legatee, and thereafter such plaintiff dies, and the action is revived and prosecuted to judgment in the name of his administrator, no revivor being had in the name of his assignee, the proceeds of such judgment, when collected by the administrator, do not become a part of the assets of the estate, but are held by him in trust for such assignee: *Wood v. Sheidley (Kan.)*, 97 Pac. Rep. 800. If an action is brought by a husband and wife, properly joined as plaintiffs, and the husband dies pending the suit, it is proper to substitute his administratrix as a plaintiff: *Gomez v. Scanlan*, 2 Cal. App. 579, 580; 84 Pac. Rep. 850.

9. Pleading. A complaint by an administrator, containing no allegation respecting his representative character, but in the title of which words showing simply his official capacity are added directly to his name without the word "as," will be deemed a complaint by

him in his individual capacity: *Burling v. Tompkins*, 77 Cal. 257, 258; 19 Pac. Rep. 429. Executors in the state of Washington may sue without alleging that letters testamentary have been granted on a non-intervention will provided for by the statute: *Boyer v. Robinson*, 26 Wash. 117; 66 Pac. Rep. 119, 120. Where a plaintiff dies pending suit, and the action is revived by an order in favor of his personal representative, the pleadings should be so amended as to show the legal capacity of the representative: *Central Branch U. P. Ry. Co. v. Andrews*, 34 Kan. 563; 9 Pac. Rep. 213, 216. If the plaintiff sues as administrator, and proves the death of decedent, and issuance of letters of administration to himself, this, in the absence of any proof to the contrary, sufficiently establishes his representative capacity: *Sallazar v. Taylor*, 18 Col. 538; 33 Pac. Rep. 369. If representatives allege in their complaint that they sue under authority in a will, which was probated, and their capacity is properly alleged in the complaint, a denial of such allegations on information and belief is insufficient: *Thompson v. Skeen*, 14 Utah, 209; 46 Pac. Rep. 1103. An allegation, in a complaint, that plaintiff was duly appointed administrator, and that he qualified and received letters, is a sufficient statement of his representative capacity as against a general demurrer for want of facts: *Knight v. Le Beau*, 19 Mont. 223; 47 Pac. Rep. 952; *German Fire Ins. Co. v. Wright*, 6 Kan. App. 611; 49 Pac. Rep. 704; *Halleck v. Mixer*, 16 Cal. 574, 579. Though a complaint by an administrator may contain redundant matter, and perhaps allegations relating to more than one cause of action, it is the duty of the court to sustain the pleading, if sufficient facts can be found to constitute any cause of action: *Bright v. Ecker*, 9 S. D. 192; 68 N. W. Rep. 326, 327. Where a cause of action accrues to an executor or administrator after the death of the decedent, he may sue thereon, either in his representative or individual character, and an averment of the representative character may be regarded as surplusage: *Scars v. Daly*, 43 Or. 346; 73 Pac. Rep. 5, 6; *Lewis v. Adams*, 70 Cal. 403, 411, 412; 11 Pac. Rep. 833; 59 Am. Rep. 423. If an executrix takes notes in her own name for a debt due the estate, she may bring suit in her own name thereon, as well as in her representative character: *Getty v. Larkin*, 59 Kan. 548; 53 Pac. Rep. 755. A person appointed administrator by an order of court, which was void for want of jurisdiction, cannot maintain a bill in equity against the administrator legally appointed for expenses incurred and fees claimed to have been earned in his alleged administration, where he has an adequate remedy at law for all payments made by him for the benefit of the estate: *Slate v. Henkle*, 45 Or. 430; 78 Pac. Rep. 325, 327. An objection to an action brought by an executor, that the complaint does not show by what court, if any, the plaintiff was appointed executor, is not good upon general demurrer, where it appears that the defendant contracted with the plaintiff as executor. This, *prima facie* at

least, would give the executor the right to enforce or forfeit the contract by suit or otherwise: *Stein v. Waddell*, 37 Wash. 634; 80 Pac. Rep. 184, 186; *Waldo v. Milroy*, 19 Wash. 156; 52 Pac. Rep. 1012. An allegation in a complaint in an action by an executor, that the will authorized and directed said executor to administer upon the estate, without the intervention, order, or advice of any court, and to fully execute all its terms and provisions, is sufficient, as against demurrer, to show that the will under which the executor was acting at the time dispensed with letters of administration: *Miller v. Borst*, 11 Wash. 260; 39 Pac. Rep. 662. The statute of Oregon has abolished the common-law rule which made one who officiously interfered with the property of a deceased person an executor de son tort, by depriving creditors of the estate and others of the remedy which they anciently possessed. Such intermeddler is now made answerable only to the legal representative of the deceased, for the value of all property taken or removed, and for all injury caused by his interference therewith; and where an adequate remedy in a law action instituted against such intermeddler may be had to recoup against the claim for damages caused by his intermeddling, a demurrer to the complaint, in the nature of a cross-bill in equity, should be sustained: *Slate v. Henkle*, 45 Or. 430; 78 Pac. Rep. 325, 326.

REFERENCES.

Effect of qualifying words, "as executor" and "as administrator": See note 15 L. R. A. 850-852.

10. Evidence. In an action by an administrator de bonis non against the sureties on the bond of his predecessor, where property is shown to have come to the hands of such predecessor, the burden of proof is on the sureties to show that such property has been properly administered: *Gatch v. Simpson*, 40 Or. 90; 66 Pac. Rep. 688, 691.

REFERENCES.

Declarations of executor or administrator, when admissible as evidence against the intestate's estate: See note 25 Am. Dec. 301-303.

11. Judgment. Judgment in every case commenced by an executor or administrator in which the defendant becomes entitled to costs ought to be entered against such executor or administrator personally. After payment, he may charge the amount in his account of administration, to be allowed or not as it may appear to the judge of the probate court that the suit was discreet or otherwise: *Meyer v. O'Rourke* (Cal.), 88 Pac. Rep. 706, 707.

REFERENCES.

Judgment for costs: See head-line 12, *infra*. Right of executor or administrator to have judgment against the decedent set aside: See

note 54 L. R. A. 761-762. Power of Federal court to enforce its own judgment against a decedent's estate: See note 12 L. R. A. (N. S.) 155-157.

12. **Costs.** The general rule, subject to certain exceptions, is, that a personal representative who sues or defends in any proceeding which he can bring or defend in such capacity is not personally liable for costs, if he fails in his contest: *De Bow v. Wollenberg* (Or.), 96 Pac. Rep. 536, 544. An administrator is individually liable for costs, under a judgment for defendant in an action brought by him as such administrator, unless the estate is expressly made chargeable: *Stevens v. San Francisco etc. R. R. Co.*, 103 Cal. 252, 254; 27 Pac. Rep. 146. Costs should be imposed upon the executor individually, and not upon the estate, nor upon him in his representative capacity. He has the right to seek an allowance from the estate in a proper case. If, however, the litigation has been unjust, or ill-advised, then, to prevent the dissipation of estates at the hands of careless executors, the executor will be compelled to bear the burden: *Meyer v. O'Rourke* (Cal.), 88 Pac. Rep. 706, 707.

REFERENCES.

Judgment for costs: See head-line 11, *supra*. Personal liability of executor or administrator for costs: See note 14 L. R. A. 696-699.

13. **On contracts.** An administrator may sue to enforce an agreement to sell corporate stock, which had been sold under a pledge to secure a debt of the deceased before his death, the holder of the stock having agreed to transfer the same to him on certain conditions: *Sayward v. Houghton*, 119 Cal. 545, 549; 51 Pac. Rep. 853; 52 Pac. Rep. 44. An administrator may sue and recover on an oral contract, made after the death of the intestate, in which it is agreed by two creditors of the deceased that, in consideration of the conveyance of lands of the estate by the heirs to each of said creditors, one of them will release and satisfy a judgment in his favor against the estate, and the other creditor will pay and discharge all debts of the deceased and costs of administration, and cause said estate to be settled solvent, where such contract is shown to have been performed by the heirs and by the former contracting creditor, but the latter creditor refuses to perform after having received the consideration: *Stewart v. Rogers*, 71 Kan. 53; 80 Pac. Rep. 58, 60. An action may be maintained by the administratrix of a surety on a promissory note of defendant, which she, as administratrix, has been compelled to pay in order to protect the estate: *Townsend v. Sullivan*, 3 Cal. App. 115, 118; 84 Pac. Rep. 435. An action may be maintained by an executor on a certificate of deposit issued by a bank to his testator, payable to the order of himself upon the return of the certificate properly

indorsed, where a demand of payment by the executor before suit is alleged, without alleging that the certificate was properly indorsed: *Emerson v. Thatcher*, 6 Kan. App. 25; 51 Pac. Rep. 50, 51. The right to sue on a promissory note belonging to an estate is vested in the personal representatives and not in the heirs of deceased: *Presby v. Pickett*, 1 Kan. App. 631; 42 Pac. Rep. 405. The same is true of a right to sue on a policy of fire insurance: *German Fire Ins. Co. v. Wright*, 6 Kan. App. 611; 49 Pac. Rep. 704. An action may be maintained by an administrator against the executor of a deceased predecessor in administration to recover the proceeds of a life-insurance policy on the life of the intestate, collected and not accounted for by the deceased administrator: *Curran v. Kennedy*, 89 Cal. 98, 99; 26 Pac. Rep. 641. An action by the executor to compel a specific performance of a contract, by which, as alleged, the defendant became liable to pay the purchase price bid by him at a probate sale of the land of the decedent, will not lie, where the attempted sale was void: *Kertchem v. George*, 78 Cal. 597, 600; 21 Pac. Rep. 372. The principle that a contract made through a mutual mistake of law may give a right to one of the parties thereto to rescind, or to have some other legal remedy against the other party, does not, in an action by an administrator, apply to a case where property of the estate was used by a former executor to pay an individual debt: *Snyder v. Jack*, 140 Cal. 584, 586; 74 Pac. Rep. 139, 355. In an action by executors for a debt due the estate, it is no defense that a final account has been rendered and distribution made, if the executors have not been finally discharged: *Denny v. Sayward*, 10 Wash. 422; 39 Pac. Rep. 119.

14. Conversion.

(1) **In general.** An executor may sue for the recovery of converted property of the estate, under the general authority conferred by statute, and needs no special authorization therefor from the court: *Halleck v. Mixer*, 16 Cal. 574, 580. An administrator may maintain an action to recover possession of personal property, for the benefit of creditors, from the mortgagee in possession, who had allowed his mortgage to expire by lapse of time: *First Nat. Bank v. Ludvigsen*, 8 Wyo. 230; 56 Pac. Rep. 994, 1000. An administrator may maintain an action for the conversion of personal property against one claiming under an alleged sale from decedent, where the evidence shows the sale was not accompanied by immediate delivery and continued change of possession: *Kelly v. Murphy*, 70 Cal. 560, 563; 12 Pac. Rep. 467. An administrator de bonis non may maintain an action against his predecessor and sureties for assets which have been converted into money, but are still unadministered: *Gatch v. Simpson*, 40 Or. 90; 66 Pac. Rep. 688, 690; *American Surety etc. Co. v. Piatt*, 67 Kan. 294; 72 Pac. Rep. 775, 776. At common law, the authority of an administrator de bonis non extended only to such estate as remained

unadministered or unconverted by his predecessor. He could not maintain an action to recover converted assets. That right belonged to heirs or others interested in the estate: *Gatch v. Simpson*, 40 Or. 90; 66 Pac. Rep. 688, 689; *Reed v. Hume*, 25 Utah, 248; 70 Pac. Rep. 998, 1000. A complaint in an action in the nature of an action of trover, maintained by the administrator, contained the averment that "said estate was the owner and possessed" of the property, etc. Held, that the allegation was equivalent to an averment that the plaintiff, as administrator, was the owner in possession: *Ham v. Henderson*, 50 Cal. 367, 369. If the taking of the property by the defendant was tortious, no demand by the plaintiff, previous to the commencement of the action, is necessary: *Ham v. Henderson*, 50 Cal. 367, 369. In an action by an administrator to recover personal property of the estate, which had been sold by the widow, an allegation, in the answer, that the sale was made under a mutual mistake by both parties is no defense: *Snyder v. Jack*, 140 Cal. 584, 586; 74 Pac. Rep. 139, 355.

(2) **What is a conversion.** Where property of the estate has been sold, but the sale was not sanctioned by the probate court, the administrator may treat the property as converted by the purchaser, and sue to recover the same or its value, without regard to the question as to whether it was sold to satisfy a debt: *Horton v. Jack*, 115 Cal. 29, 33; 46 Pac. Rep. 920. An administrator is absolutely entitled to all personal property of the estate until distribution, and any interference with that property, which deprives him of the possession, is a conversion for which he is entitled to recover, irrespective of whether the estate is indebted or not: *Horton v. Jack*, 115 Cal. 29, 34; 46 Pac. Rep. 920. If, on the return of an executrix of sales under an order to sell, she reports that she sold the property to satisfy her individual liability to a creditor, and on this showing the court refuses to confirm the sale, and the executrix subsequently files an account, in which she treats the property sold as still on hand, and does not ask for nor receive any credit for the payment of any debt of the estate, title to the property remains in the estate, and the executrix is entitled to treat the property as converted by the individual creditor, and to recover its value from him: *Horton v. Jack*, 115 Cal. 29, 33; 46 Pac. Rep. 920; 37 Pac. Rep. 652.

(3) **Suits in individual capacity.** The administrator is deemed in law to have possession, or to be entitled to possession, of personal property of the estate from the time of the death of deceased, and may therefore maintain an action in his own name against a person who, after the death and before the issuance of letters, converts any of the personal property of the estate to his use: *Jahns v. Nolting*, 29 Cal. 507, 511; *Ham v. Henderson*, 50 Cal. 367, 369. An executor may

sue on a note and mortgage executed to him in either his representative or his individual capacity: *Burrell v. Kern*, 34 Or. 501; 56 Pac. Rep. 809, 810. The person in possession of personal property as administrator may sue in his individual capacity to recover possession from one who wrongfully takes it from him and converts it to his own use; and any statement of the representative capacity of plaintiff may be regarded as surplusage: *Munch v. Williams*, 24 Cal. 167, 171. Although an administrator may sue in his own name to recover property belonging to the estate, the suit must be brought before he ceases to be administrator: *Affierbach v. McGovern*, 79 Cal. 268, 272; 21 Pac. Rep. 837.

(4) Action must fail when. An action by an executrix for the conversion of property of the estate must fail, where it appears that defendant received the property by direction of the plaintiff to be sold, and that the defendant had sold the same and applied the proceeds in paying debts of the deceased: *Rutherford v. Thompson*, 14 Or. 236; 12 Pac. Rep. 382.

15. For damages in causing death. An action for the wrongful death of a deceased husband, though usually prosecuted in the name of the widow and children, may be likewise prosecuted in the name of the personal representative for the benefit of the widow and children: *Archibald v. Lincoln County* (Wash.), 96 Pac. Rep. 831, 832. The statute of Oregon authorizes the personal representative of a deceased person to bring an action for negligence which caused his death; but the heirs have no remedy for damages occasioned by an injury to the person of the deceased. The fund recovered in such a case is the property of the estate: *Olston v. Oregon etc. Ry. Co.* (Or.), 96 Pac. Rep. 1095, 1097. A statute creating a cause of action for damages sustained by the relatives or next of kin of the deceased is not penal. Such a cause of action is transitory, and may therefore be enforced in any state or country whose public policy is not opposed to the recognition and enforcement thereof: *Denver etc. R. R. Co. v. Waring*, 37 Col. 122; 86 Pac. Rep. 305, 306. The right given by the statute of one state to recover for the death of a person caused by wrongful act may be enforced in the jurisdiction of another state, through the medium of an administrator appointed by the courts of the latter state for that purpose: *In re Lowham's Estate*, 30 Utah, 436; 85 Pac. Rep. 445, 446; *Utah S. & T. Co. v. Diamond Coal etc. Co.*, 26 Utah, 299; 73 Pac. Rep. 524; *Stewart v. Baltimore etc. R. R. Co.*, 168 U. S. 445, 447; 18 Sup. Ct. Rep. 105; 42 L. ed. 537; *Boston and Maine R. R. Co. v. Hurd*, 108 Fed. Rep. 116; 47 C. C. A. 615; 56 L. R. A. 193. It seems to be the rule in most states, that, unless there is some law of the forum which will prevent the action from being maintained by the person designated by the law of the place where the injury

occurred, it may be so maintained. This follows the rule announced by Mr. Justice Miller in *Dennick v. Railroad Co.*, 103 U. S. 11; 26 L. ed. 429, that actions may be maintained in one state by a personal representative of a decedent, and based upon a liability of the defendant for damages arising out of injuries sustained by the decedent or for death resulting from injuries to the decedent in another state: *Denver etc. R. R. Co. v. Waring*, 37 Col. 122; 86 Pac. Rep. 305, 309. Actions by the executor or administrator for damages sustained by a deceased employee, and resulting in his death, must be brought by and in the name of the party designated by the statute of the state or country in which the cause of action arose, even though a similar statute of the forum provides that the action shall be brought by some other party: *Denver etc. R. R. Co. v. Waring*, 37 Col. 122; 86 Pac. Rep. 305, 306. While a claim for damages for death by wrongful act is not a general asset of the estate, under the provisions of the Wyoming statute, yet, under the provisions of that statute, it has been held, in an action in the state of Utah, construing said statute and the right of an administrator thereunder, that such claim is a sufficient asset of the estate for the appointment of an administrator to bring suit to recover damages for such death: *In re Lowham's Estate*, 30 Utah, 436; 85 Pac. Rep. 445, 446. The statutes of Arizona create a right of action for the benefit of the estate, the damages recoverable to be distributed as assets of the estate, not subject, however, to debts: *Southern Pac. Co. v. Wilson (Ariz.)*, 85 Pac. Rep. 401, 403. An administrator may bring an action to recover damages for the death of a decedent whom he represents, but the action is for the benefit of the heirs, and an allegation that there are heirs is necessary to maintain the action: *Webster v. Norwegian Min. Co.*, 137 Cal. 399, 400; 92 Am. St. Rep. 181; 70 Pac. Rep. 276. The power of an administrator to sue for damages sustained by causing death will be upheld, where the record of the probate court shows that it had jurisdiction to issue letters: *Union Pac. Ry. Co. v. Dunden*, 37 Kan. 1; 14 Pac. Rep. 501, 502.

REFERENCES.

Administrator's right to sue for the wrongful death of his intestate: See note 3 L. R. A. (N. S.) 473-474.

16. Ejectment. A patent to land, issued to an administrator, vests the legal title in him, and entitles him to recover in ejectment: *Burling v. Tompkins*, 77 Cal. 257, 262; 19 Pac. Rep. 429. Under the statutes of Washington, an administrator appointed within the time limited for the presentation of claims against the estate, may bring an action to recover possession of land of the intestate held by one claiming adversely, even though such adverse claimant be an heir: *Gibson v. Slater*, 42 Wash. 347; 84 Pac. Rep. 648, 651. An adminis-

trator may bring ejectment in his own name as administrator for the possession of land of the deceased: *Black v. Story*, 7 Mont. 238; 14 Pac. Rep. 703, 704. An executor or administrator can, in behalf of the estate and all of the heirs at law, maintain an action for the possession of real estate against a person who, whether he is one of the heirs or not, has wrongfully seized such real estate and retained the possession under an adverse claim of title, thus depriving both the administrator and the heirs at law of the enjoyment of their rights: *Gibson v. Slater*, 42 Wash. 347; 84 Pac. Rep. 648, 651. The right of possession resting in an executor or administrator is barred in the same way as the right of possession in any other trustee, and his right to maintain ejectment for lands claimed by the estate may be barred by adverse possession: *Webb v. Winter*, 135 Cal. 455, 457; 67 Pac. Rep. 691. An executor of a deceased tenant in common may join with his co-tenants in bringing ejectment: *Touchard v. Keyes*, 21 Cal. 202, 209. An administrator cannot maintain ejectment for land, the legal title to which vested in the heirs of his intestate after his death: *Emeric v. Penniman*, 26 Cal. 119, 123, 124. A judgment in an action of ejectment, brought by an administrator, where the title of the decedent is put in issue, binds the heirs and all claiming under the decedent: *Cunningham v. Ashley*, 45 Cal. 484, 485, 494. And a judgment in favor of the administrator would inure to the benefit of the heir and of his grantee, to whom he had conveyed prior to the recovery of the judgment: *Spotts v. Hanley*, 85 Cal. 155, 167, 168; 24 Pac. Rep. 738.

REFERENCES.

Ejectment by executor or administrator: See note 18 L. R. A. 789.

17. **To enforce trusts.** An administrator is not a proper party to bring an action to establish a trust and to compel a conveyance of the legal title of land to himself: *James v. Throckmorton*, 57 Cal. 368, 387; *Field v. Andrada*, 106 Cal. 107, 108; 39 Pac. Rep. 323. An administrator cannot maintain an action against a trustee under a trust created by deceased in his lifetime, where neither the trust property nor its proceeds constitute a part of the estate: *Barrette v. Dooly*, 21 Utah, 81; 59 Pac. Rep. 718. Without showing that an alleged trust fund is mingled with some part of a decedent's estate into which it can be traced, no action in equity can be maintained to have it declared a lien thereon and to have it or its equivalent paid over to the beneficiary; and, without averments of a conversion, or some other breach of trust by the representative of the estate, no action at law can be sustained against the estate without averring a presentation of a claim for the fund claimed: *Burke v. Maguire*, 36 Cal. Dec. 322, 324 (Oct. 17, 1908). An action may be maintained by an administrator to charge defendants as involuntary trustees of his intestate

and to redeem from such persons, who hold a deed of trust executed by the deceased in his lifetime, etc.: *Smith v. Goethe*, 147 Cal. 725, 730, 733; 82 Pac. Rep. 384. In a suit by the administrator of a deceased locator of a mining claim to have the patentee declared a trustee for the estate, on the ground of fraud, the burden is on the plaintiff of proving the alleged fraud: *Scott v. Crouch*, 24 Utah, 377; 67 Pac. Rep. 1068, 1070.

18. To recover excessive fees charged. An action may be maintained by an executor to recover from a public officer excessive fees charged for filing papers in the estate, under circumstances showing that the payment was compulsory and not voluntary; and it is none the less compulsory that the party could have procured a writ of mandate compelling the officer to file the papers without the fees demanded: *Lewis v. San Francisco*, 2 Cal. App. 112; 82 Pac. Rep. 1106.

19. On foreign judgments. If a judgment debtor removes to another jurisdiction, administration may be there granted, and the administrator appointed may maintain an action upon such judgment: *Law v. Horner*, 10 Haw. 531, 539. An action may be maintained in the state of California by an executor appointed in a foreign state, upon a judgment obtained in such foreign state, as upon a debt at law due to the plaintiff personally: *Lewis v. Adams*, 70 Cal. 403, 411; 11 Pac. Rep. 833; 59 Am. Rep. 423.

20. Gifts. If an action brought by an administrator is one to recover a gift in view of death, the complaint sufficiently shows, if that is necessary, that there are creditors interested in having the property recovered, where it alleges that there are outstanding and unpaid claims which have been duly presented, allowed by the administrator, and approved by the county judge, to a specified amount, and that there is no property other than that in possession of defendants out of which they can be satisfied: *Bright v. Ecker*, 9 S. D. 192; 68 N. W. Rep. 326, 327. In an action by an administrator to recover a bank deposit of decedent, a claim of gift from the decedent, by a third party, supported only by the oath of the claimant, should be received with caution, and even with suspicion, in order to prevent frauds: *Freese v. Odd Fellows' Sav. Bank*, 136 Cal. 662, 665; 69 Pac. Rep. 493. If it is shown, in an action by the executor of a deceased husband to recover bank deposits of community property from the executor of the wife, who died after drawing and transferring them to her own account, that the husband had done everything necessary to a valid gift to his wife, and so intended, the gift was complete: *Spring v. Walton*, 145 Cal. 228, 233; 79 Pac. Rep. 645. And oral declarations by the donor at the time are admissible to show the husband's intent to make a gift: *Spring v. Walton*, 145 Cal.

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228, 234; 78 Pac. Rep. 645. If such deposits did not pass as a gift, they may be recovered without presenting a claim against the estate of the deceased wife: *Spring v. Walton*, 145 Cal. 228, 233; 78 Pac. Rep. 645.

21. **For injunction.** An administrator is entitled to bring an action against a county, county judge thereof, and others, to enjoin and restrain the prosecution of a proceeding instituted by the county, for his removal as such administrator, where it appears, among other facts, that the action or proceeding sought to be enjoined was instituted in pursuance of a conspiracy entered into by the county judge, and the attorneys for the county, upon false charges of misconduct against the administrator, filed in the name of the county by certain of the defendants: *Alderman v. Tillamook Co. (Or.)*, 91 Pac. Rep. 298.

22. **For life insurance, and sick benefits.** In an action on a policy of life insurance, which does not contain the name of any beneficiary, but is payable subject to the will of the insured, and where the insured died, leaving a will, by which he gave all his estate to a person named, after payment of his debts, and appointed another person executor, the latter is the proper party to recover on the policy: *Winterhalter v. Workmen etc. Fund Assoc.*, 75 Cal. 245, 250; 17 Pac. Rep. 1. An action to recover sick benefits due the deceased during his lifetime, from a defendant voluntary beneficial association, is properly brought by and in the name of the personal representative: *Pearson v. Anderburg*, 28 Utah, 495; 80 Pac. Rep. 307, 308. This right to maintain an action against a voluntary benefit association is not lost by stipulations made by the deceased in his application to become a member, to the effect that, "I will seek my remedy for all legal rights on account of said membership or connection therewith, in the tribunals of the order only, without resorting for their enforcement, in any event, or for any purpose, to the civil courts." This stipulation does not go to the extent of affecting a property right created by, and growing out of, a contract with the association: *Pearson v. Anderburg*, 28 Utah, 495; 80 Pac. Rep. 307, 309.

23. **On mortgages.** In an action by an administrator to obtain a decree to the effect that the intestate was, at the time of his death, the owner of certain lands; that an accounting be had to determine the amount due to defendant upon a mortgage; that defendant has no right, title, or interest in the land, except as a mortgage thereof; and that, upon the payment to defendant of such sum as may be found due him (if any), he be required to satisfy the mortgage,—the proper judgment to be rendered is that, upon the failure of plaintiff to pay the amount found due, within the time specified by the court, the action be dismissed: *Boyce v. Fisk*, 110 Cal. 107, 116;

42 Pac. Rep. 473; *Booth v. Hoskins*, 75 Cal. 271; 17 Pac. Rep. 225. In an action by an administrator to foreclose a mortgage, the defendant is not permitted to plead a note held by him against the testator, as a counterclaim, where such note is barred by the statute of limitations at the commencement of the action upon the principal claim, inasmuch as the same did not constitute a cause of action existing at the commencement of the action, or upon which a counterclaim was maintainable: *Lyon v. Petty*, 65 Cal. 322, 325; 4 Pac. Rep. 103. The answer in such an action should set forth the fact as to when the note pleaded as a counterclaim was assigned to defendant. It is not sufficient to aver that the assignment was before the death of the maker. It must appear whether such assignment was before or after the maturity of the note itself. If the note was assigned before maturity, it would have constituted the subject-matter of a counterclaim if a cause of action could have been predicated upon it at the commencement of the plaintiff's action; but, if after maturity, the assignee took it subject to all existing equities between the maker and the payees. Under such circumstances it would not be the subject of a counterclaim, and could not be pleaded as such: *Lyon v. Petty*, 65 Cal. 322, 325; 4 Pac. Rep. 103. An action to foreclose a mortgage given to secure a debt due to the deceased should be brought by the administrator. The heirs are not proper parties: *Grattan v. Wiggins*, 23 Cal. 16, 29. An executor of the mortgagee of land must bring suit to foreclose before the statute of limitations has run against the mortgage, or the grantee of the mortgagor may plead the bar of the statute: *California Title etc. Ins. Co. v. Miller*, 3 Cal. App. 54, 58; 84 Pac. Rep. 453.

24. Partition. An administrator has no such interest in the land of an estate as entitles him to sue for a partition: *Ryer v. Fletcher Ryer Co.*, 126 Cal. 482, 485; 58 Pac. Rep. 908.

25. To quiet title, or to determine adverse claims. An executor or administrator is authorized, by the statute of North Dakota, to bring an action to quiet title to real estate belonging to a decedent, pending administration of the estate: *Blakemore v. Roberts*, 12 N. D. 394; 96 N. W. Rep. 1029. Actions to quiet title, or determine any adverse claim to property of an estate, may be brought by an administrator, and a suit to set aside a deed on the ground of incapacity of the grantor is clearly within this provision: *Collins v. O'Laverty*, 136 Cal. 31, 33. The sole test of the administrator's right of action is the right of the estate to the possession of the property: *Collins v. O'Laverty*, 136 Cal. 31, 35; 60 Pac. Rep. 327. A suit to determine adverse claims to property of the estate is rightly brought in the name of the administrator, and is prosecuted for the benefit of the estate: *Curtis v. Sutter*, 15 Cal. 259, 264; *Pennie v. Hildreth*, 81 Cal. 127, 130; 22

Pac. Rep. 398. Under the statute of Colorado, an administrator is not authorized to sue to remove a cloud from a leasehold interest held by his intestate, where there is no allegation that a sale of the land is necessary to pay debts, etc.: *McKee v. Howe*, 17 Col. 538; 31 Pac. Rep. 115, 116. Nor can he sue to quiet title to a water right appurtenant to land: *Travelers Ins. Co. v. Childs*, 25 Col. 360; 54 Pac. Rep. 1020, 1023. Although an administrator has no legal title to the real property of a decedent, yet, as he is entitled to possession thereof, he has such an interest as entitles him to maintain suit to determine an adverse claim thereto: *Ladd v. Mills*, 44 Or. 224; 75 Pac. Rep. 141, 142. In an action by an administrator to quiet title, where the complaint is unverified, a general denial puts in issue the fact that he is administrator: *Pennie v. Hildreth*, 81 Cal. 127, 132; 22 Pac. Rep. 398.

26. Replevin. An action to recover personal property of the estate may be maintained by the administrator, against one who claims title thereto, without a previous demand: *Knight v. Tripp* (Cal.), 49 Pac. Rep. 838, 839. In an action by an administrator to recover assets claimed to belong to his intestate's estate, the plaintiff's own affidavit, and a prior citation issued by the county judge, requiring defendant to appear and be examined, and the order of the county court made on such hearing, requiring defendant to disclose his knowledge of assets of the estate appropriated by him, and to deliver such assets to plaintiff, are competent evidence, and it is error to sustain an objection to it: *Bright v. Ecker*, 9 S. D. 192; 68 N. W. Rep. 326, 327. If an executor borrows money to pay debts of the estate, and pledges the personal property thereof to secure its payment, he may sue in replevin to recover such pledged property: *Parks v. Mockenhaupt*, 133 Cal. 424, 425; 65 Pac. Rep. 875. An administrator, under the Kansas statute, may maintain any possessory action to enforce his right to the possession of the personal estate; *Black v. Elliott*, 63 Kan. 211; 65 Pac. Rep. 215; following *Bauserman v. Charlotte*, 46 Kan. 480; 26 Pac. Rep. 1051, and *Kulp v. Kulp*, 51 Kan. 341; 32 Pac. Rep. 1118; 21 L. R. A. 550.

27. To set aside fraudulent conveyances.

(1) **In general.** Where a complaint, by an administrator, to set aside a conveyance for the benefit of creditors charges actual fraud on the part of the deceased grantor, and the evidence shows the conveyance to have been voluntary; that the deceased was indebted at the time, and conveyed all his property subject to execution; that the conveyance was kept secret; that the grantor continued to use the property as his own until the time of his death; and that there were other circumstances of a want of good faith; and there is no substantial contradiction,—a finding which negatives the charge of fraud is unwarranted by the testimony: *Daugherty v. Daugherty*, 104

Cal. 221, 223; 37 Pac. Rep. 889. An executor or administrator may maintain an action necessary either to protect his possession or reduce into possession property of the estate held by others. *Collins v. O'Lavery*, 136 Cal. 31, 35; 68 Pac. Rep. 327. Where the husband fraudulently conveyed land to his wife, but the deed was not recorded, and he continued to exercise acts of ownership, and had it assessed to himself until his death, a judgment creditor of the husband may pursue the land to enforce his judgment lien thereon without joining the executrix of the deceased husband as a defendant and without having presented his claim to the estate within the time limited by statute: *O'Doherty v. Toole*, 2 Ariz. 288; 15 Pac. Rep. 28. Where an estate is insolvent, and there is reason to believe that a conveyance of land executed by decedent was fraudulent, the creditors have the right to insist that the administrator endeavor to recover it for their benefit, and if he refuses to do so, or his personal interest tends to prevent him from doing his duty in this regard, he should be removed: *Marks v. Coats*, 37 Or. 609; 62 Pac. Rep. 488. If the pleader, in an action to recover property embezzled or alienated before the granting of letters of administration, desires to show that there are acknowledged debts against the estate, it is appropriate for him to allege that the claims have been "approved" by the county judge, where the statute provides that claims against an estate "allowed by the executor or administrator, and approved by the judge," etc., shall be filed in the county court, and be ranked among the acknowledged debts of the estate to be paid in due course of administration: *Bright v. Ecker*, 9 S. D. 192; 68 N. W. Rep. 326, 327. In a suit by an administrator to recover, for the benefit of creditors, property fraudulently conveyed by the deceased, he is entitled to recover only the decedent's interest in the property fraudulently conveyed. If it had been previously mortgaged, and the fraudulent grantee discharged that mortgage, he is entitled to be subrogated to the rights of the mortgagee: *Ackerman v. Merle*, 137 Cal. 169, 171; 69 Pac. Rep. 983. In an action by an administrator to recover, for the benefit of creditors, property fraudulently conveyed by the deceased, he may recover all the property so conveyed, if his complaint is otherwise sufficient, without a direct allegation that all is necessary to pay debts: *Ackerman v. Merle*, 137 Cal. 157, 158; 69 Pac. Rep. 982. A judgment in ejectment against an executor, in favor of the grantee in a fraudulent deed of a deceased person, is not a bar to a suit in equity, brought either by the executor or by a creditor of the testator, to set aside such fraudulent deed, on which the judgment in ejectment was obtained, and to apply the property in payment of his claim: *Hills v. Sherwood*, 48 Cal. 386, 392.

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Constitutionality of statute, authorizing disposition of surplus, after the setting aside of a sale fraudulent as to creditors: See note, § 641, ante.

(2) **May be brought by special administrator when.** If suit be brought by a special administratrix to set aside a deed and to recover property for the estate, and a will is afterward probated, and both plaintiff and defendant in that action are appointed and qualified as executors, the executrix, who was the special administratrix and the original plaintiff, is the proper party to prosecute the action, and the defendant should retain his individual character therein: *Stohr v. Stohr*, 148 Cal. 180, 182; 82 Pac. Rep. 40, 777. Where there is a deficiency of assets, an action may be maintained by a special administrator to recover property, for the benefit of creditors, which had been fraudulently conveyed by decedent in his lifetime: *Forde v. Exempt Fire Co.*, 50 Cal. 299, 302. The statute of limitations does not afford a defense to an action brought by a special administrator to set aside a fraudulent conveyance made by the deceased, where, by the complaint, it appeared that the conveyance was made with the intent to defraud the creditors, and that there was a deficiency in the assets of the decedent's estate, and that some of the creditors obtained judgment against the estate within three years next before the filing of the complaint: *Forde v. Exempt Fire Co.*, 50 Cal. 299, 302. Under the California statute, it is the duty of a special administrator, where there is a deficiency of assets, to maintain an action to recover real estate conveyed by the decedent, in his lifetime, with the intent to defraud his creditors: *Forde v. Exempt Fire Co.*, 50 Cal. 299, 302.

(3) **May be brought by creditor when.** If it is made the duty of an executor or administrator to sue to recover property fraudulently conveyed by the deceased, when there is a deficiency of assets, such action by a creditor will not ordinarily lie, at least until he has exhausted all means to procure action by the representative; but where the representative is also the fraudulent grantee, it may be maintained by the creditor or his assignee: *Emmons v. Barton*, 109 Cal. 662, 668; 42 Pac. Rep. 303. A statute empowering the executor or administrator to prosecute an action to set aside a fraudulent conveyance of the personalty or realty by the testator or intestate does not necessarily preclude the creditors from bringing such action, if they are authorized so to do by the general law: *Hills v. Sherwood*, 48 Cal. 386, 393. A creditor has, under the general laws, the right to pursue property fraudulently conveyed by the debtor, in the hands of the vendee, without joining the executor of the deceased debtor. The statute gives the executor or administrator the right, when the assets are not sufficient to pay the debts of the estate, to bring suit to set aside a fraudulent conveyance of the testator or intestate; but he is not the only party who has that right. The right is given for the protection of creditors, and a creditor himself may, in equity, pursue the remedy: *O'Doherty v. Toole*, 2 Ariz. 288; 15 Pac. Rep. 28. The statute providing for the filing of claims against

an estate within a specified period, while barring the creditor from collecting his debt against the estate proper (in this instance an insolvent estate), does not preclude the creditor from bringing an action to recover property fraudulently conveyed by a deceased debtor: *O'Doherty v. Toole*, 2 Ariz. 288; 15 Pac. Rep. 28. Claims against an estate, which have been allowed, may be assigned to one of the creditors for the purpose of bringing an action to set aside a fraudulent conveyance of property by the decedent; and where the grantee of such a conveyance is executrix, the action may be brought by the assignee creditor: *Emmons v. Barton*, 109 Cal. 662, 667, 668; 42 Pac. Rep. 303. An action to set aside a fraudulent conveyance made by a decedent in his lifetime may be maintained by a creditor of the estate, where the administrator occupies a position hostile to the creditor and refuses to act at his request: *Barker v. Battey*, 62 Kan. 584; 64 Pac. Rep. 75. It has been held, in Utah, that a creditor cannot maintain an action to set aside a fraudulent conveyance by a deceased debtor without first demanding that the administrator bring such suit and being met by a refusal to comply on the part of the latter: *Fehringer v. Commercial Nat. Bank*, 23 Utah, 393; 64 Pac. Rep. 1108. An administrator of a deceased creditor may prosecute an action commenced by his intestate against the widow of a deceased debtor to set aside an alleged fraudulent conveyance by the latter: *Perea v. De Gallegos*, 3 N. M. 151; 3 Pac. Rep. 246, 248. A judgment in an action by a creditor to set aside a fraudulent conveyance of real property made by an intestate proves the indebtedness prima facie in favor of the plaintiff as against the grantee of the intestate: *Hills v. Sherwood*, 48 Cal. 386, 393. See *McLaughlin v. Bank of Potosi*, 7 How. (U. S.) 221. The holder of a claim against an estate, which has been disallowed by the administrator, is not a creditor who may compel the administrator to sue for property alleged to have been fraudulently conveyed by the deceased: *Ohm v. Superior Court*, 85 Cal. 545, 548; 26 Pac. Rep. 244; 20 Am. St. Rep. 245. But an order that the administrator allow her name to be used in a suit for the recovery of such property for the benefit of creditors is not appealable: *Estate of Ohm*, 82 Cal. 160, 161, 163; 22 Pac. Rep. 927.

(4) **Elements necessary to maintain.** The administrator of a deceased person cannot maintain any claim against a surviving wife, for whom provision had been made by the deceased, while solvent, in the setting apart to her of property, upon which a large sum constituting community property had been expended, that the deceased himself could not have successfully asserted in his lifetime; and this applies also to the creditors, who, like the administrator, are limited by the lines bounding the rights of the husband, except in cases of a disposition of his property for the purpose of defrauding them: *Peck v. Brummagim*, 31 Cal. 440, 450; 89 Am. Dec. 195. In an action by an

administrator to set aside a conveyance of land by the deceased, on the ground that it was in fraud of creditors, it must appear that there are creditors and that there is an insufficiency of assets to meet their demands: *Field v. Andrada*, 106 Cal. 107, 110; 39 Pac. Rep. 323. In an action by an administrator to subject to administration certain property alleged to have been conveyed by the decedent in his lifetime, in fraud of creditors, where there is neither a claim nor a pretense that the decedent, in making the conveyance in question, had any intent to defraud any one, and where a conveyance by gift is not made, it cannot be said that the conveyance is fraudulent as a matter of law. The question of fraudulent intent is one of fact and not of law: *Brown v. Pereault*, 5 Ida. 729; 51 Pac. Rep. 752. In an action by an administrator against the wife of a decedent to recover property alleged to have been fraudulently conveyed to her, the fraudulent intent of the grantor must be alleged: *Threlkel v. Scott*, 89 Cal. 351, 353; 26 Pac. Rep. 879. In an action by a legatee against the administrator of a deceased executor to compel the application of property, alleged to have been fraudulently concealed and misapplied by such deceased executor, in payment of a legacy to plaintiff, the complaint should show proper diligence in discovering the alleged fraud; and if more than three years have elapsed after the perpetration of it, the facts and circumstances should be stated which would excuse delay in its discovery: *Burke v. Maguire*, 35 Cal. Dec. 428, 432 (April 28, 1908). On the trial of an action by an administrator to recover, for the benefit of creditors, personal property fraudulently transferred by a deceased debtor, evidence that there were creditors to be defrauded, and that the transfer was made with intent to defraud them, would be material, and its exclusion is reversible error: *Harris v. Harris*, 59 Cal. 623.

28. Set-off and counterclaim. In a suit by an administrator, a defendant having a set-off may plead and prove the same without showing that it has been presented as a claim against the estate, and this, notwithstanding the amount of the set-off exceeds the sum sued for, though in such case no judgment for the surplus should be rendered against the estate: *Murphy v. Colton*, 4 Okl. 181; 44 Pac. Rep. 208, 209; *Fishburne v. Merchants' Bank*, 42 Wash. 473; 85 Pac. Rep. 38, 40; *Talty v. Torling*, 79 Minn. 386; 82 N. W. Rep. 632. In an action by an executrix to recover a deposit of her testator from a bank, the latter may plead as a counterclaim the application of the amount in part payment of a promissory note of the testator held by it for a larger amount, which fell due after his death, but before suit brought: *Ainsworth v. Bank of California*, 119 Cal. 470, 474, 475; 51 Pac. Rep. 952; 63 Am. St. Rep. 135; 39 L. R. A. 686. Under the Washington statute, a set-off may be interposed by the defendant in an action by an executor or administrator, and it is not required that

such set-off claim shall be first presented to the executor or administrator: *Fishburne v. Merchants' Bank*, 42 Wash. 473; 85 Pac. Rep. 38, 40. A note may be interposed as a set-off in an action by an administrator, where such note had matured before the commencement of the action. A note maturing after death, and before the commencement of the action, may be properly interposed by way of counterclaim in an action by the executor or administrator: *Fishburne v. Merchants' Bank*, 42 Wash. 473; 85 Pac. Rep. 38, 40; *Ainsworth v. Bank of California*, 119 Cal. 470; 51 Pac. Rep. 952; 39 L. R. A. 686; 63 Am. St. Rep. 135. The code provision concerning set-off relates to the situation of the parties "at the commencement of the action," and the death of one of the parties to the demand, though such death occur before the maturity of the demand, does not change the relative rights of the parties in pleading a counterclaim, or in compensating the claims so far as they equal each other, provided the set-off be due when the action is commenced: *Ainsworth v. Bank of California*, 119 Cal. 470, 474; 63 Am. St. Rep. 135; 51 Pac. Rep. 952; 39 L. R. A. 686. If a patient of a physician has transferred all of his property, which fact is known to the physician, who delays for a number of years, after the patient's death, to assert his rights in the estate, such physician cannot, when sued on an individual claim by the administrator of the decedent, and which administrator was the transferee of the decedent's property, counterclaim for his services on the ground of a trust imposed on the plaintiff to pay the decedent's debts when the property was conveyed to him: *Lauridsen v. Lewis* (Wash.), 97 Pac. Rep. 663, 665. In an action by an administrator to recover upon a promissory note executed by the defendant to the intestate, the defendant cannot set up, by way of counterclaim, his share of an indebtedness alleged to be due to him from the intestate, because of partnership moneys misappropriated by the latter, where there is no averment in the counterclaim that any claim had ever been presented to the representative of the estate of the deceased, or any allowance made: *Reed v. Johnson*, 127 Cal. 538, 541; 59 Pac. Rep. 986. The cross-demand must have been an existing demand against the testator or intestate at his death. It is not necessary that the cross-demand thus existing should have become due at the time of the testator's death. It is sufficient if it becomes due and payable in time to be pleaded as a set-off in the same manner as if the testator or intestate had lived to bring the action: *Ainsworth v. Bank of California*, 119 Cal. 470, 475; 63 Am. St. Rep. 135; 51 Pac. Rep. 952; 39 L. R. A. 686.

REFERENCES.

Right of persons sued by an executor or administrator to set off a claim against the deceased not presented within the statutory period: See note 7 Am. & Eng. Ann. Cas. 850.

29. For trespass on land. An administrator is a proper party to sue for damages to land of the deceased, which accrued in the lifetime of the latter: *Hanlen v. Baden*, 6 Kan. App. 635; 49 Pac. Rep. 615, 616. As to the sufficiency of allegations that plaintiffs are qualified administrators, see *Central Branch etc. R. R. Co. v. Andrews*, 37 Kan. 162; 14 Pac. Rep. 509. A sole devisee in possession, who is also executrix, may sue for damages to property of the estate, and a recovery by her as devisee would bar a recovery by her for the same cause as executrix: *Colton v. Onderdonk*, 69 Cal. 155, 159; 10 Pac. Rep. 395; 58 Am. Rep. 556. A cause of action for trespass or injury to land, occurring after the death of a decedent, does not pass to the executor or administrator, but to the heir or devisee. An executor who has no estate in the premises, except the right to lease the same, cannot, therefore, maintain an action for trespass or waste: *Adams v. Slaterry* (Col.), 85 Pac. Rep. 86, 88. An action brought by testamentary executors and trustees for damages to land of the estate in which, under the law of Kansas, the widow has a right, must fail for want of joinder of the widow as a necessary party, unless it is shown that she consented to the will, or elected to take under it: *Atchison etc. Ry. Co. v. Davenport*, 65 Kan. 206; 69 Pac. Rep. 195, 199.

30. Unlawful detainer. Executors of a deceased lessor may give the necessary notice and maintain an action in unlawful detainer against lessees of the deceased, who hold after rent due and demand made: *Knowles v. Murphy*, 107 Cal. 107, 112; 40 Pac. Rep. 111.

31. Limitation of actions. The statute of limitations does not commence to run upon a contract until the plaintiff can maintain an action thereon. Hence an administrator may maintain an action upon a contract made eight years prior to the commencement of the action, where it appears that the contingency on which payment depended happened within the period of the statute: *Noyes v. Young*, 32 Mont. 226; 79 Pac. Rep. 1063, 1066. An action by an executor of a deceased husband is not barred by limitation against the administratrix of his deceased widow, where the latter was appointed less than two years before action was commenced: *Sprague v. Walton*, 145 Cal. 228, 236; 78 Pac. Rep. 645. If an executor or administrator makes a void sale of the land of a decedent, and fails to sue for the recovery of the land, or to set aside the sale, the three years' statute of limitations begins to run after the administrator has had a reasonable time in which to obtain settlement of his final account, and what is such reasonable time must depend, in general, on the circumstances of each estate: *Dennis v. Bint*, 122 Cal. 39, 44, 45; 68 Am. St. Rep. 17; 54 Pac. Rep. 378. Under a statute by which, upon the death of a plaintiff, an order to revive the action in the names of his representatives or successors may be made, but shall not be made without the

consent of defendant after the expiration of one year from the time the order might have first been made, the statute of limitations is not suspended until the appointment of a representative, but begins to run after the expiration of a reasonable time from the death in which a representative might have been appointed, and parties seeking to avail themselves of its benefit must use diligence and strictly comply with its terms: *Glazier v. Heneybuss* (Okl.), 91 Pac. Rep. 872. Under the California statute, the executors or administrators of a deceased judgment creditor may, by motion and order, obtain and enforce execution upon a judgment in favor of their decedent after the lapse of five years from the date of its entry: *Weldon v. Rogers*, 151 Cal. 432, 435; 90 Pac. Rep. 1062. Suit brought by the assignee of a mortgage to foreclose the same for the benefit of the assignor, who is administrator of the mortgagor's estate, may be disregarded in considering whether the action is barred by limitation: *Brown v. Mann*, 71 Cal. 192, 193; 12 Pac. Rep. 51. If an administratrix, because of lapse of time, cannot maintain an action to recover property of the estate sold by her under proceedings alleged to be defective, the right of the heirs to maintain such action is also barred: *Dennis v. Bint*, 122 Cal. 39, 47; 54 Pac. Rep. 378; 68 Am. St. Rep. 17; *McLeran v. Benton*, 73 Cal. 329, 342; 14 Pac. Rep. 879; 2 Am. St. Rep. 814; *Jenkins v. Jensen*, 24 Utah, 108; 66 Pac. Rep. 773, 778. A letter by a debtor of a decedent to plaintiff, before the latter became administrator, although an heir, could not revive a right of action barred by limitation: *Visher v. Wilbur* (Cal. App.), 90 Pac. Rep. 1065. An administrator will not be permitted to waive the statute of limitations: *Boyce v. Fisk*, 110 Cal. 107, 117.

REFERENCES.

The statute of limitations begins to run in favor of an executor or administrator when: See note 99 Am. Dec. 394-396.

32. Termination of right to sue. If it is conceded that an administrator, at the time suit was brought, had ceased to be the administrator, no cause of action can be maintained by him as such. But if it appears on retrial that a bill of sale for the property in controversy should have been to the plaintiff individually, and not as administrator, the reference to him as administrator should be regarded as merely descriptive of the person: *Afflerbach v. McGovern*, 79 Cal. 268, 272; 21 Pac. Rep. 837. If a testator dies seized of certain land, leaving a will under which his administratrix is the sole residuary legatee, and it appears that she has made an agreement to sell the property after the time for presentation of claims has passed, and all debts and legacies have been paid, leaving in her hands money much more than sufficient to pay all costs and expenses of administration, she thus becomes the sole beneficiary of the land in question, and not having been empowered by the court to sell the land, her contract to

sell it is binding on her personally, and operates as an equitable transfer of the ownership of the property. The purchaser must therefore be regarded in equity as the real owner of the land, and, after the estate has been fully settled, leaving nothing to be done except the entry of the decree, which it is the duty of the executrix to apply for and of the court to enter, the power of the executrix to maintain a suit against such purchaser must be regarded as having terminated: *Moffitt v. Rosencrans*, 136 Cal. 416, 418; 69 Pac. Rep. 87. The right of an executrix to maintain suit against one holding under her personally must be regarded as terminated when the estate has been fully settled, except as to costs of administration, for which she has ample funds; and a person in possession of land, under a contract of purchase not authorized or ratified by the court, will be regarded as holding under her personally: *Moffitt v. Rosencrans*, 136 Cal. 416, 418, 419; 69 Pac. Rep. 87.

III. ACTIONS AGAINST EXECUTORS OR ADMINISTRATORS.

1. **In general.** Where a partnership existed, between the plaintiff and the defendant administrator's intestate, and the administrator collects funds belonging to the partnership, an action may be maintained by the surviving partner against the administrator to recover the amounts so collected. As to such amounts, the representative of the deceased partner has no right thereto, either in his representative or individual capacity. If, on the other hand, there was no partnership, and the representative collected, either in his individual or representative capacity, more than the share which belonged to the intestate, suit may, nevertheless, be maintained against the representative for moneys received which should have been paid to the plaintiff: *Bales v. Cannon* (Col.), 94 Pac. Rep. 21. The presence of an executor at a sale by a trustee under a trust deed made by the testator, and the conduct of the executor in failing to object when the trustee read the conditions showing that the title would be certified to the purchaser free and clear of encumbrances, do not conclusively establish an estoppel against him as executor from defending an action brought to charge the estate with liability for a deficiency resulting from the sale: *Crisman v. Lanterman*, 149 Cal. 647; 87 Pac. Rep. 89; 117 Am. St. Rep. 167.

2. **Parties.** In an action in equity to adjudge as null and void a note purporting to have been given by a deceased husband and by the plaintiffs, as joint makers, and which was alleged to have been a false, fraudulent, and forged instrument, the personal representatives of the deceased husband of a co-plaintiff are not necessary parties to the adjudication: *Ritterhoff v. Puget Sound Nat. Bank*, 37 Wash. 76; 79 Pac. Rep. 601. Where a complete determination of the controversy cannot be had without the presence of the administrator, the

court has the right to order him to be brought in as a party, upon the application of the plaintiff, through the filing of a supplemental complaint, and summons may be issued and served upon such administrator after the expiration of one year from the commencement of the action, where summons had been issued against the original defendants within the year, as provided by statute. The plaintiff, in such case, was under no obligation to procure the appointment of an administrator at an earlier time: *Churchill v. Woodworth*, 148 Cal. 669; 84 Pac. Rep. 155; 113 Am. St. Rep. 324. The plaintiff in an action to have a deed absolute in form declared to be a mortgage, and to foreclose the same, may bring his action against the heirs of the mortgagor, and subsequently, upon the appointment of an administrator, the latter should be joined in the action as a necessary party. The plaintiff does not waive his right to bring his action against the administrator within a year after the issuance of letters, by commencing the action against the heirs of the deceased, before the appointment of such administrator: *Churchill v. Woodworth*, 148 Cal. 669; 84 Pac. Rep. 155; 113 Am. St. Rep. 324. No action will lie against an administrator to set aside a decree between parties, where one of the parties to the suit is dead, and the administrator is brought in, in a representative capacity, and the action concerns rights other than those affecting property as to which the administrator stands only in a representative capacity: *Smith v. Smith*, 13 Col. App. 295; 57 Pac. Rep. 747, 748. It is no valid objection to an order substituting an executor or administrator in place of a deceased party to an action, that it was made on the day notice of the application therefor was served: *Skinner v. Lewis*, 40 Or. 571; 62 Pac. Rep. 523. Under the law of Colorado, where an attempt has been made to revive an action in the name of an administrator which was pending against his decedent at his death, if the administrator has no notice of the proceeding, and did not appear in the action, a judgment against him is void for want of jurisdiction: *Symes v. Charpiot*, 17 Col. App. 463, 466; 69 Pac. Rep. 311, 312.

3. By distributees. An action for the distributive share of an estate by a distributee, after final distribution, should be brought against the administrator in his individual and not in his representative capacity, and it is unnecessary to allege a demand before suit: *Malone v. Davis*, 67 Cal. 279, 282; 7 Pac. Rep. 703. An action by a legatee against an executor or administrator to recover his share of an estate is an action against the executor or administrator individually, and not against him in his representative capacity. It is not an action against the estate. As against the estate, the rights of the distributee are fully adjudicated by the decree of distribution: *St. Mary's Hospital v. Perry* (Cal.), 92 Pac. Rep. 864, 865. In an action to recover a distributive share of an estate, as fixed by

the decree of distribution, for refusal to pay over moneys which, under the decree, it was the duty of the executrix to pay, the words "as executrix," in the title of the action, should be held to be merely descriptive: *St. Mary's Hospital v. Perry* (Cal.), 92 Pac. Rep. 864, 865. In an action to recover plaintiff's share of an estate, distributed to the plaintiff legatee in trust, it is not proper for the judgment against the executrix to specify the terms of the trust: *St. Mary's Hospital v. Perry* (Cal.), 92 Pac. Rep. 864, 866.

4. Against foreign executor or administrator. A foreign executor, who comes into this state to reside, and brings with him property belonging to the estate, cannot be made liable in this state, upon the suit of a local creditor of the testator, to the extent of the property brought here, but may be to the extent of the property already here: *Falke v. Terry*, 32 Col. 85; 75 Pac. Rep. 425. Under the statute of Kansas, a foreign executor or administrator may be sued in an action on a contract for the recovery of money, and service may be obtained by attachment and publication: *Cady v. Bard*, 21 Kan. 667; *Donifelser v. Heyl*, 7 Kan. App. 606; 52 Pac. Rep. 468. Courts of a state, other than that of the domiciliary jurisdiction, cannot try the title of real estate situate in the latter, where the action is one between legatees under a will and a foreign executor, who is charged with the wrongful application of the personal assets of the estate: *Falke v. Terry*, 32 Col. 85; 75 Pac. Rep. 425. An administrator *de bonis non*, appointed in Illinois, may be authorized to sell real estate in Kansas, in the same manner and upon the same terms and conditions as are prescribed in the case of an executor or administrator appointed in the latter state; but, to procure an order for that purpose, it is essential that he should give notice. If he sells property in Kansas without giving notice, the deed is void, and constitutes no defense to an action of ejectment brought by the owners of the land: *Albright v. Bangs*, 72 Kan. 435; 83 Pac. Rep. 1030. Where a defendant dies pending suit, and his executors, appointed in another state, who are also legatees, appear as such executors in the action, without ancillary administration, and adopt the answer of their testator, and judgment is rendered against them, not payable in course of administration, the validity of such judgment cannot be denied by them in an action thereon against them as executors *de son tort* in the state of their appointment, although it cannot there be enforced against the estate: *First Nat. Bank v. Lewis*, 12 Utah, 84; 41 Pac. Rep. 712.

REFERENCES.

Attachment against foreign executor: See head-line 42, post.

5. Pleadings. A suit against an administrator in his representative capacity is simply an action against the estate, and a complaint

in such a suit should state a cause of action against the estate: *Nickals v. Stanley*, 146 Cal. 724, 727; 81 Pac. Rep. 117. In an action brought against a defendant as an executor, the probate of the will and the executorship of defendant are sufficiently pleaded, where it is alleged that the will "was duly admitted to probate"; that "letters testamentary were thereupon issued to him"; and that "he has been and now is the duly appointed, qualified, and acting executor" of the said will of, etc.: *Kirsch v. Derby*, 96 Cal. 602, 604; 31 Pac. Rep. 567. A gift by a decedent to his daughter, who is administratrix of his estate, cannot be set aside as fraudulent by a creditor without appropriate pleading in which the fraudulent intent is alleged as a fact: *Estate of Vance*, 141 Cal. 624, 627; 75 Pac. Rep. 323. Where a plaintiff sues in a representative capacity, he must allege matters showing his appointment, but such is not the case as to defendants who are sued as executors or administrators. It is sufficient to allege, simply, that they are such executors or administrators: *Wise v. Williams (Cal.)*, 14 Pac. Rep. 204. An administrator is bound by the rule of practice that a party suing on a contract need not set forth specifically the items of the indebtedness. If the defendant is not satisfied with the general allegation of indebtedness, the code specially provides a remedy. He may, within five days, demand a copy of the plaintiff's account; and if he fails to avail himself of the right thus given him, he cannot be heard to say that the complaint is insufficient on the ground of uncertainty in that respect: *Wise v. Hogan*, 77 Cal. 184, 186; 19 Pac. Rep. 278. In an action against a representative to recover an alleged indebtedness due from the defendant's testator, and based upon separate counts, and where, following the main allegations, there is an allegation of the death of the testator and of the proceedings in probate, the complaint is sufficient against the objection that the allegations as to the death of the testator and as to the proceedings in probate are not separately stated in each count, as such allegations may be considered as referring to either or both of the counts: *Moseley v. Heney*, 66 Cal. 478; 6 Pac. Rep. 134. A cause of action is not shown in a complaint against an administrator and his sureties, brought by alleged heirs to recover a sum equivalent to the plaintiff's alleged interest in the estate of a decedent, where it is averred that no mention of the two alleged heirs was made in the proceedings for the sale of the real estate of the decedent, or of their claims to heirship, and where it appeared that at no time had either of the alleged heirs, or their assignees, appeared in the probate court to have his or her status as heir adjudicated. An administrator, at his peril, declares persons to be interested as heirs, or other claimants, before such persons have been formally declared by the court, in probate proceedings, to be such: *Kirk v. Baker*, 26 Mont. 190; 66 Pac. Rep. 942, 943. In a suit brought by a creditor against an executor de son tort, in Colo-

rado, the complaint, though inartificial, will be deemed to state a cause of action, where it alleges that the defendant was an executor de son tort of the estate of the deceased, and that, as executor, the defendant took charge, without authority, of the property of decedent, which consisted of a large sum of money, house and lot, and personal property, if such allegations are followed by other allegations relating to the employment of the plaintiff by the decedent, the agreed compensation therefor, that decedent died without paying, and that demand had been made upon the defendant and payment refused: *Ebbinger v. Wightman*, 15 Col. App. 439; 62 Pac. Rep. 963. Consent given by an executor to the filing of a substituted complaint after an action accrued upon a claim based upon a promissory note, and answering such substituted complaint, does not constitute an estoppel from invoking the premature bringing of the action as a defense, where such action was instituted before the cause of action accrued: *Radue v. Pauwelyn*, 27 Mont. 68; 69 Pac. Rep. 557.

6. Evidence. Stipulations. In an action against an administrator, wherein the plaintiff claims ownership of certain mining lands, and seeks to quiet the title against the administrator and other defendants, declarations of a deceased person, as to the identity of the lands, made after conveyance, are admissible against the personal representative in the action: *Collins v. McKay* (Mont.), 92 Pac. Rep. 295, 298. A will is not admissible in evidence in an action against the executor to recover money paid to the decedent by the plaintiff, where such will did not contain any statements of the deceased concerning his receipt of the money, nor any denial of his obligation to repay it, nor in any manner tend to contradict any fact to which the plaintiff or any of her witnesses, or any of his witnesses, had testified in support of the action. The admission of the will in evidence, injecting collateral facts into a case, and diverting the jurors from the real question in issue, is, where no opportunity was given to rebut it, reversible error: *Grubbe v. Grubbe*, 26 Or. 363; 38 Pac. Rep. 182, 184. A stipulation, in an action against an administrator upon a promissory note, that the claim sued upon had been disallowed by the administrator, as well as by the probate court, and that the action be tried upon the issues made upon the pleadings, etc., does not estop the defendant, as administrator, from offering evidence to show that the claim was not presented, and does not have the effect of shifting the burden of proof in the action: *Logan County Bank v. Beyer* (Okl.), 87 Pac. Rep. 607.

7. Judgments.

(1) **In general.** Where an action was brought against a person who refused, as executor, to turn over to a distributee, after a decree

of distribution, a legacy charged with a trust, without first receiving from the legatee an agreement to perform the trust, and this constituted the only defense, it was proper to render a judgment upon the pleadings in favor of the distributee, inasmuch as the duty appertaining to the trust is another and subsequent matter with which the executor or administrator has nothing to do; *St. Mary's Hospital v. Perry* (Cal.), 92 Pac. Rep. 864. See *Melone v. Davis*, 67 Cal. 279; 7 Pac. Rep. 703; *Le Mesnager v. Variel*, 144 Cal. 463; 77 Pac. Rep. 988; 103 Am. St. Rep. 91. A creditor of an estate has the right to inquire into the legality of a judgment against the administrator, such as a judgment rendered for the foreclosure of a mortgage, and for judgment for attorneys' fees and a deficiency, as a judgment for a deficiency arising upon the sale must, of necessity, swell the liabilities of the estate, and leave a smaller amount to be distributed: *O'Keefe v. Foster*, 5 Wyo. 343; 40 Pac. Rep. 525. If an administrator, believing that he has assets sufficient for the payment of all debts, suffers judgment to be entered against him, he will be relieved in equity, if the assets become insufficient through an unexpected depreciation of their value. So, too, if the act done or the judgment suffered is made under a mistake, or through ignorance of a material fact, and without fault on his part, it is relievable in equity. But if an executor confesses judgment against himself, for a debt of his testator, upon a miscalculation of the amount of assets in his hands, and it appears afterward that the assets are insufficient to satisfy it, he will not be relieved in equity against the judgment: *Brenner v. Alexander*, 16 Or. 349; 19 Pac. Rep. 9. Where, under the statute, the entire estate has been set aside to the widow, she cannot be made a party to a suit against the representative of the deceased, or be bound by any judgment which may thereby and therein be obtained, where she had nothing to do with the making or indorsing of the note upon which the action was based: *Wills v. Booth* (Cal. App.), 91 Pac. Rep. 759. Judgment against the executor of one estate, as well as against the administrator de bonis non of another state, has the effect, only, of establishing the claims of the plaintiff against such estates in the same manner as if they had been presented to and allowed by the executor of the one, and the administrator de bonis non of the other, and by the court. No execution can issue on such a judgment, and it is not even a lien on the property of the estate: *Prefontaine v. McMicken*, 16 Wash. 16; 47 Pac. Rep. 231. Where an agreement is entered into between a prospective purchaser and an executor, and a deposit is made in advance of the order of the court authorizing the sale of the property, the deposit to be returned if the sale is not a good one, such prospective purchaser is entitled to recover such deposit, where the sale is irregular and invalid, and the deed to the property would pass no title. The executor, in such case, cannot

recover the loss incident to a resale of such property, or retain such deposit, or apply the same in payment of the deficiency resulting therefrom. In an action to recover the deposit, a judgment in favor of the plaintiff will not be reversed, because it was entered against the defendant individually, where no objection to the action on the ground that defendants were sued as individuals and not as executors, was raised by demurrer or answer: *Hellman v. Merz*, 112 Cal. 661, 668; 44 Pac. Rep. 1079.

(2) **Must be payable in course of administration.** A judgment in an action against an administrator should be against him *de bonis testatoris*: *Jones v. Perot*, 19 Cal. 141; 34 Pac. Rep. 728. A judgment against executors or administrators should be made payable in due course of administration: *Atherton v. Fowler*, 46 Cal. 323, 327; *Kelly v. Bandini*, 50 Cal. 530, 532; *Drake v. Foster*, 52 Cal. 225, 227; *Lawrence v. Doolan*, 68 Cal. 309, 315; 5 Pac. Rep. 484; 9 Pac. Rep. 159. So in Colorado, a judgment in an action against an executor or an administrator should be, that it be payable out of the estate of the deceased in due course of administration; and a provision in the judgment, in that state, that the plaintiff have costs and that he have execution therefor, is erroneous: *Kilpatrick v. Haley*, 14 Col. 399; 60 Pac. Rep. 261. If a party to an action dies after a cause is tried, and submitted to the court for its decision, and a written opinion announcing the court's conclusion is filed, and before judgment is entered, the court may order judgment entered *nunc pro tunc* as of the date of the submission and filing of its decision. In such case it is proper that judgment be directed against the decedent payable in the course of administration on his estate: *Fox v. Hale and Norcross S. M. Co.*, 108 Cal. 478; 41 Pac. Rep. 328. An action may be maintained against the administrator of a tax-collector and the sureties on the official bond of the deceased official to recover money of the plaintiff received by the deceased in his official capacity, but which money was neither paid to the treasurer nor to the plaintiff; and the judgment against the representative must provide that it be paid by him in due course of administration: *Lawrence v. Doolan*, 68 Cal. 309, 313; 5 Pac. Rep. 484; 9 Pac. Rep. 159. If an action is instituted against an executor as such, and the court has acquired no jurisdiction of him in his personal capacity, the proceedings cannot be amended so as to permit a personal judgment to be entered: *Renwick v. Garland*, 1 Cal. App. 237; 82 Pac. Rep. 89.

(3) **Foreign judgments.** A judgment recovered against the administrator of a deceased person in one state is no evidence of debt in a subsequent suit by the same plaintiff in another state, either against an administrator, whether the same or a different person appointed there, or against any other person having assets of the

deceased: *Braithwaite v. Harvey*, 14 Mont. 208; 36 Pac. Rep. 38. See *Johnson v. Powers*, 139 U. S. 156; 11 Sup. Ct. Rep. 525.

REFERENCES.

Foreign judgment against executor or administrator: See note 27 L. R. A. 101-117.

(4) **Void if made after termination of office.** A judgment recovered against an executor, upon a contract made by the testator in his lifetime for the conveyance of an interest in real estate, to compel the execution, by the executor, of a deed according to the terms of the contract, is not binding upon the heirs and devisees, where such judgment was obtained against the executor after his resignation, and the approval and settlement of his account: *Luco v. Commercial Bank*, 70 Cal. 339; 11 Pac. Rep. 650. No judgment can properly be entered against an administrator, as such, after his removal from office, although he may have an appeal pending from the order for his removal: *More v. More*, 127 Cal. 460, 463; 59 Pac. Rep. 823.

8. **Costs.** In an action against an executrix to recover plaintiff's distributive share of an estate, costs are allowable as in other cases, and both costs and interest are chargeable only against the executrix as an individual, and not against the estate: *St. Mary's Hospital v. Perry* (Cal.), 92 Pac. Rep. 864, 866.

9. **Actions on accounts.** In an action against an executor to recover a balance due on a mutual account, the finding of the trial court as to the amount due upon the account, which was less than the amount claimed, will be treated as conclusive by the appellate court: *Merithew v. Orr*, 90 Cal. 363, 364; 27 Pac. Rep. 295. An administrator defendant may demand a copy of the account sued on, in an action against him, where the complaint is on an account, without specifying the items, and is bound by the rule that if he fails so to do, he cannot object to the complaint for uncertainty in that respect: *Wise v. Hogan*, 77 Cal. 184, 186; 19 Pac. Rep. 278.

10. **Attachment.** Under the law of Kansas, an attachment suit may be maintained against a foreign executor to enforce a contract made by his testator, who died owning property in that state: *Manley v. Mayer*, 68 Kan. 377; 75 Pac. Rep. 550.

REFERENCES.

Garnishment of executor or administrator: See note 47 L. R. A. 345-365. Right of creditor to levy attachment on property of decedent's estate under a writ against the executor or administrator: See note 5 Am. & Eng. Ann. Cas. 912.

11. Suits on contracts.

(1) **On contracts by decedent.** To recover in an action against an estate in assumpsit on a quantum meruit for services rendered by a wife to the decedent, the plaintiff must prove a contract, either express or implied, and that services were rendered under such contract, and the value thereof. Assumpsit does not necessarily imply a contract, but may lie where some duty would justify the court in imputing a promise to perform it: *Snowden v. Clemons*, 5 Col. App. 251; 38 Pac. Rep. 475. An action brought against the estate of a decedent for services rendered in discovering ore on mining property belonging to the estate, and based upon the promise of the testator to pay the claimant therefor, is sufficiently supported by the testimony of two witnesses to the facts and circumstances, the weight and credibility of whose testimony is for the jury: *Titus v. Bernard*, 20 Col. App. 104; 77 Pac. Rep. 256. In an action by the daughter against the estate of her deceased mother, for services rendered the mother in her lifetime, while it is presumed that such services are gratuitous, the plaintiff may show, and the burden is upon her to show, in such case, an express contract, or a mutual meeting of minds upon a matter of contract; but it is not essential that a formal offer and acceptance, in writing or otherwise, be shown: *Griffith v. Robertson*, 73 Kan. 666; 85 Pac. Rep. 748. In an action by a daughter to recover from the estate of her deceased mother, for services rendered during the mother's lifetime, the daughter is competent to testify to conversations had between her mother and another, which took place in her presence, tending to show that the mother had agreed to pay for the services, and that such payment was to be made by the provisions of a will: *Griffith v. Robertson*, 73 Kan. 666; 85 Pac. Rep. 748. *Bonebrake v. Tauer*, 67 Kan. 827; 72 Pac. Rep. 521. Suit against an executor upon a promissory note executed by a deceased is prematurely brought, where it was commenced prior to the maturity of the note, although subsequent to the presentation of the claim based thereon, and the rejection thereof by the executor. Rejection does not constitute any breach of the contract giving a right of action before maturity: *Radue v. Pauwelyn*, 27 Mont. 68; 69 Pac. Rep. 557. If personal services are performed by one person for another under a contract or mutual understanding that compensation is to be made therefor in the will of the party receiving the benefit, or by some instrument to become absolute upon his death, and the party dies without making such provision, an action will lie against his estate to recover the actual value of the services. If the question arises as to whether or not the services were gratuitous, the plaintiff is entitled to recover on a quantum meruit. It is not necessary to predicate the action on a breach of the agreement: *Pelton v. Smith* (Wash.), 97 Pac. Rep. 460, 461. An action may be maintained against the administrator of a deceased

person on a contract for services, notwithstanding the services were to be rendered in a foreign jurisdiction, as the cause of action is transitory: *McCann v. Pennie*, 100 Cal. 547, 552; 35 Pac. Rep. 158. An action may be maintained against the representatives of a deceased person for the value of property of which the decedent received the benefit in his lifetime: *Fox v. Hale and Norcross S. M. Co.*, 108 Cal. 478, 483; 41 Pac. Rep. 328. An action cannot be maintained against executors for services gratuitously rendered to a decedent during her life without request: *Dallman v. Frank*, 1 Cal. App. 541, 545, 546; 82 Pac. Rep. 564. In an action against an administrator for services rendered to a decedent during life, a finding that the services were rendered at an agreed price is sustained by proof of admissions by plaintiff to that effect; but a finding that such services were wholly paid for is not sustained by evidence showing only partial payment; and the burden of proving payment is on the defendant: *Stuart v. Lord*, 138 Cal. 672, 674; 72 Pac. Rep. 142. If a physician performs a surgical operation upon a person who is unconscious as the result of a physical injury, and also renders other professional services to such person, all during his last illness, he has a right to recover upon his claim against the estate of such injured person in case of the latter's death, not by reason of any contract with the injured person, either express or implied, but by virtue of the statute, which gives a preference right of payment of expenses of the last sickness over all ordinary debts out of the estate of the decedent: *Cunningham v. Lakin* (Wash.), 97 Pac. Rep. 447. An action may be maintained against the administrator of a deceased person to enforce a verbal agreement by the decedent to share in discharging a mortgage on the land of plaintiff, where decedent had received the full consideration for such agreement: *McDowell v. Miller*, 1 Kan. App. 666; 42 Pac. Rep. 402.

(2) **On contracts by executor or administrator.** As executors and administrators cannot, by virtue of their general powers as such, make any contract which will bind the estate and authorize a judgment *de bonis decedentis*, an action cannot be maintained against an estate to recover a balance due on a contract made by the plaintiffs with the defendant, as executrix, by which the plaintiffs agreed that they "would drill a well for defendant on the property of said estate," etc.: *Renwick v. Garland*, 1 Cal. App. 237; 82 Pac. Rep. 89. Where an action is brought in *assumpsit* against an administrator as such, to recover upon a note signed by him, and default is taken, the only judgment that can be rendered against the administrator is for whatever can be made by a levy against the goods of the deceased in his hands, and if such property is not sufficient to satisfy the judgment, costs can be levied only *de bonis propriis*. Generally, a judgment by default against an administrator is an admission of

assets to the extent charged in the proceedings against him; but where there is no allegation in the declaration that the administrators had assets in their hands, default cannot admit what is not charged: *Senescal v. Bolton*, 7 N. M. 351; 34 Pac. Rep. 446. An administrator cannot be sued in his representative capacity for attorney's fees for services rendered in the administration of the estate: *Torrenson v. Bowman*, 26 Nev. 369; 68 Pac. Rep. 472. See *Briggs v. Breen*, 123 Cal. 657; 56 Pac. Rep. 633, 886. Upon contracts made by an administrator to pay an attorney in property out of the estate for services rendered the estate, the administrator personally, and not the estate, is liable. Such fees, to bind the estate, must be fixed and allowed by the court: *Estate of Page*, 57 Cal. 238, 241. Where a lessee takes an administrator's lease of property, he is bound to take notice of the title, and he cannot sue the administrator to recover rent paid, should the title fail as to part of the leased property: *Miller v. Gray*, 136 Cal. 261, 264; 68 Pac. Rep. 770. One who renders services and expends moneys for the benefit of an estate, at the request of the executor or administrator, is entitled to recover the same in an action against the representative. Such services rendered and moneys expended are "expenses of administration": *Gurnee v. Maloney*, 38 Cal. 85, 87; 99 Am. Dec. 352.

12. **For conversion.** The administrator is a trustee for those entitled to succeed to the property, and where he converts the property to his own use, the *cestuis que trustent* are injured, and become invested with a cause of action against him; but no action for the conversion by the administrator can be sustained against him or his sureties until an accounting is had in the probate court: *Reed v. Hume*, 25 Utah, 248; 70 Pac. Rep. 998. See *Beall v. New Mexico*, 16 Wall (U. S.) 535; 21 L. ed. 292. In Oregon, a claimant in an action against an estate, for conversion by the testator, is a competent witness in his own behalf, but his testimony is not, of itself, sufficient to establish his claim: *Goltra v. Penland*, 45 Or. 254; 77 Pac. Rep. 129. If an administrator or executor applies to the use of the estate money or the proceeds of property belonging to a third person, he is liable in both his individual and representative capacity, and the injured party may elect whether he will hold him in the one capacity or in the other. If, however, a party elects to sue the executor in his representative capacity, he can only take such judgment as the law authorizes in such cases; that is, one which is the same, in effect, as a claim established against the estate: *Collins v. Denny Clay Co.*, 41 Wash. 136; 82 Pac. Rep. 1012. In an action against an administrator for property of a plaintiff alleged to have been converted to his own use by the intestate, a finding that the intestate refused to recognize the right of plaintiff to redeem the property, which had been pledged to him, obviates the necessity of averring a tender of

the debts secured: *Lowe v. Ozmun*, 3 Cal. App. 387, 395; 86 Pac. Rep. 729. If a person defends, in an action brought against him for conversion, upon the ground that the property is held by him as administrator, this defense must be by certain and positive averments showing, — 1. His appointment and qualification as administrator, together with the facts that he is possessed of or entitled to such property, and is chargeable therewith as administrator; and 2. His intestate's right, title, or interest in and to such property. Unless the defense is unequivocal in this respect, advantage cannot be taken of the statutory rule which precludes parties and persons interested in an action from testifying therein when the opposite party sues or defends as an administrator: *Prewitt v. Lambert*, 19 Cal. 7; 34 Pac. Rep. 684. The executor of a deceased administrator may be sued by his successor in administration for the proceeds of a policy of life insurance collected by his testator in his former representative capacity, but not accounted for: *Curran v. Kennedy*, 89 Cal. 98, 99; 26 Pac. Rep. 641. Where an action by a partner is commenced against the estate of his deceased partner for a conversion of property alleged to belong to the firm, and the complaint is amended after the statute of limitations has run against the cause of action, the statute bars any new cause of action brought in by way of amendment. In this case the claimant did not assert his right to recover under a claim of joint ownership for more than a year after letters testamentary had been issued to the executor: *Schwartz v. Stock*, 26 Nev. 155; 65 Pac. Rep. 357. See *Atkinson v. Canal Company*, 53 Cal. 102.

13. To recover deposit on void sale. An action to recover money paid as a deposit on a probate sale of land, which was void as not having been made in accordance with the order of sale, should not be brought against the executor in his representative capacity, unless it appears that the money has actually been made a part of the assets of the estate: *Schlicker v. Hemenway*, 110 Cal. 579, 582; 42 Pac. Rep. 1063; 52 Am. St. Rep. 118.

14. Ejectment. Ejectment may be maintained against the representative of a deceased person: *Barrett v. Birge*, 50 Cal. 655, 658.

15. Eminent domain. Proceedings to condemn land for public use may be maintained against an executor; and the word "recovery," in the statute authorizing suits by and against the estates of a deceased person, includes condemnation for public use: *Monterey County v. Cushing*, 83 Cal. 507, 512; 23 Pac. Rep. 700.

16. To enforce trust.

(1) In general. A suit in equity to enforce a trust against a specific fund may be maintained against an administrator, where the

fund is capable of identification, notwithstanding plaintiff's cause of action may have some elements of an ordinary claim against the estate: *Dunham v. Siglin*, 39 Or. 291; 64 Pac. Rep. 662, 663. In an action against an administrator to enforce a trust, if the trust property can be traced and identified, the action may be maintained by the beneficiary; for he is seeking his own property only, and does not seek to enforce a claim against the property of the estate of decedent: *Roach v. Caraffa*, 85 Cal. 436, 444; 25 Pac. Rep. 22. Where the title to land stood in the name of a deceased person, and the purchase price therefor had been paid one half by decedent and one half by another person, the latter may enforce his resulting trust in one half of the property against both the administrator and general creditors of the estate: *Murphy v. Clayton*, 113 Cal. 153, 159; 45 Pac. Rep. 267. The fact that plaintiff, in an equitable action to recover trust property held by an administrator, had recovered a money judgment against the same administrator will not be regarded as an election to rely on his legal remedy, unless it appears that he made such election with full knowledge of all the facts: *Wells Fargo Co. v. Robinson*, 13 Cal. 133, 141, 143. If the holder of a promissory note, pending suit thereon, assigns the same in trust, to pay from the proceeds the fees of his attorney in prosecuting an action thereon, a suit may be maintained by such attorney against the administrator of the trustee to enforce the trust: *Tyler v. Mayre*, 95 Cal. 160, 168; 27 Pac. Rep. 196. In a suit in equity, relating to a trust fund, against an administrator of a trustee, the statement that the trust fund must be capable of identification does not mean that it must be kept as a separate fund, or in a special account. If the trustee mingle it with other funds, so long as there is in the mass an amount greater than the trust fund, it will be presumed, in the absence of a contrary showing, to include the trust fund; and if, after such mingling, the trustee has withdrawn any portion of the mass, it will be presumed to have been his own, rather than from that held by him in trust: *Elizalde v. Elizalde*, 137 Cal. 634, 641; 66 Pac. Rep. 369; 70 Pac. Rep. 861.

(2) **Presentation of claims.** A suit in equity may be maintained against the executors of a deceased person to enforce an oral trust, notwithstanding the plaintiff has presented his claim to them for the subject of the trust, which claim was allowed in part by them, and was approved by the court, and filed: *Walkerly v. Bacon*, 85 Cal. 137, 141; 24 Pac. Rep. 638. If an administrator comes into possession of trust funds held by the decedent, which constitute no part of the assets of the estate, he may be sued therefor in equity without presenting a claim against the estate: *Gunter v. Jance*, 9 Cal. 634, 658. But this right to proceed in equity exists only so long as the trust property, or the product of it, can be identified: *Lathrop v. Bampton*, 31 Cal. 17, 22, 23; 89 Am. Dec. 141. If a trust fund created by the

will of the testator has been distributed and invested under the will, but not yet delivered to the ultimate trustee, and the distributee dies after such investment, the ultimate trustee may maintain suit against his administrator for the securities representing the investment without presenting a claim against the estate: *Kauffman v. Foster*, 3 Cal. App. 741, 743; 86 Pac. Rep. 1108.

(3) **Action by creditors.** The creditors of an insolvent estate of a deceased person cannot maintain an action against the administrator of such an estate and others, pending administration, to compel him and them to transfer to the estate real property to which he has, for himself and them, obtained the legal title in such a way as to raise a constructive trust in favor of the estate. If the defendant administrator is sued, in such action, both in his representative and personal capacity, there is a misjoinder of parties defendant in the one case, coupled with an incapacity to sue as to the plaintiffs; and a demurrer to the complaint is properly sustained: *Mesmer v. Jenkins*, 61 Cal. 151, 153.

(4) **Collateral attack.** An action may be maintained against an executor to recover moneys that had constituted a part of the estate, but which are claimed to be due to the plaintiff, as a trustee for certain beneficiaries. But such action, where it exceeds the jurisdictional amount of the justice's court, can be maintained only in the superior court. And where a subsequent action is maintained to obtain a decree vacating and setting aside a judgment rendered against the executor, such subsequent action, even though denominated a direct attack, is in the nature of a collateral attack, and will not warrant the assumption of a jurisdiction to review the proceedings in the original action: *LeMesnager v. Variel*, 144 Cal. 463, 467; 77 Pac. Rep. 988; 103 Am. St. Rep. 91.

17. **For fraud.** An action may be maintained against the executor of a deceased person to set aside a judgment obtained by the decedent against the plaintiff, where such judgment was obtained through fraud of an extrinsic character. Such fraud operates, not upon matters pertaining to the judgment itself, but to the manner in which it was procured. Equity will give relief from a judgment for such fraud practised on the plaintiff against whom the judgment was obtained, where there was no adverse trial of the issues in the action, and where the plaintiff was prevented, through fraudulent acts of his adversary, and without any fault on his own part, from presenting a meritorious defense to the action brought against him: *Flood v. Templeton* (Cal.), 92 Pac. Rep. 78. An action by an heir is authorized and proper to charge a defendant as an involuntary trustee for the benefit of the plaintiff, where the defendant, while acting as admin-

istrator, fraudulently and wrongfully acquired the property by taking advantage of his position in inducing the heir to convey his interest in the estate: *Wingarter v. Wingarter*, 71 Cal. 105; 11 Pac. Rep. 853. If there is not a deficiency of assets in the hands of the administrator to meet the demands of creditors, he cannot maintain an action to recover any property transferred by the decedent in his lifetime, or defend an action for its recovery: *Murphy v. Clayton*, 114 Cal. 526, 536; 43 Pac. Rep. 613; 46 Pac. Rep. 460.

REFERENCES.

Right of executors or administrators to defend or to impeach on the ground of fraud: See note 3 Am. St. Rep. 740-745.

18. On mortgages. The administrator being entitled, under the statute, to the possession of the decedent's real property, he must be made a party to all suits affecting it. If, therefore, an action is instituted to foreclose a mortgage, and the administrator of the mortgagor's estate is not made a party, the complaint is defective for want of proper parties: *Harwood v. Marye*, 8 Cal. 580, 581. In a suit to foreclose a mortgage made by a deceased mortgagor, it is not necessary to make the heirs parties. The executor represents the state, and a judgment against him binds the heirs and devisees: *Dickey v. Gibson*, 121 Cal. 276, 278; 53 Pac. Rep. 704; *Bayly v. Muehe*, 65 Cal. 345, 348; 3 Pac. Rep. 467; 4 Pac. Rep. 486. The administrator is a necessary party to an action brought to foreclose a mortgage, where the testator, as mortgagee, dies before judgment: *Belloc v. Rogers*, 9 Cal. 123, 126. Where a mortgage cannot be foreclosed, by reason of the bar of the statute of limitations, against the grantee of the mortgage, no recovery can be had against the administrator of the deceased mortgagor. The only right of action against the grantee of a mortgage is one to secure a sale of the mortgaged premises, and the application of the proceeds of the debt and costs. This right of action exists against the grantee as soon as the debt falls due. The statute begins to run against this right of action at the same time, and the running of the statute is not interrupted by the death of the mortgagor: *California Title etc. Co. v. Miller*, 3 Cal. App. 54; 84 Pac. Rep. 453. An action may be maintained against an executor to have certain deeds of conveyance, absolute in form, decreed to be in fact only mortgages, the amount due thereon ascertained, and conveyances of the property therein described ordered to be executed upon the payment of the amount adjudged to be due. In such a case the grantee, as plaintiff, is competent to testify as to any matter of fact occurring before the death of the decedent grantor: *Wadleigh v. Phelps*, 149 Cal. 627; 87 Pac. Rep. 93. In a suit against the executor of a grantor to declare a deed a mortgage and to foreclose it, where a claim has been presented to the estate and rejected,

but no judgment for a deficiency is demanded, the fact that more than the statutory time had elapsed after rejection of the claim before suit is immaterial: *Fox v. Bernard* (Nev.), 85 Pac. Rep. 351, 352.

19. To quiet title. In an action to declare a deed to a decedent a mortgage, and to quiet title to the land so conveyed, both the administrator and heirs of such decedent are proper parties defendant: *Louvall v. Gridley*, 70 Cal. 507, 509; 11 Pac. Rep. 777.

20. Replevin. In an action of replevin against an administrator, if the facts would not warrant a recovery in an action by him, they constitute no defense in an action against him: *Murphy v. Clayton*, 114 Cal. 526, 536; 43 Pac. Rep. 613; 46 Pac. Rep. 460. If an administrator is sued to recover property, claimed adversely to the estate, he cannot unite with his defense of title in his intestate a claim of lien on the property in favor of himself personally: *Gardner v. Gilliam*, 20 Or. 598; 27 Pac. Rep. 220, 221. If the taking of possession of personal property by the administrator, after the decease of the intestate, and before her appointment, was lawful, and for the benefit of the estate, the title which the administrator subsequently secured to the property, relates back to the intestate's death, and such title may be pleaded as a defense to an action of replevin, not because of the newly acquired title after the action was commenced, but because of the right and legality of the taking in the first instance: *Casto v. Murray*, 47 Or. 57; 81 Pac. Rep. 883.

21. For torts.

(1) Acts done by the executor or administrator. It is a general rule of law, that no action will lie against an executor or administrator to which his testator or intestate was not liable; hence, where the foundation of plaintiff's demand is the personal tort of the defendant, and not that of his testator, as for damages for personal injuries sustained by the plaintiff in consequence of the neglect of the defendant to keep in repair that portion of the street fronting a lot belonging to the testator, such defect not being alleged to have existed anterior to the death of such testator, and therefore, no obligation having been incurred by the testator in his lifetime, in respect thereto, which could serve as a basis for a valid claim against his estate, or a right of action against the administrator of his estate, an action will not lie against the administrator as such: *Eustace v. Jahna*, 38 Cal. 3, 21. As a general principle, an estate cannot be held liable for a tort committed by an administrator or executor: *Nickals v. Stanley*, 146 Cal. 724; 81 Pac. Rep. 117. A personal injury resulting from neglect of the duty devolving upon an administrator, or other person in the representative relation to the estate of his testator, renders him personally liable for a tort; but

under no principle of the law can the estate be charged with the result of such negligence. It cannot be sustained upon the principle of respondeat superior, or principal and agent, for the simple reason that no such relation exists between heirs, legatees, or creditors of the estate and the administrator. The administrator is not in the employ or subject to the control of any superior, other than the probate court, in the performance of any duty imposed upon him as such by law: *Eustace v. Jahns*, 38 Cal. 3, 22. The only way in which an action can be brought against an estate is to sue the administrator or executor in his representative capacity. The estate cannot be held liable for a tort committed by the representative, nor can it be held liable for damages for a breach of contract by him: *Sterrett v. Barker*, 119 Cal. 492, 494; 51 Pac. Rep. 695. An action cannot be maintained against an executor or administrator, as such, on a penal statute; nor when the cause of action is founded upon malfeasance or misfeasance, or when the complaint imputes a tort done to the person or goods of another by the testator or intestate: *Eustace v. Jahns*, 38 Cal. 3, 23. Tortious acts by an administrator are outside of his authority, and the estate cannot be held liable for the consequences thereof. This being so, it has been held that, under a statute providing that the party in interest, or to the record, shall not be allowed to testify, the heir and distributee is not disqualified as a witness, and should be allowed to testify on behalf of the defendant in an action brought against him for an alleged conversion of moneys and chattels: *McCoy v. Ayers*, 2 Wash. Ter. 307; 5 Pac. Rep. 843.

REFERENCES.

In what capacity may an executor or administrator be sued for his personal tort: See note 51 L. R. A. 266-268.

(2) **Acts commenced before decedent's death.** An action may be maintained against an executor to recover damages for the wrongful acts of the testator in maliciously, and without cause, procuring an action to be brought against another person, and committing acts whereby the business of such other person was destroyed, and his property, goods, accounts, and bills receivable were lost: *Thornton et. Co. v. Bretherton*, 32 Mont. 80; 80 Pac. Rep. 10, 11. A special administrator may be sued for maintaining an obstruction to a right of way, notwithstanding it was created by a decedent whose estate he represents: *Hardin v. Sin Claire*, 115 Cal. 460, 463; 46 Pac. Rep. 363. An action may be maintained against a special administrator to abate an obstruction to a private way, and for such damages as the special administrator, by his wrongful acts, had caused the plaintiff to suffer, where it is alleged that the nuisance was maintained by the special administrator, as it was by the decedent, and such action for abatement and for damages may be maintained without having pre-

sented a claim against the estate of decedent, there being nothing in the statute requiring the presentation of claims for damages caused by wrongful acts: *Hardin v. Sin Claire*, 115 Cal. 460, 463; 47 Pac. Rep. 363. A personal right of action dies with the person, unless the right of action has been kept alive by some statute. It has been held, under a statute providing that a person "may maintain an action against the executor or administrator, or any testator or intestate, who, in his lifetime, has wasted, destroyed, taken, or carried away, or converted to his own use, the goods or chattels of any such person," that an action for false imprisonment by the testator is not maintainable against his administrator: *Harker v. Clark*, 57 Cal. 245, 246.

22. Unlawful detainer. The executor of the will of a deceased tenant cannot be sued in unlawful detainer: *Martel v. Meehan*, 63 Cal. 47, 50.

23. To vacate sale. An action commenced against an administrator to vacate and annul an order of sale, that the sale thereunder be declared void and set aside, and that the defendants be enjoined from disposing of the proceeds thereof until a further order of the court, is an action requiring the determination of a right or interest in real property, and a motion for a change of place of trial from the county wherein the land is situated to the county wherein the defendants reside is properly denied: *Sloss v. De Toro*, 77 Cal. 129, 132; 19 Pac. Rep. 233.

24. For waste. In an action brought against the administrator and his sureties for waste, or a misapplication of the assets of the estate, it is not necessary, as formerly, that the devastavit be previously established, in order to charge the principal and sureties on the bond, but the action cannot be maintained against the sureties unless the facts alleged, if proved, amount to and establish the devastavit: *Howe v. People*, 7 Col. App. 535; 44 Pac. Rep. 512. An administrator cannot be liable for a devastavit of the estate to an amount greater than the estate has lost, or that has been wasted; and no action can be maintained therefor against him or his bondsmen until his liability has been fixed by a proceeding in the probate court: *Territory v. Bramble* (Dak. Ter.), 5 N. W. Rep. 945, 948. Co-executors are to be treated as one individual, and the acts of each are to be taken as the acts of all; and, although there are cases in which one is not answerable for the misconduct of others, still where one, by his negligence, suffers another to waste the estate, when it could have been prevented by reasonable diligence, he is answerable for the loss: *Insley v. Shire*, 54 Kan. 793; 39 Pac. Rep. 713, 716. In an action by an executor against a co-executor, in his representative capacity, charging waste and asking for his removal, no judgment should be entered against

him individually for the value of property lost to the estate: *Inaley v. Shire*, 54 Kan. 793; 39 Pac. Rep. 713, 715.

25. On street assessments. An action on a street assessment can be maintained against the executor of a deceased person: *Parker v. Bernal*, 66 Cal. 113, 114; 4 Pac. Rep. 1090. But he is not a necessary party, as the suit may be brought against the successors to the title: *Phelan v. Dunne*, 72 Cal. 229, 230; 13 Pac. Rep. 662. And where there is no allegation in the complaint touching the estate of the decedent, or as to the representative character of the defendant, and he is sued also as an individual, a judgment against the defendant in his representative capacity must be reversed: *Flinn v. Gouley*, 139 Cal. 623, 624; 73 Pac. Rep. 542.

26. Limitation of actions. The statute of limitations in Kansas runs against the claim of a mortgage creditor as against the estate of the mortgagor, during the time there was no administrator, where an unreasonable time had elapsed before making the claim,—in this case eight years,— and where the debt was renewed by a new note executed by all of the heirs of the deceased mortgagor except one: *Black v. Elliott*, 63 Kan. 211; 65 Pac. Rep. 215, following *Bauserman v. Charlott*, 46 Kan. 480; 26 Pac. Rep. 1051, and *Kulp v. Kulp*, 51 Kan. 341; 32 Pac. Rep. 1118; 21 L. R. A. 550. An action by a widow to set aside deeds made by her deceased husband, on the ground that they were made upon trusts which are alleged to be invalid, is barred by the same limitation of time from the date of the execution of the deeds as would have bound the decedent: *Page v. Page*, 143 Cal. 602, 604; 77 Pac. Rep. 452. Where a statute provides that if a person against whom a right of action exists dies, and the cause of action survives, an action may be brought against his representative within six months after the issuing of letters testamentary or of administration; such provision may prolong, but does not shorten, the time within which an action is barred by the general statute of limitations; and in case there is a statutory provision that when the commencement of an action is stayed by statutory prohibition, the time of the continuance of the prohibition shall not be a part of the time limited for bringing an action, and a further provision that an action cannot be maintained until after the rejection of a claim and the expiration of six months from the granting of letters, the allowance of six months before the administrator may be sued is a statutory prohibition, and suspends the general statute of limitations during that time: *Blaskower v. Steel*, 23 Or. 106; 31 Pac. Rep. 253, 254. The statute of limitations does not run against a judgment recovered against an executor or administrator pending the administration of the estate: *Shively v. Harris*, 5 Cal. App. 513; 90 Pac. Rep. 971. The statute of limitations cannot be pleaded in bar of an action against

an administrator, as against an amended complaint stating no new cause of action, where such statute is not a bar to the original complaint: *Vanderslice v. Matthews*, 79 Cal. 273, 277; 21 Pac. Rep. 748. See *Easton v. O'Reilly*, 63 Cal. 308; *Cox v. McLaughlin*, 76 Cal. 60; 18 Pac. Rep. 100; 9 Am. St. Rep. 164. An administrator will not be permitted to waive the statute of limitations: *Boyce v. Fisk*, 110 Cal. 107, 117. Where the testator, by will, requests executors to pay obligations without reference to any law of limitations, which he positively repudiates and waives, the executors cannot urge the statute of limitations against such an obligation of the testator: *Glassell v. Glassell*, 147 Cal. 510, 511; 82 Pac. Rep. 42. The statute of limitations that reads, "no claim against any estate, which has been presented and allowed, is affected by the statute of limitations, pending the proceedings for the settlement of the estate," etc., is a special statute having application alone to claims against the estate, and cannot be held to apply to any and every person who may happen to be jointly or severally indebted with the deceased as to such claim. On the other hand, the statute of limitations is a general statute, and must be applied generally, and in all cases where an exception to its operation is not specifically made: *Tynan v. Walker*, 35 Cal. 634; 95 Am. Dec. 152; *Vandall v. Teague*, 142 Cal. 471, 474; 76 Pac. Rep. 35. The provision of the California statute, limiting the time within which an action may be commenced on a rejected claim; has no application where the action was already pending when the claim was presented: *Gregory v. Clabrough's Executors*, 129 Cal. 475, 479; 62 Pac. Rep. 72. In an action against the administrator, where the statute of limitations is set up as a defense, the burden is upon the defendant to show that the plaintiff's cause of action is barred: *Wise v. Williams (Cal.)*, 14 Pac. Rep. 204.

27. Appeals. Where a mutual benefit association is not legally liable to pay money due upon a certificate issued by it to anybody; where the association institutes an action against the executor of an estate and the heirs thereof for the purpose of determining to whom the moneys due upon the certificate shall be paid; where the association is liable only to the nominee of a deceased member; and where there is no nominee, the policy having remained unchanged at the time of the deceased member's death, the heirs of the deceased wife of the member who took out the certificate are not "aggrieved" parties on appeal from the order of the court directing payment of the amount of the policy to the executor of the estate, where the decedent left a surviving wife, and by will had bequeathed the insurance-moneys to such surviving wife, directing therein that the officers of the order substitute her name in the certificate for the name of the deceased wife, and pay the amount thereof to the surviving wife: *Order of Mutual Companions v. Grist*, 76 Cal. 494, 497; 18 Pac. Rep. 652. In an action

against an executor, where a personal judgment is rendered against him for costs, he is not entitled to review the judgment if he failed to make himself individually a party to the litigation: *Meyer v. O'Rourke*, 150 Cal. 177; 88 Pac. Rep. 706.

IV. MANAGEMENT OF ESTATES.

1. *In general.* It is no part of the duty of an executor or administrator to manage the estate he represents for the benefit of the estate or of the heirs. So far as they are concerned, it is his duty, simply, to preserve the estate until distribution. He cannot make investments for them, or satisfy adverse claims, or sell because the estate would profit by it: *Brenham v. Story*, 39 Cal. 179, 188. It is his duty to administer and turn over the estate as soon as possible, and not to speculate with it, or to carry on business on its account, or to improve it for the benefit of heirs: *Estate of Moore*, 72 Cal. 335, 342; 13 Pac. Rep. 880. If he has money of the estate in his custody, he should deposit it for safe-keeping in a bank of good standing and credit, as this is what prudent and judicious men ordinarily do with such of their own funds as the exigencies of their business require them to keep on hand: *McNabb v. Wixom*, 7 Nev. 163, 171. It is his duty to pay all taxes imposed upon the estate; for distribution thereof among the heirs and devisees is forbidden until all taxes are paid: *People v. Olvera*, 43 Cal. 492, 494; and the court has power to order the payment of assessments on mining stocks held by the estate: *Estate of Millenovich*, 5 Nev. 161. An executor or administrator is affected with notice of unpaid taxes on property of the estate which was owned by or in which the deceased had an interest at the time of his death, and of which the executor or administrator was entitled to the custody for administration and distribution: *Clayton v. Dinwoodey* (Utah), 93 Pac. Rep. 723, 726. An executor derives his authority from the will, and confirmation by the court, followed by the filing of his bond, is equivalent to taking out letters testamentary, the letters being but the authentic evidence of the power conferred by the will: *Bank of Montreal v. Buchanan*, 32 Wash. 480; 73 Pac. Rep. 482, 484. Whether the administrator should be allowed for payments made for the services of a book-keeper depends upon the circumstances of the estate, and is a matter properly left to the discretion of the probate judge: *Estate of More*, 121 Cal. 609; 54 Pac. Rep. 97, 99. But if he improperly withdraws money of the estate and pays the same out to a book-keeper, he is answerable for interest on the sum paid, at the legal rate: *Estate of Scott*, 1 Cal. App. 740; 83 Pac. Rep. 85, 87. Where an executor fraudulently induces an heir to lend to him a sum of money, bequeathed to her, but to which she is not entitled until she reaches twenty-one years of age, and the evidence shows that the executor procured the loan by concealing from the heir his failing financial condition, and by misleading her in

other respects, the transaction is not only questionable, but absolutely void: *Ehrngren v. Gronlund*, 19 Utah, 411; 57 Pac. Rep. 268.

2. Discovery of assets. A summary proceeding in the probate court, for the discovery, and to compel the delivery, of property or effects of an estate, suspected of having been concealed, embezzled, or conveyed away, is not a proper remedy to enforce the payment of a debt to the estate, or to try contested rights to property as between the representative of the estate and others. If, on the hearing of a charge that a person who had given a promissory note, an asset of the estate, was concealing it, it develops that there was in fact no concealment of the note, the court is justified in closing the investigation and discontinuing the proceeding, where it is proposed to extend the inquiry as to the maker's liability upon the note: *Humbarger v. Humbarger*, 72 Kan. 412; 83 Pac. Rep. 1095. See note to § 385, ante.

3. Advances by administrator. The administrator, in the absence of special authority, must administer the estate as he finds it, paying taxes and other necessary expenses, and doing such other acts as are necessary to preserve it as left; he cannot advance money to remove encumbrances, unless his estate was bound to pay the money. If he takes the responsibility of improving the estate, or bettering the title in this way, it must be at his own risk. The loss cannot be visited on the heirs who gave him no authority to cause it. Nor can he ask legal protection when he has himself, though with the best motives, gone beyond the provisions of the law: *Tompkins v. Weeks*, 26 Cal. 50, 63. If the executor or administrator does not have on hand, and is not chargeable with, any funds of the estate whatever, no duty rests on him, under such circumstances, to advance money to the estate, or to buy claims against it and to discharge them: *Smith v. Goethe*, 147 Cal. 725; 82 Pac. Rep. 384, 387. The only right of an administrator, who anticipates distribution to the widow or heirs, and pays in advance of such distribution, is, when distribution is ordered, to have such payments retired therefrom, and receive a credit on account thereof from the distributive share so to be charged. It is not material in such a case, what property may have been distributed to the widow. Whatever may be the rights of subrogation to which the defendant is entitled, the same can only be worked out upon the final decree of distribution: *Elizalde v. Murphy*, 4 Cal. App. 114, 116; 87 Pac. Rep. 245, 246. If, however, an administrator has made advances for the benefit of the estate, he may be allowed credit therefor as so much money advanced on account of the distributive shares of the heirs, but he is not entitled to charge such advancement as expenses of administration: *Estate of Rose*, 80 Cal. 166, 180; 22 Pac. Rep. 86. If all interests in an estate are owned by an administrator and another person, who enter into a verbal agreement, whereby the com-

missions of the administrator, as well as moneys advanced by the administrator, shall be a lien on the property, and whereupon the administrator enters into possession with the verbal understanding that the profits of the estate shall be divided between the owners according to their respective interests, such agreement is within the statute of frauds and void. The administrator, therefore, cannot, in equity, enforce his lien against the estate, although there has been a part performance: *Tucker v. S. Ottenheimer Estate*, 46 Or. 585; 81 Pac. Rep. 360, 362.

4. Making improvements. It is no part of the duty of an executor or administrator to improve the property he represents for the benefit of the heirs: *Estate of Moore*, 72 Cal. 335, 342; 13 Pac. Rep. 880; *Tompkins v. Weeks*, 26 Cal. 50, 63. Administrators are not authorized to erect a dwelling-house with the funds or assets of the estate, to be occupied by one of them, or for any other use or purpose; neither can they involve the estate by borrowing money with which to pay for material and labor performed in the construction of such house. They do not have authority to charge the estate with the repayment of the money by them borrowed for such purpose: *Ralfson v. Cannon*, 3 Utah, 232; 2 Pac. Rep. 205, 206. An administratrix, as a tenant in common with the other heirs of the deceased, has no right to make extensive and costly improvements upon the estate, and charge the expense thereof, or any portion of the same, to her co-tenants, in the absence of an agreement, express or implied, upon the part of the latter to pay therefor. But if she makes the improvements with the consent of her co-tenants, and the same are beneficial to the estate, the co-tenants ought not to complain of her action in that regard, or to refuse to pay their just proportion of the expense, especially where the administratrix did what she believed to be for the best interests of the estate: *In re Alfstad's Estate*, 27 Wash. 175; 67 Pac. Rep. 593, 598.

5. Investment of funds. In the investment of trust funds, though an executor is not an insurer, he is nevertheless required to exercise that degree of care and discretion which an intelligent person of ordinary prudence and judgment would observe in the management of his own affairs. In lending money on mortgages of real estate, a degree of care is necessary, which, if omitted, will render the executor liable personally. If an executor lends funds on real estate, he must use care as to the title, and ascertain that the value of the premises mortgaged is such as will, in all probability, be adequate security for repayment whenever the money shall be called in. The criterion of value, in such cases, is the opinion or estimate of men of ordinary prudence, who would deem it safe to make a loan of the like amount of their own money on the same property: *In re Roach's Estate (Or.)*, 92 Pac. Rep. 118, 123. In the absence of statutory provisions touching

the method of investment, executors and administrators are bound to employ, in the investment of funds of the estate, such prudence and diligence as, in general, prudent men of discretion and intelligence employ in their own affairs: *In re Roach's Estate* (Or.), 92 Pac. Rep. 118, 125. The loss of trust funds by an executor or administrator, in consequence of an omission to take adequate security, is negligence, and an executor is personally liable for a failure to obtain a repayment of money of the estate loaned without any security, whether or not the loan was made before or after the passage of an act prescribing the manner of investing funds by a trustee: *In re Roach's Estate* (Or.), 92 Pac. Rep. 118, 126.

6. Effect of chattel mortgage. Chattels under mortgage constitute an asset of the estate, subject to the preferential claim of the mortgagee, and the devolution of the decedent's title in no wise affects or impairs the right of the mortgagee. His right of property remains as distinct and as sacred as theretofore, and is a lien which cannot be lessened or impaired by the occurring of general expenses in the course of administration. After the chattels are sold, his right extends and attaches to the money derived from the sale, and this right is exclusive of that claimed by the administrator to apply any portion of the money towards the expenses of administration: *Horsfall v. Royles*, 20 Mont. 495, sub nom. *In re Horsfall's Estate*, 52 Pac. Rep. 199. Where certain cattle of an estate were, at the time they were sold by an administrator, encumbered by a chattel mortgage, the proceeds of such sale should be withdrawn from the general assets of the estate for the purpose of discharging the mortgage upon the cattle: *Baker v. Becker*, 67 Kan. 831; 72 Pac. Rep. 860, 861. Where a decedent, prior to his death, executed a chattel mortgage to secure the payment of money, and the property afterwards passed into the hands of the decedent's administrator, and the chattel mortgage was not renewed as required by law, such mortgage ceased to be valid as against creditors of the mortgagor, who became such before as well as after the default in the renewal, and the creditors of the decedent are in a position to take advantage of the invalidity of the mortgage, and the administrator, as a representative of the creditors of the estate, occupies the same position as the creditors themselves in respect to the avoidance of the mortgage, which is void because it was not filed or renewed: *First Nat. Bank v. Ludvigsen*, 8 Wyo. 230; 56 Pac. Rep. 994, 997, 999.

7. Paying off liens. Redemption. An executor or administrator has the power to use the money in his hands for the purpose of redeeming property of the estate from liens existing on it, when it is necessary for the preservation of the property of the estate. This power, however, is subject to the contingency of the expense being disallowed by the court: *Estate of Freud*, 131 Cal. 667, 673; 82 Am.

St. Rep. 407; 63 Pac. Rep. 1080. . And in cases where the administrator is otherwise without power to redeem, authority may be given him by the court to do so: *Estate of Freud*, 131 Cal. 667, 673; 82 Am. St. Rep. 407; 63 Pac. Rep. 1080. Under the existing law of California, where, in the course of any regular proceeding, the relief becomes appropriate, resort may now be had to the court in which the administration is pending: *Toland v. Earl*, 129 Cal. 148; 79 Am. St. Rep. 100; 61 Pac. Rep. 914; *Estate of Freud*, 131 Cal. 667, 673; 82 Am. St. Rep. 407; 63 Pac. Rep. 1080. Where the executors have sufficient funds in their hands to enable them to redeem certain land from a foreclosure sale, they may be ordered to make such redemption by the probate court: *Estate of Heydenfeldt*, 117 Cal. 551; 49 Pac. Rep. 713. But an executor is not bound by the duties of his office to pay bankers, brokers, and other persons a bonus above legal interest to secure a loan of money to redeem property, belonging to the estate of his testator which has been sold under the decree of a court having jurisdiction to order the sale, nor is he bound to pledge his own securities or to use his own credit to secure such loan: *In re Holladay's Estate*, 18 Or. 168; 22 Pac. Rep. 750. The estate has a cause of action to redeem from sales under a mortgage and a trust deed, upon a proper accounting, and, in enforcing the right of the estate of the deceased to redemption from such sales, the court has a discretion in the matter, and may make a final decree without an interlocutory decree. It is not imperative upon the court, in all actions to redeem, to make the interlocutory order so as to give the opportunity to appeal: *Smith v. Goethe*, 147 Cal. 725, 736; 82 Pac. Rep. 384. While a creditor holds collateral, he may collect dividends upon his entire claim, even to the extent of payment in full, in which case the security would inure to the benefit of the unsecured creditors; or, if insufficient to pay the claim in full, and the dividends reduce the claim to less than the value of the security, the fiduciary must redeem it for the benefit of the estate; yet if, before or after the claim is proved, he disposes of the security, and realizes thereby a partial payment of the claim, he has derived all the benefit that it was intended to give, and all that, under his contract, he is entitled to receive, and it no longer exists for any purpose. In other words, if he disposes of the collateral, and puts it out of his power to return it in case the debt is paid from other sources, it ceases to be collateral, and the sum realized operates as a payment and reduces his claim pro tanto: *Erle v. Lane*, 22 Col. 273; 44 Pac. Rep. 591, 594.

8. Other questions relating to mortgages. If an executor or administrator has no funds of the estate in his hands, and desires to protect the property of the estate from a sacrifice under a foreclosure sale, he may purchase the mortgage himself, without going outside of the line of his duties as administrator: *Burnett v. Lyford*, 93 Cal. 114; 28

Pac. Rep. 855. A purchase of assets by the executor or administrator, or his taking and accounting for the same at their appraised value, may often be really advantageous to the estate, "and such advantage is, after all, the main thing to be considered; and when it becomes necessary to save the estate from loss, it is right, and even obligatory, for the executor or administrator to purchase or to take possession of land, on the foreclosure of a mortgage belonging to the estate, and to hold the title for the benefit of the estate": *Dusing v. Nelson*, 7 Cal. 184; 2 Pac. Rep. 922, 924, citing *Shouler on Executors and Administrators*, secs. 323, 358. It is the duty of an administratrix, who holds a mortgage against the estate she represents, to list such mortgage for taxation: *Estate of McDougald*, 146 Cal. 196; 79 Pac. Rep. 875, 876.

9. Continuing business of decedent.

(1) **In general.** Generally speaking, an executor or administrator has no power to carry on the business of the decedent, yet he may do so, if necessary to preserve the property: *Estate of Rose*, 80 Cal. 166, 172; 22 Pac. Rep. 86; *Estate of Smith*, 118 Cal. 462, 466; 50 Pac. Rep. 701; *Estate of Freud*, 131 Cal. 667, 671; 82 Am. St. Rep. 407; 63 Pac. Rep. 1080. It is the duty of the executor, without special direction of the court, to preserve the property of the estate. He does not require leave of the court so to do, and it is a question how far an order so obtained will protect an administrator either in doing or omitting to do something which might be deemed important. When the court is so consulted, the heirs are not specially cited, but, on the settlement of the accounts of an executor, they are called in, and have an appeal to the supreme court from any determination which may be made. The previous consent of the acts of the executor cannot limit their inquiry as to the lawfulness of the acts done or the duty of the executor to do that which has been omitted. Ordinarily, it would determine a question of good faith, and quite often that is the only matter in issue. Hence it is always an advantage to have such permission. Still, the failure to obtain it does not render the expenditures made improper. The only result is that the matter is yet to be passed upon: *Estate of Smith*, 118 Cal. 462, 466; 50 Pac. Rep. 701. If an administrator elects to carry on the business of an estate, he is to be charged with gains and credited with expenses: *Estate of Rose*, 80 Cal. 166, 178; 22 Pac. Rep. 86. And a person who is employed by him in such business is the employee of such administrator, and not the employee of such estate. Such employee must therefore look to the administrator, and not to the estate, for his pay: *Estate of Rose*, 80 Cal. 166, 176; 22 Pac. Rep. 86. The executor or administrator is chargeable with loss arising from his carrying on of the decedent's business, but where it is found that a distinct gain has been made in such business, and he has been charged with such gain, the judgment will not be disturbed, notwithstanding alleged losses which

have not been satisfactorily accounted for: *Estate of Gianelli*, 146 Cal. 139, 141; 79 Pac. Rep. 841.

(2) **Exception to the rule.** While it is not permissible, as a general rule, for an executor or administrator to engage in trade with the assets of the estate, or to carry on the business of the decedent, unless expressly so directed by the will, or authorized by the court which has charge of the administration of the estate, this rule is not without exceptions; and where the executor or administrator finds it necessary, in a mercantile business, or in a manufactory, to dispose of and to realize upon the assets of the business to the best advantage, and not for the mere purpose of making profits upon sales, as in the ordinary course of business, it is not regarded, in law, as the carrying on of the trade or business, but simply as the winding up of the affairs: *Fleming v. Kelly*, 18 Col. App. 23; 69 Pac. Rep. 272. Where the estate consists of several thousand head of animals, it is the duty of the executor or administrator to care for them until they are sold, and in so doing he is not carrying on the business of the intestate in any sense other than that he is caring for the personal property of the estate until it can be advantageously sold: *Estate of Fernandez*, 119 Cal. 579, 585; 51 Pac. Rep. 851.

(3) **Individual liability.** An executor or administrator is not authorized or required by law to continue to carry on the business in which the decedent had been engaged. If he does so he acts upon his own responsibility. He can derive no profit from the success of his venture, and must bear the loss of a failure. Expenses incurred in carrying on such business are not debts of or claims against the estate, nor are they "charges or expenses of administration," within the meaning of the probate law. The items of increase and items of expenses of such business are not matters that come within the purview of the itemized account of an administrator, as such, subject to the rules of audit and allowance: *Estate of Rose*, 80 Cal. 166, 173; 22 Pac. Rep. 86; *Estate of Straus*, 144 Cal. 553, 559; 77 Pac. Rep. 1122. The liabilities growing out of the management of a decedent's estate, by an executor or administrator, are his liabilities. He has a right to pay them out of the increase of the business, but if by so doing a loss is sustained to the estate, he must make the loss good. Protected from loss and from liability at all times, the estate is interested in the business only to the extent of its profits; and in them, not because it is the business of the estate, but because the administrator is using the property of the estate in a way he is not authorized to do, and consequently is required to account for all the profit made by its use: *Estate of Rose*, 80 Cal. 166, 173; 22 Pac. Rep. 86; *Estate of Straus*, 144 Cal. 553, 559; 77 Pac. Rep. 1122. In the absence of a testamentary direction, an administrator of the

estate of a deceased person cannot carry on the business of the decedent without being individually answerable for the conduct of the business. The law charges him with all losses thereby incurred, without, on the other hand, allowing him to receive the benefit of any profits that he may make; the rule being that the persons beneficially interested in the estate may either hold the representative liable for the amount so used, with interest, or, at their election, take all the profits which the representative has made by such unauthorized use of the funds of the estate: *Campbell v. Faxon*, 73 Kan. 675; 85 Pac. Rep. 760, 762. If an administrator continues the business of his decedent, under the sanction of the court, and with the consent of the parties interested, but is held individually answerable to a vendor of goods, which goods the administrator purchased in good faith and used to keep up the stock in trade of such business, justice requires that he should be reimbursed from the estate: *Estate of Akana*, 11 Haw. 420, 423.

(4) **Liability created by court.** If the probate court, in the exercise of its incidental powers, orders the administratrix to conduct the business of the decedent, and the business results in a profit to the estate, expenses incurred in the conduct of the business are claims against the estate, and not against the administratrix personally. The liability for such obligation incurred by the express order of the court is not a debt incurred upon the credit of the administratrix, but a liability created by the court itself: *Fleming v. Kelly*, 18 Col. App. 23; 69 Pac. Rep. 272, 273.

(5) **Administrator's report and account.** If the executor or administrator elects to carry on the business in which the decedent had been engaged, he is bound to report to the court, as money or property coming into his hands as administrator, the true net gains or profits derived from the business in money or kind, but the detailed account of the management or conduct of the business is no part of his accounts as administrator. If he reports them into the court at all, it should be done in a separate paper, perhaps as an exhibit attached to his official report or account. And when so done, it simply serves the purpose of showing his good faith in the premises, and is not a matter for audit by the court. The probate jurisdiction of the court is separate and distinct from its jurisdiction in ordinary civil actions. To the extent that the court, in the exercise of its probate jurisdiction, undertakes to audit the account and control the conduct of that business, to that extent it also, as well as the administrator, assumes to make a speculative and hazardous use of the property of deceased persons not authorized by law. If the administrator fails to honestly account to the estate for the profits, or to make good the loss of his acts *ultra vires*, he

is guilty of a fraud, for which he may be proceeded against in a civil action, as in any other case of fraud, and then, and in that proceeding, those accounts of the business which he conducted with the property of the estate, without authority of law, will become the subject of investigation, item by item, and their investigation will be governed by the same rules of evidence as apply in the examination of other disputed accounts: *Estate of Rose*, 80 Cal. 166, 173; 22 Pac. Rep. 86; *Estate of Straus*, 144 Cal. 553, 559; 77 Pac. Rep. 1122.

10. Advice and instructions. Under certain circumstances, an executor or administrator may go into equity to seek advice and instructions; but not where the questions of law asked are such as can be readily answered by an attorney at law, from whom the executor or administrator has the right to obtain the desired advice at the expense of the estate: *Kaikainahale v. Allen*, 14 Haw. 527, 529. Executors and administrators should be guided by the following advice and instructions, viz.:

1. Upon the receipt of letters, take into your possession, immediately, all the estate of decedent, real and personal, and collect all debts due to the decedent or to the estate: See § 623, ante.

2. Make and return to the court, as soon as practicable, a true inventory and appraisement of "all" the estate, including the homestead, if any, which has come to your possession or knowledge. See § 356, ante.

3. Make immediate application to the court for an order of publication of notice to the creditors of the estate to present their claims: See § 440, ante.

4. Upon the expiration of the time for publication of notice to creditors, file a copy thereof, with the affidavit of the printer, showing due publication: See § 444, ante.

5. Pay no claim until the same has been properly presented, allowed, approved, filed, and ordered paid by the court: See §§ 457-459, ante. Pay no amount, however small, without taking a receipt in writing.

6. Sell no property, real or personal, of decedent, without an order of the court: See § 483, ante.

7. Within thirty days after the expiration of the time mentioned in the notice to creditors, within which claims must be presented, render a full account and report of your administration to the court, and file therewith vouchers for all charges, debts, claims, and expenses which you have paid: See §§ 662, 671, post.

8. Upon the settlement of your account, obtain an order of the court for the payment of the debts which have been allowed: See § 702, post.

9. All costs incurred by reason of your neglect to comply with your duty, and in enforcing such compliance, will be charged to you, and not to the estate.

10. In case of doubt as to how you should act, apply to your attorney, or to the court, for advice and instructions.

V. ESTATES WHERE PARTNERSHIP EXISTED.

1. **Interest of deceased partner. Assets of estate.** Partnership assets, as such, form no part of the individual estate of a deceased partner; the residuum only, after satisfying liabilities and advances, if any, made by the survivor, becomes the property of the estate. The assets which pass to the executor or administrator consist of the individual estate of the decedent: *Andrade v. Superior Court*, 75 Cal. 459, 463; 17 Pac. Rep. 531; *Theller v. Such*, 57 Cal. 447, 459. When a partnership is dissolved by the death of one of the partners, its assets, debts, and credits remain as distinct from those of its late members, until its affairs are wound up, as before the dissolution; and if all the members of a firm die, whether within the jurisdiction of the same or different probate courts, the assets, debts, and credits of the partnership do not become confused with the estate of the last survivor, but continue a separate existence: *Theller v. Such*, 57 Cal. 447, 461. Partnership property is assets of the firm, and subject to the exclusive management or control of the surviving partner. It is not assets of the estate in the hands of the administrator: *Tompkins v. Weeks*, 26 Cal. 50, 66. But the interest of a decedent in a partnership must be included in the inventory of his estate, and be appraised as other property: *Painter v. Estate of Painter*, 68 Cal. 395, 396; 9 Pac. Rep. 450.

REFERENCES.

Rights of heirs in real estate of deceased partner: See note 27 L. R. A. 348-354.

2. **Presentation of claims.** In general, a creditor cannot reach the property of a deceased partner in disregard of the positive statute requiring the presentation of his claim: *Frazier v. Murphy*, 133 Cal. 91, 97; 65 Pac. Rep. 326; *Falkner v. Hendy*, 107 Cal. 49; 40 Pac. Rep. 21, 386. The surviving partner cannot bring suit against the administrator of a deceased partner for his interest in partnership assets until he has presented a claim within the time limited in the notice to creditors: *McKay v. Joy (Cal.)*, 9 Pac. Rep. 940, 942. For evidence in a proceeding for the establishment of a claim against a decedent's estate which shows that the claim arose from a debt of the firm of which the deceased was a partner, see *In re Morgan's Estate*, 46 Or. 233; 77 Pac. Rep. 608, 609. But an action for an accounting and settling of the affairs of a partnership, and for an accounting with

respect to and for the delivery of trust property remaining in the hands of the decedent at the time of his death, may be maintained without first presenting a claim against the estate and property of the decedent, where the trust property can still be "earmarked," traced, and identified: *Roach v. Caraffa*, 85 Cal. 436, 444; 25 Pac. Rep. 22. So if one of the members of a firm which executed a negotiable promissory note dies before maturity, presentment should be made to and demand be made of the surviving partners, and not the executor of the deceased partner, and suit on such a note against the surviving partner may be maintained without having presented the claim to the administrator for allowance: *Barlow v. Coggan*, 1 Wash. Ter. 257, 260, 261. Nor need a claim against joint lessors, who are partners, for overcharged rent be presented as a claim against the estate of a deceased partner, in order to enforce it against the firm, as such claim is not against the estate of the deceased partner, but against the firm of which he had been a member: *Corson v. Berson*, 86 Cal. 433, 441; 25 Pac. Rep. 7. Where an administrator of a deceased partner sues a surviving partner for an accounting and settlement of the partnership affairs, such surviving partner is entitled to have the accounts adjusted, and an amount claimed by him for sums drawn by the deceased from the partnership during his lifetime allowed as an offset to the claim of plaintiff, although he has not presented a claim to the administrator for the latter's allowance and approval: *Manuel v. Escolle*, 65 Cal. 110; 3 Pac. Rep. 411. No presentation of a claim against the estate of the deceased partner is necessary, where payment is not sought out of the assets of the estate: *Franklin v. Trickey* (Ariz.), 80 Pac. Rep. 352, 353.

REFERENCES.

Presentation of claims against estates of deceased persons: See note to § 481, head-line 3, ante.

3. Jurisdiction. Probate court. Equity. If questions arise in the course of the settlement of partnership affairs, which cannot be adjusted without recourse to the courts, the probate court is not the forum in which such questions can be solved, but, like other questions cognizable in courts of equity, they must be determined in the last-named courts: *Andrade v. Superior Court*, 75 Cal. 459, 463; 17 Pac. Rep. 531. If all the members of a partnership die, whether within the jurisdiction of the same or of some different probate court, the rights of the representatives or successors of the several partners can be determined only in a court of equity, which has the power and machinery for settling those rights by an appropriate decree. Where none of the partners are surviving, no one has a better right to the partnership property than those who had received it *colore officii*, as executors of him who held it, and who have an interest in the

residuary rights of his estate: *Theller v. Such*, 57 Cal. 447, 460, 461. If the existence of a partnership between a decedent and a survivor is denied by the latter, the probate court cannot adjudicate the question, and decree the existence or non-existence of the relation: *Andrade v. Superior Court*, 75 Cal. 459, 463; 17 Pac. Rep. 531; *Wright v. Wright*, 11 Col. App. 470; 53 Pac. Rep. 684; *In re Alfstad's Estate*, 27 Wash. 175; 67 Pac. Rep. 593, 597. The probate court has no authority to settle and adjust accounts between a surviving partner and the representatives of a deceased one. Its power is limited to requiring a survivor to account. If the status of partnership is admitted, the court may call upon a survivor to render an account: *Andrade v. Superior Court*, 75 Cal. 459, 462, 463; 17 Pac. Rep. 531. As ancillary to the right of the court to enforce an accounting by the surviving partner, and to enable it to determine whether what purports to be an account is such in reality, or whether another and further account is requisite, the court has the right to examine the surviving partner under oath, or any other witness or witnesses who may possess information germane to the question: *Andrade v. Superior Court*, 75 Cal. 459, 563; 17 Pac. Rep. 531. The probate court, in settling the accounts of executors or administrators, has no jurisdiction to determine the administrator's claim, as a partner of the decedent, to one half of his estate: *In re Alfstad's Estate*, 27 Wash. 175; 67 Pac. Rep. 593, 597. It is not error for a probate court to refuse to confirm a sale of the personal property of a deceased partner, which was in the possession of the surviving partner, and which constituted a part of the partnership property, where the court had no jurisdiction to order the sale: *In re Auerbach's Estate*, 23 Utah, 529; 65 Pac. Rep. 488, 490. The fact that an executor under a non-intervention will applied to the court for leave to sell the interest of the deceased in partnership property, and to be discharged from his trust, does not indicate that the estate was either managed or settled under the supervision and control of the probate court. The probate court is without power, except such as is especially conferred upon it by the statute, to control the administration of the estates under wills of this character: *In re MacDonald's Estate*, 29 Wash. 422; 69 Pac. Rep. 1111, 1115.

4. Bequest of interest in firm. Payment of partnership debts. A partner cannot bequeath any specific article of firm property, for he has no absolute title to any part of it. It is all subject to the payment of partnership debts, and then to an adjustment of the interests of the partners. It is the duty of the surviving partner to apply the partnership money on hand at the time of the death of the testator, and all sums collected on notes and accounts, to the payment of the partnership debts, and to pay the deficiency out of the proceeds of the partnership goods. Whatever remains is subject

to division, and the portion belonging to the testator's estate passes to his beneficiaries. The partnership property is primarily liable for partnership debts, and the beneficiaries have no right to have the testator's individual property applied to the payment of the partnership debts: *Brady v. Foley*, 59 Kan. 778; 53 Pac. Rep. 761, 762.

5. Authority of executor or administrator. The executor or administrator has no authority to intermeddle at all with the partnership affairs, except so far as he is entitled to call upon the surviving partner to proceed and close up the partnership affairs, and to account to him for the share of the surplus belonging to the estate. The authority of the executor or administrator extends only to settling up the affairs of the estate, sharing the debts, and distributing the remainder, under the direction of the probate court, to the parties interested: *Tompkins v. Weeks*, 26 Cal. 50, 66. He is not authorized to advance money or to use funds belonging to the estate for the purpose of carrying on business with the surviving partner of his intestate: *Tompkins v. Weeks*, 26 Cal. 50, 65. A court, even upon the application of an executor or administrator, cannot order a summary sale of the joint personal property, upon the dissolution of a partnership, by the death of one or more of the partners, for it becomes immediately vested in the survivor as trustee, and it is thereupon his duty to dispose of it in good faith for the best interests of decedent's estate and all concerned. The court has no jurisdiction to make such an order, and no executor or administrator has authority to execute it. Neither has a court jurisdiction to state or to settle a disputed account between an executor and a surviving partner, although it may order the latter to "render an account." No court, in the absence of any breach of duty on the part of a surviving partner, can, by ordering a sale of the decedent's share in the partnership, deprive the surviving partner of his possession and control of the joint property: *In re Auerbach's Estate*, 23 Utah, 529; 65 Pac. Rep. 488, 490. Neither the executor nor the administrator of a partnership has any power, nor can a probate court authorize him, to partition real property: *Burnside v. Savier*, 6 Or. 154.

REFERENCES.

Rights of administrator of deceased partner: See note 7 L. R. A. 792. Position of executor or administrator as to real estate of deceased partner: See note 27 L. R. A. 340-353.

6. Surviving partner as executor or administrator. Although a surviving partner was appointed executor of a deceased partner's will, wherein the testator waived the giving of a bond by the surviving partner, such executor may still be required to give bond as administrator of the partnership estate, which he must first settle up, and

afterwards settle the individual estate of the testator: *Palicio v. Bigne*, 15 Or. 142; 13 Pac. Rep. 765. Section 1365 of the Code of Civil Procedure of California provides that "if the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate"; and, under this provision, one who had formerly been a partner, and between whom and the deceased there were unsettled partnership accounts, is not eligible as an administrator: *Estate of Garber*, 74 Cal. 338; 16 Pac. Rep. 233. But section 1350 of that code does not prohibit a surviving partner from being one of the executors of the estate of the deceased partner; and the fact that the surviving partner is also one of the executors of the estate of the deceased partner is not any reason for refusing to settle his accounts as an executor because of the absence of a statement showing the condition of the partnership affairs. Of course, when any portion of the assets of a partnership has come into the hands of an executor, as such, he must charge himself therewith in his accounts: *Miller v. Lux*, 100 Cal. 609, 614; 35 Pac. Rep. 345, 639. An executor who is also the surviving partner of the deceased cannot, on appeal from an order of the probate court settling the account of said executor, and from an order denying his motion for a new trial in the matter of said order, contend that the account involved is his account as surviving partner, and that the probate court has no jurisdiction to settle such an account, especially where the account is, upon its face, the account of appellant, not as surviving partner, but as executor: *Estate of Sylvester*, 105 Cal. 189, 190; 38 Pac. Rep. 648.

7. Surviving partner. Rights and powers. A surviving partner, in the absence of statute, has exclusive control of partnership effects: *Barlow v. Coggan*, 1 Wash. Ter 257; *In re Auerbach's Estate*, 23 Utah, 529; 65 Pac. Rep. 488, 490; *Allen v. Hill*, 16 Cal. 113; *Gray v. Palmer*, 9 Cal. 616; *McKay v. Joy (Cal.)*, 9 Pac. Rep. 940; *Miller v. Lux*, 100 Cal. 609, 614; 35 Pac. Rep. 345, 639. A surviving partner, if he deems it advisable and for the interest of the concern, may sell the entire partnership's stock of goods at auction, or otherwise, within a month after the dissolution of the partnership; and it is within his discretionary power to continue to dispose of the stock to the customers of the concern in the ordinary way, if that is deemed more beneficial to the interest of all parties concerned, and, for that purpose, to employ the necessary salesmen and other agents: *Louis v. Elfelt*, 89 Cal. 547, 551; 26 Pac. Rep. 1095. When the partnership has been carried on for some time, after dissolution by death, and such continuance has proved beneficial to the parties, it is but just and proper that the surviving partner should receive a reasonable allowance for his skill and industry in conducting the business, for, during that time, the business has not received the care and labor of the deceased partner

as an equivalent for such services. While all the parties are living, each is under obligation to devote his time and services to the partnership business, and there is, therefore, good reason for holding that neither should receive a compensation for such service. But when, in consequence of the death of one partner, this equality no longer exists, it is but equitable that the surviving partner should be compensated for such services as he may have rendered in the business after the death of the deceased partner, to be deducted out of the profits realized by the continuance of the business; the overplus of such profits, after deducting such compensation, to be divided between the partners. This principle does not justify the court in holding that the surviving partner is entitled to compensation merely for services rendered in winding up the affairs of the firm, but should be applied where the partnership business has been continued for a considerable time in order that the affairs of the partnership may be advantageously wound up: *Griggs v. Clark*, 23 Cal. 427, 430; *Louis v. Elfelt*, 89 Cal. 547, 551; 26 Pac. Rep. 1095. A surviving partner may have partition of the real estate belonging to the partnership, standing in the name of his deceased partner, and he has an equitable lien upon partnership real estate for his indemnity against the debts of the firm and for the balance due him: *Gray v. Palmer*, 9 Cal. 616, 639. A contract, however, made between a surviving partner, a widow of the deceased partner, who left minor children, and a part of the individual creditors of the deceased partner, that the surviving partner should pay a proportionate share of the individual indebtedness of the deceased partner and retain all the partnership property, is against public policy, and therefore illegal and void. So a promise made by the surviving partner to a creditor of a deceased partner, in pursuance of such an agreement, to pay such creditor a proportionate share of the individual debt is also illegal and void. No contract can be made respecting the assets of a deceased person's estate except by the authority, and with the approval, of the probate court and then only to the extent authorized or permitted by the laws of the state: *Cox v. Grubb*, 47 Kan. 435; 28 Pac. Rep. 157. A surviving partner cannot collect from the general assets of his deceased partner's estate a debt due by the decedent to the partnership without first complying with the statute relative to his settling up the affairs of the partnership, and ascertaining whether the partnership assets will pay the partnership debts: *Painter v. Estate of Painter*, 68 Cal. 395, 397; 9 Pac. Rep. 450.

REFERENCES.

Respective rights of surviving partner and heirs of deceased partner: See note 7 L. R. A. 793, 794. Position of surviving partner in partnership real estate: See note 28 L. R. A. 129-137.

8. **Surviving partner. Settlement of partnership affairs.** A surviving partner is entitled to continue in possession of the partnership for the purpose of settling up its business; and this, in the absence of any statutory provision directing otherwise, he must do without delay, and account for and pay to the executor or administrator of the deceased partner, from time to time, any balance payable in right of the decedent. He may be required to give bond, and for any failure in the performance of his duty is amenable to any action, at the instance of the executor or administrator, which the decedent could have maintained. This is simply declaratory of the common law, and does not change the common-law doctrine that a surviving partner is entitled to the management and possession of the joint property for the purpose of winding up the affairs of the partnership and paying its debts: *In re Auerbach's Estate*, 23 Utah, 529; 65 Pac. Rep. 488, 490; *Gleason v. White*, 34 Cal. 258, 263; *Tompkins v. Weeks*, 26 Cal. 50, 56. The power of the surviving partner to settle partnership affairs gives full authority to the surviving partner to do everything that may be necessary to wind up the affairs of the partnership, but he can do nothing that is not indispensable to this end: *Berson v. Ewing*, 84 Cal. 89, 94; 23 Pac. Rep. 1112. He must settle affairs of the partnership without delay, and account to the executor or administrator, and pay over such balances as may, from time to time, be payable to him in right of the deceased: *Painter v. Estate of Painter*, 68 Cal. 395, 396; 9 Pac. Rep. 450. When the partnership is dissolved by the death of one of the partners, its assets, debts, and claims remain as distinguished from those of its late members, until its affairs are wound up, as before the dissolution. The surviving partner is to proceed and wind up the affairs of the partnership, pay its debts out of the assets, if sufficient, and divide the residue, if any, among those entitled to it: *In re Auerbach's Estate*, 23 Utah, 529; 65 Pac. Rep. 488, 491. Partnership debts cannot be collected out of the assets of an estate of a deceased partner until the firm property is exhausted: *Barlow v. Coggan*, 1 Wash. Ter. 257. If the surviving partner has been appointed executor of his deceased partner's will, the partnership estate must be first settled, and next the individual estate: *Palicio v. Bigne*, 15 Or. 142; 13 Pac. Rep. 765, 767. That the surviving partner may be required to give a bond, see *Palicio v. Bigne*, 15 Or. 142; 13 Pac. Rep. 765, 766; *In re Auerbach's Estate*, 23 Utah, 529; 65 Pac. Rep. 488, 490. A delay of five years in winding up the affairs of a partnership, occasioned by a provision of the will of deceased that his interests in the concern should be liquidated and wound up and divided among his "residuary legatees within the period of five years from and after" his death, furnishes no reason that will justify the executors in interfering with the surviving partner and invoking the aid of a court of equity to sell the property, nor can such delay give the court jurisdiction to do so: *In re Auerbach's*

Estate, 23 Utah, 529; 65 Pac. Rep. 488, 491; nor does the fact that the surviving partner submitted a bid for the property justify the inference that he had any intention to waive his standing as such partner, particularly where he expressly reserves his legal rights as a surviving partner: In re Auerbach's Estate, 23 Utah, 529; 65 Pac. Rep. 488, 491. When the affairs of the partnership are wound up, and, upon striking a balance, it is found that one partner has drawn out more than he was entitled to, or that one partner has paid more than his portion of the debts, if there is a deficiency of assets then the relation of debtor and creditor between the surviving partner and the representative of the deceased partner arises. There is but one balance between them, as there is but one settlement of the partnership business. There is no such thing as a partial balance as between the partnership and its late members. The surviving partner may, from time to time, divide between the executor or administrator of the deceased partner and himself, and pay over such sums as he may have on hand, which are not needed for the payment of the partnership debts. But there is only one settlement, one balance of account, between the partnership and the partners or their representatives. Until that is struck, the surviving partner cannot be said to be either the debtor or creditor of the deceased partner on account of the partnership dealings, though the surviving partner or the estate of the deceased may be either a debtor or creditor of the partnership while it is being wound up, as it may have been before its dissolution: Gleason v. White, 34 Cal. 258, 263.

9. Surviving partner. Completion of executory contracts. It is a well-settled rule that the surviving partner must complete all executory contracts of a firm which remain in force after the death of a partner, and must settle the business of the partnership without charge against the partnership for his personal services. And there is no distinction in this respect between commercial partnerships and those entered into by attorneys for the practice of their profession. This obligation of the surviving partner is one of the risks assumed by him in entering into the partnership, unless otherwise specifically agreed. In the discharge of this obligation or duty in relation to the unsettled and unfinished business of the firm, the surviving partner occupies the position of a trustee, and, while he may compromise disputed debts or modify an existing contract by releasing the other party thereto from some of its obligations, when in the exercise of an honest judgment the best interest of the partnership seems to him to require such action, still, in doing so, he cannot be permitted to make gain for himself at the expense of the estate of a deceased partner by consenting to the extinguishment of a contract belonging to the partnership, and the substitution therefor of another relating to the same subject-matter, and in the profits of which he alone is to participate.

Whatever may be the effect of such new or substituted contract as between the immediate parties to it, a court of equity, in settling the accounts of the partnership, will not treat it as an entire extinguishment of the original contract, nor deny the rights of the representatives of the deceased partner to an equitable participation in the profits realized from the latter contract, and it may be regarded, so far as concerns the partnership, as only a modification of the former contract. This rule is particularly applicable in the settlement of the partnership accounts of attorneys at law when the firm has been dissolved by the death of one member, leaving contracts not fully performed, often constituting a large part of the assets of the partnership, and which it is the duty of the surviving partner, as far as possible, to complete and preserve for the benefit of the firm: *Little v. Caldwell*, 101 Cal. 553, 560; 40 Am. St. Rep. 89; 36 Pac. Rep. 107.

10. Surviving partner. Accounting.

(1) **In general.** The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balance as may, from time to time, be payable to him in right of the decedent: *In re Auerbach's Estate*, 23 Utah, 529; 65 Pac. Rep. 488, 490. He is a trustee for the purposes of winding up the affairs of the firm, and is accountable for the profits of the realty, as well as the personalty, or the value of the use and occupation: *Smith v. Walker*, 38 Cal. 385, 389; 99 Am. Dec. 415. After the partnership affairs are all wound up, but not before, a balance is to be struck. As said in the preceding section, there is only one settlement, one balance of account, between the partnership and the partners or their representatives: *Gleason v. White*, 34 Cal. 258, 263. A final settlement in the probate court, between the administrator and a surviving partner, bars an action by the heirs to compel the administrator to make full discovery and settlement of the business of the copartnership, and for a judgment for moneys due to the estate: *Kingsley v. Miller*, 45 Cal. 95, 96.

(2) **Court may compel accounting.** The court may, upon application of the executor, compel the surviving partner to render an account of the partnership business, and the executor, in a proper proceeding, may doubtless, if good cause appear therefor, be required to demand an accounting from the surviving partner and return the same into court: *Miller v. Lux*, 100 Cal. 609, 614; 35 Pac. Rep. 345, 639. The court has no authority to settle and adjust the accounts between the surviving partner and the representative of the deceased, but it does have power to require the surviving partner to file his account of the partnership affairs: *Andrade v. Superior Court*, 75 Cal. 459; 17 Pac. Rep. 531.

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(3) **Actions for accounting.** No action can be maintained by a surviving partner against the administrator of his deceased partner for an accounting of the partnership affairs, as the surviving partner has ample power to take possession of the partnership property and to wind up its affairs: *McKay v. Joy*, 70 Cal. 581, 582; 11 Pac. Rep. 932. But the widow of a deceased partner may sue to compel the surviving partner of a firm to account to her respecting the partnership accounts of attorneys at law, when the firm has been dissolved by the death of one member, leaving contracts not fully performed, and where the executor fails to sue: *Little v. Caldwell*, 101 Cal. 553; 40 Am. St. Rep. 89; 36 Pac. Rep. 107. The right of action in such cases is fixed by the duty of a surviving partner. The surviving partner is required to account, not with the heirs, but with the executor or administrator. This duty of the surviving partner is the correlative of the right of the personal representative, and fixes the person in whom the right of action exists. If he is to account with the administrator, the administrator it must be who has the right to call him to account. The heirs have no legal capacity to require the surviving partner to account to them: *Robertson v. Burrell*, 110 Cal. 568, 574; 42 Pac. Rep. 1086. In an action to obtain an accounting of a partnership business in which the estate is interested, all of the executors should join as plaintiffs; but where such action is brought by one alone, and the other executors are made defendants, and no question is raised on account of the misjoinder, before judgment is rendered, the failure to name them as plaintiffs is not a fatal objection: *Insley v. Shire*, 54 Kan. 793; 39 Pac. Rep. 713. An action by an executor against a co-executor, charging maladministration, and asking for a removal from the trust, cannot be properly joined with an action for an accounting of a partnership in which the estate has an interest with another person not connected with the estate: *Insley v. Shire*, 54 Kan. 793; 39 Pac. Rep. 713. If an action is brought by an administrator of a deceased partner, to obtain an accounting and settlement of partnership affairs, sums drawn from the partnership by the plaintiff's intestate during his lifetime may be offset against the plaintiff's claim: *Manuel v. Escolle*, 65 Cal. 110; 3 Pac. Rep. 411.

11. **Accounts of executors may be settled, regardless of order.** The failure of the executor to apply for an order requiring the surviving partner to account is no reason why the court should refuse to settle an annual account of the executor; and the fact that the surviving partner is also one of the executors of the estate of a deceased partner is not any reason for refusing to settle his accounts as an executor because of the absence of a statement of the condition of the partnership affairs: *Miller v. Lux*, 100 Cal. 609, 614; 35 Pac. Rep. 345, 639.

12. Actions by or against surviving partners, and by or against executors or administrators.

(1) **Actions by or against surviving partners.** Suits may be brought by or against a surviving partner for partnership demands and liabilities: *Barlow v. Coggan*, 1 Wash. Ter. 257; *Gray v. Palmer*, 9 Cal. 616; *In re Auerbach's Estate*, 23 Utah, 529; 65 Pac. Rep. 488. But partnership debts cannot be collected out of the assets of the estate of a deceased partner until the partnership property is exhausted: *Barlow v. Coggan*, 1 Wash. Ter. 257. If the administrator has taken possession of the assets of the deceased partner, the surviving partner cannot sue him for his interest in such assets without first having presented his claim to the administrator: *McKay v. Joy* (Cal.), 9 Pac. Rep. 940.

cf. 36 Cal. 426
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(2) **Actions by or against executors or administrators.** In case of a disputed account between a surviving partner and the representative of a deceased partner, the representative may maintain any action against the surviving partner which the decedent could have maintained: *Theller v. Such*, 57 Cal. 447, 459. In Colorado, authority to proceed against the estate of a deceased partner for a firm debt, whether the debt is evidenced by writing or rests in parol, is strictly equitable in character, and, to maintain it, the plaintiff, by allegation must aver, and by proof show, the facts which, in equity, make the individual estate of a deceased partner liable for firm debts: *Thompson v. White*, 25 Col. 226; 54 Pac. Rep. 718, 723. Where two partners are dead, the administrator of the first deceased partner is entitled, without the presentation of his claim, to maintain a suit for an accounting against the administrator of the surviving partner, who died before the partnership affairs were adjusted, as no presentation of a claim is necessary where the demand is not against the estate: *Franklin v. Trickey* (Ariz.), 80 Pac. Rep. 352, 353. The executors of a deceased partner may not be joined as parties to an action to enforce a claim for overcharged rent against joint lessors who were partners, where such claim is made against a firm: *Corson v. Berson*, 86 Cal. 433, 441; 25 Pac. Rep. 7. An action in which an accounting is demanded, respecting partnership property, must be commenced within ten years after the cause of action accrued, but in case of the dissolution of a partnership by death, neither the representative of the deceased partner, nor his successor in interest, is entitled to sue for a settlement of the partnership affairs before making a demand, or receiving notice of the surviving partner's renunciation of his trust: *McPherson v. Swift* (S. D.), 116 N. W. Rep. 76, 82.

13. **Purchase of deceased partner's interest.** It is competent for articles of copartnership to provide for a sale, on the death of one of the partners, of his interest to the survivors, and to give the sur-

viving partners an option to continue the partnership with the estate of the decedent as a member; and no question of indefiniteness or uncertainty as to the amount of the purchase price, or the manner or mode in which such price is to be arrived at, in any way affects the right of the surviving partner, under the contract to buy. Such conditions, if they exist, only result in casting the burden upon the trial court to take an accounting and to fix the price. If the amount of the purchase price of the deceased partner's interest in the business is fixed by the articles with sufficient certainty, this simply precludes the right of the court to hold a general accounting. If the making of an inventory and appraisement forms the basic element in fixing the purchase price, the transaction should be upheld, in the absence of a showing of fraud. Upon the purchase, by surviving partners, of the interest of the deceased partner, the good will of the business passes to the surviving partners, and in no case forms an asset of the estate. But when a partnership is dissolved by death, the survivors are absolved from all obligations, except to close out the partnership affairs and to account to the estate. They do not owe a duty to the estate of the deceased to abstain from business, even in the same line as that in which the partnership was engaged: *Rankin v. Newman*, 114 Cal. 635, 649, 665; 46 Pac. Rep. 742; 34 L. R. A. 265.

14. New partnership. Carrying on decedent's business. Where the testator was in partnership with another person, and there was a provision in his will authorizing the executors "to continue my present business as long as they may deem best," and the executors determined to continue the partnership business in accordance with the will, and do carry on the business upon the same terms as it was during the lifetime of the testate, the effect of the arrangement is to create a new partnership, composed of the executors of the estate on one side and of the surviving partner on the other: *Insley v. Shire*, 54 Kan. 793; 39 Pac. Rep. 713, 716. An executor or administrator, who advances money to his loss for the purpose of carrying on a business with the surviving partner of the intestate, cannot be allowed to charge such loss in his account. He has no authority to intermeddle with the partnership affairs, except to call upon the surviving partner to close up the same and account to him: *Tompkins v. Weeks*, 26 Cal. 50, 66.

15. Conveyances by one partner to another. Death before payment. If one partner conveys his undivided interest in certain land to his copartner, who dies before making payment, the grantor is a creditor of the deceased partner's estate, and, on general principles, has a lien on the property sold, as security for the debt: *Reese v. Kinkhead*, 18 Nev. 126; 1 Pac. Rep. 667.

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